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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

DECEMBER TERM, 1857.

By BENJAMIN C. HOWARD,

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

VOL. XX.

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SUPREME COURT OF THE UNITED STATES.

HON. ROGER B. TANEY, Chief Justice.
HON. JOHN McLEAN, Associate Justice.
HON. JAMES M. WAYNE, Associate Justice.
HON. JOHN CATRON, Associate Justice.
HON. PETER V. DANIEL, Associate Justice.
HON. SAMUEL NELSON, Associate Justice.
HON. ROBERT C. GRIER, Associate Justice.
HON. JOHN A. CAMPBELL, Associate Justice.
HON. NATHAN CLIFFORD, Associate Justice.

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WILLIAM THOMAS CARROLL, ESQ., Clerk.

BENJAMIN C. HOWARD, ESQ., Reporter.

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RULE NUMBER SIXTY-FOUR.

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LIST OF CASES REPORTED.

PAGE

Ahl *v.* Johnson.....511
Arkansas, State of, *v.* Bank of Washington.....530
Arkansas, State of, *v.* Beers.....527
Arkansas, State of, *v.* Platenius.....527
Same *v.* Same.....527

Bacon et al. *v.* Howard..... 22
Bank of Washington *v.* State of Arkansas.....530
Barton *v.* Forsyth.....532
Beers et al. *v.* People's Ferry Company of Boston.....393
Beers *v.* State of Arkansas.....527
Bertram et al. *v.* Lyon.....149
Bidwell *v.* United States.....261
Boyd *v.* Mattingly et al.....128
Breitling *v.* United States.....252
Brown *v.* Shannon et al..... 55
Brown *v.* Wiley et al.....443
Buckley et al. *v.* Withers..... 84
Buckner *v.* Commercial Bank of Manchester.....108
Burnley *v.* White et al.....235

Cambuston *v.* United States..... 59
Carroll et al. *v.* Dorsey et al.....205
Carryl *v.* Taylor.....583
Cavazos et al. *v.* Mussina et al.....280
Chaffee *v.* Hayward.....208
Chapman *v.* McCargo.....555
Christ Church *v.* The County of Philadelphia..... 26
Commercial Bank of Manchester *v.* Buckner.....108
Cooper *v.* Roberts.....467
Covington Drawbridge Company *v.* Shepherd et al.....227
Curtenius et al *v.* Morgan..... 1

Day *v.* Hayward.....208
Day *v.* Union India Rubber Company.....216
Dawson et al. *v.* Ingraham et al.....486
Dean *v.* Mason et al.....198
De La Lanza et al. *v.* Doswell..... 29
Dickson et al. *v.* Marks.....501
Dorsey et al. *v.* Carroll et al.....205
Doswell *v.* De La Lanza et al..... 29
Dousman *v.* Stinson.....461
Dynes *v.* Hoover..... 65

Fisher *v.* Haldeman et al.....186
Fisher *v.* Hemmenway.....255
Foote *v.* Silsby et al.....291
Same *v.* Same.....378
Forsyth *v.* Barton.....532
Fossat *v.* United States.....413

Garland *v.* Wynn..... 6
Gazzam *v.* Phillips's Lessee.....372

PAGE
Gibbes et al. *v.* White 541
Same *v.* Same 541
Gibbes et al. *v.* Williams 535
Same *v.* Same 535
Goodman *v.* Simonds 343
Grant et al. *v.* Poillon et al 162

Haldeman et al. *v.* Fisher 186
Hayward *v.* Chaffee 208
Hayward *v.* Day 208
Hemmenway *v.* Fisher 235
Hensley *v.* United States 261
Hill et al. *v.* Snow et al 543
Holcombe *v.* McKusick 552
Hoover *v.* Dynes 65
Howard *v.* Bacon et al 22
Hudgins et al. *v.* Kemp 45
Same *v.* Same 54
Hungerford *v.* Sigerson 156
Hyde et al. *v.* Stone 170

Ingraham et al. *v.* Dawson et al 486
Irvine *v.* Marshall and Barton 558

Jackson et al. *v.* Steamboat Magnolia 296
Johnson *v.* Ahl 511
Jones et al. *v.* McMasters 8

Kemp *v.* Hudgins et al 45
Same *v.* Same 54

Lapsley *v.* Spencer 264
Leitensdorfer *v.* Webb 176
Leroy et al. *v.* Wade 34
Lyon *v.* Bertram et al 149

Marks *v.* Dickson 501
Marshall and Barton *v.* Irvine 558
Mason et al. *v.* Dean 198
Mathews *v.* Sigerson 496
Mattingly et al. *v.* Boyd 128
McCargo *v.* Chapman 555
McCormick *v.* Talcott et al 402
McFaul *v.* Ramsey 523
McGavock *v.* Woodlief 221
McKusick *v.* Holcombe 552
McMasters *v.* Jones et al 8
McMicken *v.* Perin 133
Morgan *v.* Curtenius et al 1
Moreland *v.* Page 522
Morris et al. *v.* Wynn 3
Mussina et al. *v.* Cavazos et al 280
Myers et al. *v.* Selden 507

New York, Corporation of, *v.* Ransom and Wenman 581
Niles et al. *v.* Payne et al 219
Norton et al. *v.* Warner 449

Pacheco *v.* United States 261
Page *v.* Moreland 522
Patten et al. *v* Teller et al 125
Payne et al. *v.* Niles et al 219
Peaslee *v.* Sampson 571
People's Ferry Company of Boston *v.* Beers et al 393

PAGE
Perin *v.* McMicken.....133
Philadelphia, County of, *v.* Christ Church..... 26
Phillips's Lessee *v.* Gazzam.....372
Platenius *v.* State of Arkansas.....527
Same *v.* Same.....527
Poillon et al. *v.* Grant et al.....162

Ramsey *v.* McFaul.....523
Ransom and Wenman *v.* Corporation of New York.....581
Roberts *v.* Cooper.....467

Sampson *v.* Peaslee.....571
Secombe et al. *v.* Steele..... 94
Selden *v.* Myers et al.....507
Selden et al. *v.* Thompson.....195
Shannon et al. *v.* Brown..... 55
Shepherd et al. *v.* Covington Drawbridge Company.....227
Sigerson *v.* Hungerford.....156
Sigerson *v.* Mathews.....496
Silsby et al *v.* Foote.....290
Same *v.* Same.....378
Simonds *v.* Goodman..... 343
Spencer *v.* Lapsley.....264
Smith *v.* Corporation of Washington.....135
Snow et al. *v.* Hill et al.....543
Steamboat Magnolia *v.* Jackson et al.....296
Steele *v.* Secombe et al..... 94
Stinson *v.* Dousman.....461
Stone *v.* Hyde et al.....170
Sunot et al. *v.* United States.....261
Suydam *v.* Williamson et al.....427

Talcott et al. *v.* McCormick.....402
Taylor *v.* Carryl.....583
Teller et al. *v.* Patten et al.....125
Thompson *v.* Selden et al.....195

United States *v.* Bidwell.....261
United States *v.* Breitling.....252
United States *v.* Cambuston..... 59
United States *v.* Fossat.....413
United States *v.* Hensley.....261
United States *v.* Pacheco.....261
United States *v.* Sunot et al.....261
Union India Rubber Company *v.* Day.....216

Wade *v.* Leroy et al..... 34
Warner *v.* Norton et al.....448
Washington, Corporation of, *v.* Smith.....135
Watrous, Judge, ex parte.....280
Webb *v.* Leitensdorfer et al.....176
White et al. *v.* Burnley.....235
Wayte *v.* Gibbes et al.....541
Wiley et al. *v.* Brown.....443
Williams *v.* Gibbes et al.....535
Williamson *v.* Suydam.....427
Withers *v.* Buckley et al..... 84
Woodlief *v.* McGavock.....221
Wynn *v* Garland 6
Wynn *v* Morris et al..... 3

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1857.

BENJAMIN F. MORGAN, PLAINTIFF IN ERROR, *v.* ALFRED G. CURTENIUS AND JOHN L. GRISWOLD.

Where the Circuit Court adopted the construction of a State statute which was placed upon it by the Supreme Court of the State, the decision was correct; and a different construction of the statute subsequently placed upon it by the Supreme Court of the State will not authorize this court to reverse the judgment of the Circuit Court as having been erroneously given.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Illinois.

It was the same case which was before the court at the preceding term, as noticed in 19 Howard, 8.

The case is stated in the opinion of the court.

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It was argued by *Mr. Washburne* for the plaintiff in error, and *Mr. Ballance* for the defendant, upon printed arguments.

Mr. Washburne referred to the cases of Frisby *v.* Ballance 2 Gilman, 141, and Frink *v.* Davit, 14 Illinois Reports, 304; and contended that the last decision had declared the law of the State, by which the deed of Bogardus to Underhill did not, by the subsequently-acquired title of Bogardus, pass the title in fee. The decision of the Circuit Court should be reversed, as being contradictory to the established law of the State.

Mr. Ballance admitted that the United States courts could follow the State courts in the construction of their own statutes, and, when a new construction was adopted, could change and decide cases as they might arise, according to the new construction. But he denied that the Supreme Court could gather up all the old cases which had been settled under the law as it then stood, and make them conform to the new law.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiff in error, who was also plaintiff below, brought his ejectment for certain lots in the town of Peoria. On the trial, he gave in evidence a patent from the United States to John L. Bogardus, dated 5th of January, 1838; the will of Bogardus, proved 7th of July, 1838, in which he authorizes his executrix to sell his lands; a deed from the executrix, dated September 25th, 1845, to Seth L. Cole; also, a deed from Cole to Frink, and from Frink to plaintiff. The defendants claimed under Isaac Underhill, to whom Bogardus had conveyed by deed, dated 5th August, 1834, purporting, for the consideration of $1,050, "to grant, sell, and convey," to Underhill, all Bogardus's "right and interest" to the land in dispute; "to have and to hold the same, unto the said Underhill, his heirs and assigns, forever."

The defendants, moreover, proved that Underhill paid the purchase-money for the land, and took out the patent in the name of Bogardus, in whose name the entry had been made.

The plaintiff's counsel then moved the court to exclude from the jury all the evidence given by the defendants. This motion was overruled, and the court instructed the jury that the plaintiff had no title to the premises claimed in the declaration. To this instruction plaintiff's counsel excepted, and now alleges it as error.

It was contended that the deed from Bogardus to Underhill was but an ordinary quit-claim deed, conveying only such interest as the releasor had in the premises at the time of its execution; and being without any direct covenants of warranty, or that implied in the terms "grant, bargain, and sell," Bogardus was not estopped from evicting Underhill, under his legal title afterwards vested in him by the patent. The defendants contended, that however this might be at common law, the title acquired by Bogardus inured to the benefit of his grantee by virtue of the 7th section of the statute of Illinois, passed in 1833, concerning conveyances of real property, which is as follows: "If any person shall sell or convey to another, by deed or conveyance purporting to convey an estate in fee simple absolute in any tract of land or real estate, lying and being in this State, not then being possessed of the legal title or interest therein at the time of the sale of conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held in trust, and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken, and shall be

as valid as if the grantor or vendor had the legal estate or interest at the time of sale or conveyance."

Now, this case was tried in the court below, on the 8th of June, 1849, and this section of the act of 1833 had been construed by the Supreme Court of Illinois, as to its application to the conveyance in question, in the case of Frisby *v.* Ballance, decided in that court in 1845, and reported in 2d Gilman, 141. It was held in that case that the fee in the premises inured under the statute to Underhill and his assigns. This construction of the statute was therefore a settled rule of property at the time of the decision of this case in the court below, which that court was bound to follow; and having so decided, there was certainly no error in the decision at the time it was made.

But it is argued, that though the decision of the Circuit Court was in accordance with the established construction of the statutes of Illinois, and the rules of property as then declared by her highest tribunal, yet that it has become erroneous, because of a change of the law since that time, by a decision of the Supreme Court of the State in 1853, in the case of Frink *v.* Durst, (14 Illinois, 305,) by which the case of Frisby *v.* Ballance was overruled and reversed. It is true that the same conveyance and the same statute were in question in the last case, and have received a contrary construction to that which had governed such conveyances as a rule of property for more than eight years.

If the judgment of the Circuit Court in this case had been given since the last decision of the Supreme Court of Illinois, this court might have been compelled to decide whether they considered themselves bound to follow the *last* decision of that court, or at liberty to choose between them. But, however the latter decision may have a retroactive effect upon the titles held under the deed in question, it cannot have that effect upon the decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that court was given. It is therefore affirmed, with costs.

ROBERT H. WYNN, EXECUTOR AND DEVISEE OF WILLIAM WYNN, DECEASED, PLAINTIFF IN ERROR, *v.* CHARLES B. MORRIS ET AL.

In the present case, the complainant and appellant did not derive his title to the land in dispute from any statute of the United States; and therefore this court has no jurisdiction over the matter by virtue of the 25th section of the judiciary act.

THIS case was brought up from the Supreme Court of the

State of Arkansas, by a writ of error issued under the 25th section of the judiciary act.

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

It was submitted on printed arguments, by *Mr. Pike* for the plaintiff in error, and by *Mr. Watkins* and *Mr. Bradley* for the defendant.

The arguments upon both sides were directed almost entirely to the merits of the case; the question of jurisdiction was made by the counsel for the defendant in this manner:

If the decision of the court below had been against the right claimed by Mrs. Taylor, under the act of Congress of the 29th of May, 1830, *she* would have had a right of appeal, but Wynn would not; although the case might be said to involve the construction of that act, because, confessedly, he does not claim any right under it.

The decision being in favor of the right, there is no ground left for the appellate jurisdiction of this court to rest upon, unless the plaintiff can make it appear that the decision of the court below involved the construction of the act of September 4th, 1841, and was against a right claimed under that act for granting lands to the State of Arkansas.

But, according to the case made by the bill, the State does not and cannot claim any title to this land under the act of 1841. Whether the plaintiff ever acquired any right to it from the State or under the selection, is purely a question of contract, or of private grievance, as between him and the State. True, he must trace his title back to the act of 1841. But in that sense, every disputed land case might come up to this court, as all titles are more or less remotely derived from the United States.

Mr. Justice CATRON delivered the opinion of the court.

The complainant filed his bill in a State Circuit Court in Arkansas, to enjoin Morris from executing a writ of possession founded on a recovery by an action of ejectment for the northwest quarter of section 18, in township 16, south of Red river.

Wynn alleges that the whole of the quarter section was cultivated by him, and had been for years before the inception of Morris's title, and that he, Wynn, claimed title to the land through the State of Arkansas, and that Morris had obtained a legal title in fraud of Wynn's superior right in equity.

Morris claims through Keziah Taylor. In 1829 and in 1830, when the occupant law of that year passed, she was a widow, and cultivated a small farm on the land in dispute; she sold

out her possessions there in the latter part of 1830, left the country secretly, and settled permanently in the Mexican province of Coahuila and Texas, and there she remained without returning to Arkansas until December, 1842, when she made her appearance, proved her cultivation in 1829, and her continuing possession in May, 1830, in the form prescribed by the act of that year, had her pre-emption allowed, entered the land, and sold it to Morris. She got a patent in 1844.

The reason why Mrs. Taylor did not enter the land at an earlier day was, that the township No. 16 was not surveyed until 1841, and within one year before the date of her entry.

Wynn seeks a decree on the ground that Morris procured Mrs. Taylor to enter the land for Morris's benefit, when she had no right of pre-emption, because of the abandonment of her possession for more than ten years.

The register and receiver held that a preference of entry was vested by the act of 1830, and they refused to investigate the fact of abandonment. This opinion was concurred in by the Commissioner of the General Land Office. And, to correct this alleged error, the bill was filed. The State Circuit Court refused the relief prayed; adjudged that Mrs. Taylor obtained a valid title to the land, and decreed damages against Wynn for detaining the possession. From this decree he appealed to the Supreme Court of Arkansas, where the decree of the Circuit Court was affirmed, and to that decree Wynn prosecutes his writ of error out of this court; and the first question here is, whether we have jurisdiction to re-examine and reverse or affirm the decree of the State courts. This can only be done in a case where is drawn in question the construction of a statute of the United States, &c., and the decision is *against the title* set up or claimed under the statute by the losing party. If Wynn had *no title*, of course he could not claim under a law of the United States, and cannot come here under the 25th section of the judiciary act of 1789, merely to draw in question the decree which dismissed his bill.

To this effect are the cases of Owings *v.* Norwood's lessee, (5 Cra., 344;) Henderson *v.* Tennessee, (10 How., 311.)

Wynn sets up a pretension of claim to the land in dispute through the State of Arkansas, which State was authorized to locate 500,000 acres of land by acts of Congress passed in 1841 and 1842; and the complainant insists that he had made a contract with the State, through her locating agent, Charles E. Moore, who was acting under instructions from the Governor of said State, to the effect that he, the complainant, should be allowed to purchase the land from the State at two dollars per acre. But the State did not locate this quarter section, nor

had it an interest in it at any time; so that the title was outstanding in the United States till Keziah Taylor made her entry.

The complainant, Wynn, having no interest in the land but a naked possession, not protected by an act of Congress, we order that his writ error be dismissed for want of jurisdiction.

JOSIAH GARLAND, PLAINTIFF IN ERROR, *v.* ROBERT H. WYNN, EXECUTOR AND DEVISEE OF WILLIAM WYNN, DECEASED.

Where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims.

Therefore, in a case where the register and receiver of public lands have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right who had a preference of entry which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded—in such a case, the jurisdiction of the courts of justice is not ousted by the regulations of the Commissioner of the General Land Office.

THIS case was brought up from the Supreme Court of Arkansas, by writ of error issued under the 25th section of the judiciary act.

It was submitted on printed arguments, by *Mr. Bradley* and *Mr. Watkins* for the plaintiff in error, and by *Mr. Pike* for the defendant in error.

The controversy referred to the northeast quarter of section 18, in township 16 south, range 25 west of the fifth principal meridian, south of Red river, in the county of Lafayette.

The facts of the case are stated in the opinion of the court.

The bill was filed by Wynn, who alleged that he would have got a patent but for Garland's proving a pre-emption right in the land, under the act of 1830, to exist in Hemphill. After various proceedings, the Circuit Court (State court) decreed against Wynn. The Supreme Court of the State reversed this decree, and ordered Garland to convey the land in question to Wynn, upon payment of two hundred dollars, with interest; or in case of neglect, that the decree should stand as a conveyance, &c.

From this decree, Garland appealed to this court.

The principal points of law involved in the argument were: 1st, whether or not Wynn could interpose between the United

States and the patentee; and, 2d, whether the decision of the officers of the land office was not conclusive upon all persons except the United States, and upon them also until the patent was vacated by regular judicial authority.

Mr. Justice CATRON delivered the opinion of the court.

In November, 1842, William Wynn (the complainant below) proved that he had a preference of entry to the quarter section of land in dispute, according to the act of 1838, and his entry was allowed.

In February, 1843, Samuel Hemphill made proof that he had a right of pre-emption to the same land, under the act of May 26th, 1830. The two claims coming in conflict, it was decided by the register and receiver at the local land office, that Hemphill had the earlier and better right to enter the land; and in this decision the Commissioner of the General Land Office concurred.

Wynn's entry being the oldest, it was set aside, his purchase-money refunded, and a patent certificate was awarded to Samuel Hemphill, who assigned it to Garland, the plaintiff in error, to whom the patent issued. The benefit of the patent was decreed to Wynn by the Supreme Court of Arkansas; to reverse which decree, Garland prosecutes his writ of error out of this court.

It appears, from the allegations and evidence, that Garland procured the proofs, and was in fact the principal in obtaining a preference of entry in the name of Hemphill, and in causing Wynn's elder entry to be vacated; that the whole proceeding, on the part of Garland and Hemphill, was a mere imposition on the officers administering the public lands; that Hemphill never had any improvement on the northeast quarter of section 18, but that his improvement was on the northwest quarter of section 17, which adjoins the quarter section in controversy; and that Garland induced the witnesses, who made the proof before the register and receiver to establish Hemphill's preference of entry, to confound the quarter sections and their dividing lines, and misrepresented the extent of the cleared land occupied by Hemphill in 1829 and 1830; so that the witnesses ignorantly swore that the improvement and cultivation were in part on the northeast quarter of section 18, which was wholly untrue; and by which false swearing Wynn's entry was set aside, and Garland obtained a patent of the land.

Garland insists, by an amended answer in the nature of a distinct plea, that, by the law of the land, the Circuit Court had no authority or jurisdiction to set aside or correct the decision of the register and receiver; and that their adjudication

and judgment in granting and allowing the pre-emption rights to and in the name of Samuel Hemphill was final and conclusive, and cannot be inquired into, or in any manner questioned, modified, or set aside.

This matter was put in issue; and the court below, when it decreed for the complainant, necessarily decided against the bar to relief set up and claimed under an authority of the United States.

The question is, have the courts of justice power to examine a contested claim to a right of entry under the pre-emption laws, and to overrule the decision of the register and receiver, confirmed by the Commissioner, in a case where they have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right, who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded?

The general rule is, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims. Such was the case of Comegys *v.* Vasse, (1 Peters, 212,) and the case before us belongs to the same class of *ex parte* proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party *may* be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court.

It was, in effect, so held in the case of Lytle *v.* The State of Arkansas, (9 How., 328;) next, in the case of Cunningham *v.* Ashley, (14 How.;) and again in the case of Bernard *v.* Ashley, (18 How., 44.)

It is ordered that the decree of the Supreme Court of Arkansas be in all things affirmed.

JAMES R. JONES, CHARLES C. JONES, WILLIAM G. GORMAN, ROBERT LOTT, JOHN TIPPIN, MATTHEW T. TIPPIN, AND JOHN R. TALLY, PLAINTIFFS IN ERROR, *v.* CATHERINE MCMASTERS, BY HER NEXT FRIEND, MANUEL YBARBA.

Where a person was born at Goliad, then in the State of Coahuila and Texas, being a part of the Republic of Mexico, which place was also the domicil of her father and mother until their deaths, and was removed at the age of four years, before the declaration of Texan independence, to Matamoras, in Mexico, this person is an alien, and can sue in the courts of the United States.

Her allegiance remained unchanged, unless by her election, which it was incumbent on the opposite party to show.

According to general principles, mere alienage did not forfeit a title to land in Texas; and although the Constitution of Texas provided that no alien should hold land in Texas, except by title emanating directly from the Government of that Republic, yet it was afterwards declared that the Legislature should, by law, provide a method for determining what lands may have been forfeited or escheated.

In the absence of such a legislative provision, a title emanating from the Government of Mexico, anterior to Texan independence, is not forfeited.

In a court of law, where a grant from the Government is in regular form, it is not proper to inquire into the voidability of the grant from equitable considerations.

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 argued by *Mr. Hale* for the plaintiffs in error, and by *Mr. Hughes* for the defendant.

The principal question in the case was, whether Catherine McMasters was a citizen of Mexico or of Texas. The arguments of the counsel upon this point were as follows:

Mr. Hale's first point was this:

The District Court should not have sustained the demurrer to the plea to the jurisdiction pleaded by John R. Tally. It appeared by the allegations of that plea that the plaintiff was, at the time of the institution of the suit, a citizen of the State of Texas. The Constitution of the Republic of Texas declared that "all persons (Africans, the descendants of Africans, and Indians, excepted) who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the Republic, and entitled to all the privileges of such." (Const. Rep. Gen. Prov., sec. 10; Hart. Dig., p. 38.) And the incorporation of the Republic of Texas into the Union, "on an equal footing with the original States in every respect," necessarily converted the citizens of the Republic of Texas into citizens of the State of Texas and of the United States. (Joint Resolution for annexing Texas to the United States, March 1, 1845, 5 Stat. at L., 797; act of Dec. 29, 1845, 6 Stat. at L., 1.) It follows, that any person who, within the meaning of the Constitution of the Republic, *resided* in Texas at the time of the declaration of independence, and continued thus to be a citizen of the Republic until the period of annexation to the United States, became thereby a citizen of the State of Texas, and was not competent to bring a suit, in the District Court of the United States, against other citizens of the same State. The only point which presents any difficulty is in relation to

the meaning of the phrase, "who were residing in Texas," used in the Constitution of the Republic. There can be little doubt, however, that the framers of the Constitution intended this phrase to be equivalent to the corresponding one, "who had their domicil in Texas," and did not design to deprive of their citizenship those who were physically absent from the country. Many of the most respectable and deserving residents of Texas were not, personally, within the limits of the Republic at the date of the declaration of independence. They had been forced to leave the country, temporarily, by the advance of the Mexican army; they had accompanied their suffering families to the refuge offered by the United States, on the eastern bank of the Sabine; they had been sent on missions by the General Council, to arouse the sympathies of the Western States; they had returned to their former homes, to bring their wives and children, left there during hostilities, to the country now redeemed by their arms. The history and legal annals of Texas are filled with examples. (Yoakum's History of Texas, vol. II, pp. 34, 36, 118, 125, 175, 181; Ordinances of Gen. Council, pp. 52, 55, 56, 58; Republic *v.* Young, Dallam, 464; The State *v.* Skidmore, 5 Tex., 469; Russell *v.* Randolph, 11 Tex., 464–'6.) It could not be intended by the Constitution of the new State, then in need of citizens, and anxious to attract them, to disfranchise such persons by a rigorous and literal application of the term "resident." And this conclusion is confirmed by the established meaning of this term. (Lambe *v.* Smith, 15 Mees. and W., 434; Hylton *v.* Brown, 1 Wash. C. C. R., 314; Blanchard *v.* Stearns, 5 Met., 303; Crawford *v.* Wilson, 4 Barb., 522.) It is true that in some instances, especially in cases arising under attachment laws, it has been said that residence and domicil were not always equivalent terms, and that a citizen domiciliated in one State, might have a temporary residence in another. But these decisions were based entirely upon the consideration of the object and intention of the particular statutes which were then to be interpreted, and do not deny that in other statutes, having a more enlarged purpose, the two terms would be regarded as identical. Strictly speaking, the mere fact of inhabitancy does not constitute a domicil; the intention of remaining must also exist; but it follows, from this very rule, that a domicil implies and presupposes a residence, and that one who had his domicil in the Republic of Texas, necessarily resided there—legally, if not physically. The position here assumed is strengthened by the fact, that at the time of the declaration of independence of Texas, the western portion of the new Republic was filled with the military forces and polit-

ical adherents of the invader. It would be the height of absurdity to suppose that the framers of the Constitution designed to convert the troops and the supporters of Santa Anna, then actually within Texas, and with a literal residence in the country, into citizens of the revolutionary Government.

If, then, the Constitution of the Republic of Texas conferred citizenship upon those who had their domicil in the country at the time of the declaration of independence, it will follow that Catherine McMasters was a citizen of the Republic. It appeared by the allegations of the plea that the domicil of her birth or origin was in Texas, at the town of Goliad, and that domicil certainly continues until another is acquired. (Somerville *v.* Somerville, 5 Vesey, 787; Monro *v.* Monro, 7 Cl. and Fin., 876; Mascard de Prob. concl. 85, No. 1.) To acquire another domicil, an intention to abandon the domicil of origin must exist. (Monro *v.* Monro, 7 Cl. and Fin., 891.) And an absence of fifteen or twenty years is not in itself, without proof of such intention, sufficient to forfeit the original domicil. (Merlin, Repert. Domicile, § 2; Dalloz, Dict. Gen. Domicile, § 1, Nos. 9—13.) In the case of Saint Germain, absent in India for forty-five years, it was decided that such absence, without proof of his intention to abandon his residence in France, did not divest him of his domicil. (Dalloz, Jur. Gen., vol. 6, pp. 383–'4.) The intention or *animus*, thus essential to the acquisition of a new domicil, must be a legal and disposing will, and the voluntary act of a mind capable in law of acting. It can only be evinced by a person *sui juris*. (Somerville *v.* Somerville, 5 Ves., 787; Guier *v.* O'Daniel & Young, note to 1 Binn., 349, 352.) And, *a fortiori*, an infant or child cannot be capable of such an intention. *Nam infans, et qui infanti proximus est, non multum a furioso distat.* (Inst. III, 19, 10.) A minor, without parents or legal tutor, can therefore never lose or abandon *proprio marte* the domicil of origin. (Story Confl. Laws, § 46, 506, note; 1 Burge Comm. Col. Law, 38, 39; Pothier, Cout. d'Orleans, Ch. 1, sec. 1, Nos. 12—18; ed. de Brugnet, vol. 1, p. 5; Desduitz de St. Pierre *v.* Revel, Sirey, 35, p. 2, 556.) And this principle has been repeatedly recognised in the decisions of the Supreme Court of Louisiana—a court the most conversant with such questions. (Robbins *v.* Weeks, 5 Mart. N. S., 379; Succession of M. J. Robert, 2 Rob. La. R., 435–'6.) It is true that the surviving father or mother, that is to say, the natural tutor, may change, at will, the domicil of the minor, and transfer it to a different country; (Potinger *v.* Wightman, 3 Mer., 67, 79;) but this power does not extend to a mere friend, or to a person assuming, without the direct authority of law, the custody of the minor's person. (Robbins *v.* Weeks, 5 Mart.

N. S., 379.) These rules are well explained by J. Voet, in his Commentaries on the Pandects, (Lib. V, tit. I, No. 100,) where he says, "*Ut enim haud difficiliter admittendum sit minorennem non magis posse domicilium mutare quam contrahendo se obligare; tamen quemadmodum contrahere auctore tutore permissum ei est, itaque et domicilium cum patre matreve, tanquam tutelæ ejus aut saltem educationi præposita, tutoribus cæteris non contradicentibus, mutare nihil vetat.*" It is because the authority of the tutor supplies the defect of legal capacity or volition in the minor, that the latter acquires the domicil to which he accompanies the guardian; but as the authority of the delegated or appointed tutor ceases when he removes beyond the limits of the country, (Johnstone *v.* Beattie, 10 Cl. and Fin., 42, 87, 113, 148,) only the natural guardian—the parent of the minor, whose power remains unimpaired—can change the domicil of his ward to a new country. (School Directors *v.* James, 2 Watts and S., 568, 572.) These principles are substantially recognised in the case of Hardy *v.* De Leon. (5 Tex., 234–'8.) Sylvester De Leon resided in Texas at the date of the declaration of independence; in 1838, he was removed by the military authorities of the country to Louisiana, where his son, Francisco Santiago De Leon, was born; the wife of Sylvester died; the family then removed to Tamaulipas, and the children were left in the care of their grandmother, while Sylvester returned to Texas; after a short visit, he again went to Tamaulipas, with the intention of returning to Texas with his children, but was killed on the road. Francisco, his youngest son, however, came to Texas, and lived at Goliad; and in a suit commenced in his name, it was pleaded by the defendants that he was an alien enemy. The Supreme Court of Texas held that the plaintiff's father, Sylvester De Leon, had never lost his citizenship in Texas; and if he had, or if his citizenship did not attach to his infant son, born in Louisiana, still the domicil of origin, acquired by the birth of Francisco in Louisiana, could not be forfeited by his removal, during minority, and without his own volition, to Mexico.

The case made by the present plea in abatement is stronger than that of Hardy *v.* De Leon. Catherine McMasters was a child, less than five years of age, at the time of her removal from the domicil of her parents and of her own birth, in Texas, to a foreign country. Her parents were both dead; she has had no recognised tutor, nor has she been emancipated by marriage; she was removed by the family of Manuel Sabriego, with which she has continued to reside; and it does not appear that the family, which she thus acccompanied, had any legal authority whatever to control her course in life, or

decide on her domicil. It was incumbent on the plaintiff to have repelled the legal presumption arising from these facts, by a replication to the plea, and the demurrer should have been overruled.

These views are confirmed by a recent decision of the Supreme Court of Texas, made at Tyler, in 1857, in the case of Wheeler *v.* Hollis. (See manuscript opinion.) In the course of this decision, after referring to the doubt as to the general authority of a guardian to change the domicil of his ward, the court states its conclusion to be, that a mother is not deprived, by her second marriage, of the natural right of controlling the person of her child, and determining its future home; but that this power does not extend to the mere legal guardian, after the death of both parents, nor authorize the mother, even as natural guardian, to change the domicil of the child, to the injury of its interests or the forfeiture of its property. "*When an infant has no parents, the law, it is true, remits him to his domicil of origin or to the last domicil of his parents.* But when he has a surviving mother, it is difficult to perceive the justice or propriety there would be in not permitting her to make her domicil that of her children." "In other communities, it may not be unusual for children, who have parents, to have others appointed their guardians; and then it may be truly said that the ward is not naturally or necessarily a part of the guardian's family;" "*and so it may be said where the ward has no parent.*" And the court cites the opinion of Ch. J. Gibson in School Directors *v.* James, 2 W. and S., 568, with approbation, and affirms the rule, that "whatever may be the power of the guardian over the person and property of the ward, he cannot exercise it so as to injure the ward himself. The very end and purpose of his office is protection, and there is no imaginable case in which the law makes it an instrument of injury by implication." It is evident, from this decision, that Sabriego had no power to remove the infant plaintiff from the domicil of origin for any reason, much less to make such removal when it would work a forfeiture of the minor's lands in Texas.

This part of the case, however, can be put upon higher ground. The principles of the Spanish law, and not the law of nations or of nature, controlled the political rights of persons under both the Republics of Mexico and of Texas. The jurisprudence of Spain in relation to questions of citizenship was strictly and perhaps too exclusively national in its spirit. It admitted of no divided allegiance; it suffered no expatriation from the native soil. The domicil of the origin fixed the political rights and duties of the subject and citizen forever. "By law, no one can denaturalize himself." (Part.

II, 18, 29; Part IV, 24–'5.) And Aguila y Roxas, in his excellent notes to his grandfather's treatise on the conflict of laws in relation to entailments, sums up the whole doctrine in this paragraph: "*Originarius hujus Regni, qui in aliud se transtulit, non amittit originem, quia quemadmodum patrem mutare non possumus, ita nec patriam: pro qua videndi qui hanc sententiam sequuntur, Bart.* in L. Assumptio in princ. ff. ad Muncipal; *Sozin.* in cap. licet ratione ult. num. 52, de for. compet; *Sanchez* de Matrim lib. 3, disp. 23, num. 4; *Barbos.* in L. Hæres absens § Proinde n. 24 and 5, 26, 41, 87, 102, and 130, cum seq. de Judic.; *Menoch.* cons. 1076 a num. 3, and cons. 600, num. 7, and cons. 80, num. 10, and seq. and cons. 112, n. 61; *Pasc.* de vir. pat. potest. 3. cap. 2, n. 31; *Peregrin.* cons. 55; *Manuel Barbos.* ad Ordin. Portugal, lib. 2, tit. 56, in princ. num. 2; *Ciarlin.* Controv. for. cap. 149, *ubi elegans ratio ibi:* quia statim atque natus est patria, illi hypothecatus est; *Vid. D. Amaya* in L. 7 c. in col. num. 32 and seq.; *Carleval.* de Judic. tit. 1, disp. 2, num. 124; *Surd.* cons. 560, num. 5; *Cald. Pereyra* in Resp. pro D. Joan. de Tassis n. 9." (See Aguila y Roxas, Additæ Quæst, P. III, ch. 1, no. 8; Notes of Greg. Lopez to Part. IV, 24–'5.) The political existence of Catherine McMasters was attached to the soil, and, in the language of Ciarlina above cited, she was *mortgaged* to it as her country. She might lose her rights of property by absence, or her civil privileges by disuse; but the Republic of Texas could not suffer her to sacrifice the political duties which wedded her to the country of her birth—much less allow a self-appointed guardian to sever this infant, without power or freedom of choice, from her natural mother.

Mr. *Hughes:*

I. This plea shows that plaintiff below did not reside in Texas at the day of the declaration of independence, but was then residing in Matamoras, or elsewhere in Mexico. And we would say that this settles the question, for a *prima facie* case, to say the least, is made, showing that she was not a citizen of the Republic.

The declaration of the Constitution of the Republic is, "All persons (Africans excepted, &c.) who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the Republic, and entitled to all the privileges of such."—Const. of Rep., Gen. Prov., sec. 10, Hart. Dig., p. 38.

But, to avoid the effect of this provision, it is contended that the word "residing," in the connection it is found, should be construed the same as "domicil;" and to show that there might be a domicil, without a continued actual residence, numerous

authorities will no doubt be referred to—all of which, as before stated, will be admitted to be good law; but they do not meet the case. For it is manifest that the Convention which framed the Constitution did not intend to indicate "domicil" by the language used; and the error, if error there be, in the premises or conclusions of counsel, is in supposing that only by virtue of the provision of the Constitution cited, was it declared who were citizens of Texas and who were not. We suppose the provision inserted was so inserted for the purpose of providing for a class of persons who, upon general principles, might not be citizens of the new Republic. There were and could not have been otherwise than great numbers of persons, within the limits of Texas, who had not become citizens, and all such it was intended to make citizens. This will appear from an examination of the other provisions of the same 10th section and other sections of the Constitution. But, again, had the word "domicil" been used instead of "residing," there would have been something in the argument. Domicil does not necessarily indicate residence, for the authorities show, that though domicil may be accompanied with residence, it is not always so; but there may be domicil without actual residence. Residence does not always indicate domicil.

If it had been the intention to make a declaration which was to determine as to all persons who should be citizens of the Republic, some other term would have been used; but the use of the expression inserted shows that there might be other persons who were citizens, besides those provided for—those, for instance, who had been, and up to the day of the declaration of independence continued to be, citizens of the State of Coahuila and Texas, residing in Texas, but who might be temporarily absent from the State, on business of the country, &c.

Transient persons, however, were not provided for, as they should not have been. The Mexican army in the west spoken of, who came to subjugate Texas, being all transient, could not come within the language "residing."

This question will now be viewed in its true character, not as a mere question of domestic domicil, but in that more important, as a question of national character.

The plea shows that Catherine McMasters was, from the time of her birth up to about the age of four years, domiciled in Goliad, the place of her birth, but removed therefrom by those under whose charge she was, to Matamoras, before the declaration of independence. She then was a native Mexican, owing allegiance to the Republic of Mexico. When she was removed, a revolution had commenced, and was subsequently

perfected by the declaration of independence. It will not be questioned, it is presumed, that after the close of the revolution, those who had participated in the struggle on either side, by reason of their adherence to Texas or to Mexico, were either Mexicans or Texans, as they adhered to the one side or the other. But how was it with others, who by no act of adherence had made an election? It has been contended for plaintiff in error, that this was settled by the domicil of each individual: if within Texas, then they were Texans; if in Mexico, then they were Mexicans. And in this particular, Catherine McMasters, being a minor, and incapable of will, though removed beyond the limits of Texas before independence was declared, did not forfeit the domicil of her birth, that of her parents, and was a Texan. When reasoning as to domicil, this may all be well enough; but, as before intimated, we are speaking of national character, under particular circumstances; and this, in the circumstances in which Catherine McMasters stood, depended on election. If she had remained in Texas, she would have been regarded as a Texan citizen. But having been removed to Mexico, she thereby adhered to Mexico, though she had no will on the subject; but being a minor, not having power to make an election, she had time until majority to make such election; and when made, she would be a citizen of that State to which she adhered; but in the mean time she could be considered in no other light than a citizen of Mexico. These principles have been recognised in this court, and applied to a case occurring during our revolution.

A native-born American, resident in New York, united himself to the English forces in possession of New York, and adhered throughout the struggle to the British side, and went off with the British forces, and died in the British dominions. His son, born in New York, was taken with him, and continued under his charge. This son afterwards claimed an estate by descent, and it was determined that he was an alien, and could not take by descent; and in delivering the judgment of the court, Mr. Justice Thompson says: "John Inglis, if born before the declaration of independence, must have been very young at that time, and incapable of making an election for himself; but he must, after such a lapse of time, be taken to have adopted and ratified the choice made for him by his father, and still to retain the character of a British subject, and never to have become an American citizen, if his father was to be so considered. He was taken from this country by his father before the treaty of peace, and has continued ever since to reside within the British dominions, without signify-

ing any dissent to the election made for him; and this ratification as to all his rights must relate back, and have the same effect and operation as if the election had been made by him at that time."

Again: "The British doctrine therefore is, that the American *ante nati*, by remaining in America after the treaty of peace, lost their character of British subjects. And our doctrine is, that by withdrawing from the country and adhering to the British Government, they lost, or perhaps, more properly speaking, *never acquired*, the character of American citizens."—Inglis *v.* The Sailors' Snug Harbor, 3 Peters, 122–'3.

And this is the case which shows the distinction between mere questions of domestic domicil and the more important questions as to national character. In the former, the question of domicil of a minor is settled by that of his father, or the last of the father, when he is dead; while in the latter, the national character depends upon election, whether the party be adult or minor, though the act of the father making his election may operate an election for the son, if his dissent be not made in due time.

But did Catherine McMasters either show a dissent or an election to become a Mexican, instead of a Texan? It will be seen, by an examination of the plea in question, that she was about four years of age when she was removed by Manuel Sabriego to Matamoras, before the declaration of independence, in March, 1836; she was therefore of age eighteen years afterwards, in the year 1853. We have no evidence of a dissent to the act of removal by Sabriego, or of an election to become a citizen of Texas; and upon the principles established in the case referred to in this court, it must be presumed that she ratified the act of her friend, and remained a citizen of Mexico, and was so by relation from the time of removal and the declaration. But the plea is contradictory in regard to the age of Catherine McMasters, for after the statement of her age before the declaration of independence, it is in another part alleged that she was a minor at the time of filing said plea in 1854. This matter of the age is material; and if the contradiction is to have effect at all, one averment destroys the other, and then there is no good plea, for the want of material averments.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the District Court of the United States, possessing Circuit Court powers, held in and for the district of Texas.

This suit was brought in the court below by Catherine McMasters, to recover the possession of a tract of land lying in the

county of Goliad, in the forks of the San Antonio river and the Cabaza creek, containing four leagues of land. Four of the defendants put in a plea of not guilty. At a subsequent day, John R. Tally was allowed to come in and defend as landlord of Lott, one of the defendants. Whereupon, he put in a plea to the jurisdiction of the court, upon the ground the plaintiff was a citizen of the State of Texas. The plea states that she was born at Goliad, then in the State of Coahuila and Texas, when it was a part of the Republic of Mexico; that the domicil of her father and mother were at this place at the time of her birth, and continued there till their deaths. That the plaintiff was removed from the Territory of Texas to Matamoras, west of the Rio Grande, in Mexico, when she was about four years of age, during the revolutionary movements in Texas, and before the declaration of independence, which was on the 2d March, 1836. That she was removed in the family of M. Sabriego, in which she had lived in Texas, and with whom she has continued to reside since in Mexico. There was a demurrer to this plea, which was allowed, and the defendant required to answer over. The defendant then put in a plea of not guilty, and also a special plea in bar of alienage, and limitation of nine years before suit brought, founded upon a statute of the State of Texas.

There was a demurrer to this plea, but undisposed of for aught that appears on the record, when the parties went down to the trial of the issues of fact.

On the trial, the plaintiff proved a title in due form, under date of the 16th July, 1833, to the land in controversy, in her grandmother, Maria de Jesus Ybarba Trejo, followed by the official survey and judicial possession; also, that her grandmother died in possession of the premises, leaving the plaintiff's mother, her only child, at the death of her mother and father. Her grandmother and mother died about the year 1834. Her father was killed in the same year.

The defendants claimed under patents from the State of Texas, one dated 15th September, 1849, for three hundred and twenty acres; the other, the 20th of February, 1847, for like number; which covered the possessions on the tract in dispute of two of the defendants.

When the evidence closed, the counsel for the defendants prayed the court to charge the jury, that if the plaintiff, as a Mexican citizen, had continued to reside out of Texas from a period before the declaration of Texan independence, the action could not be sustained; which was refused, and a charge given, that her right remained as it was before the revolution, both according to general principles and by force of the treaty of

Guadalupe Hidalgo; and that if she had a right of property, that gave her the right to sue here.

The counsel also prayed the court to charge, that if the jury should believe, from the evidence, that the survey and grant under which the plaintiff claims title extends so as to include a large area out of the limits prescribed by law, as dated in the decree No. 190, of the laws of Coahuila and Texas, and that the error did not arise from mistake of quantity, but from intention to depart from the legal mode of survey, then the jury might consider the grant void as to such area as might be out of the limits prescribed by law, and also that the grant itself would be void in such cases for want of legal survey. Which prayer was refused.

The counsel also requested the court to charge, that if the jury should believe, from the evidence, that the survey and grant under which the plaintiff claimed extended so as to include a large area as aforesaid, and that the grant and survey were so made by fraudulent procurement on the part of the grantee, by an agent in that behalf, then the jury might consider the grant as entirely void.

The court so instructed the jury; but with the addition, that unless the alcalde commissioner was informed, at the time he gave possession and issued the title, of the fact that the survey had been extended so as to include a large area, &c., the grant would not be void; that the fraudulent procurement of the survey alone would not vitiate the grant.

The counsel also requested the court to charge, that the grant under which the plaintiff claimed is one of the class that might be forfeited for non-performance of conditions. That ordinarily a law of the Legislature, and judicial action under it, would be necessary to avoid such a grant. Yet that claimant might act so as to supersede the necessity of such a judicial determination; and if conduct of plaintiff amounted to an admission of the forfeiture, she could not afterwards set up the right, especially against a person who had, in the mean time, acquired a grant from the State; and that it was a question for the jury to determine, whether the conduct of the plaintiff amounted to an admission of forfeiture.

The court gave the instruction, with the addition, that it was a question as to the actual intention of the plaintiff; and the jury should be satisfied, considering the infancy and all other circumstances, that such was in fact her intention, or they should find for the plaintiff.

The jury found a verdict for the plaintiff.

As the practice in the court below permits pleas of whatever nature or description to be put in as a defence to the suit at

the same time, and without regard to the order of pleas, as known to the system of the common law, it will be necessary in the first place to examine the question raised on the demurrer to the plea to the jurisdiction. It is insisted that the plaintiff is a citizen of the State of Texas, according to the facts as stated in the plea and admitted by the demurrer; and if so, as she is not a citizen and resident of a different State, but a resident of Texas, the suit cannot be maintained within the 11th section of the judiciary act. We think the objection not well founded.

The plaintiff was born under the dominion of the Mexican Republic, and has lived under it ever since her birth, and beyond all question, therefore, is a citizen of that Government, owing it allegiance, which has never been interrupted or changed. There has been no act of hers, or of any one competent to represent her, or to determine her election, indicating an intention to throw off this allegiance, and to attach herself to the new sovereignty of Texas. Having been born and having always lived under the old Government, the burden rested upon the defendants, who claimed that she was a citizen of the new one, to establish the fact of the change of her allegiance. (2 Cranch, 280; 4 ib., 209; 1 Dallas, 53; 20 Johns. R., 313; 3 Peters R., 99, 122, 123; 2 Kent C., 40, 41.) The facts set up in the plea prove the contrary. According to these, the plaintiff was nineteen years old when this suit was commenced, and between twenty-two and twenty-three years when the plea was put in to the jurisdiction. If she was competent to make an election while a minor, but after she had arrived at mature years, as to the Government to which she would owe allegiance, the presumption, upon the facts, is, that she has made it in favor of the one under which she has lived since her birth. If she was incompetent to make it during her minority, then the allegiance due at her birth continued, and existed at the time of the commencement of the suit.

We do not enter upon the question of the domicil of a minor discussed on the argument, nor express any opinion upon it, as the question here is one of national character, and does not stand upon the mere doctrines of municipal law, but upon the more general principles of the law of nations. (3 Peters, 242; 2 J. Cas., 29.)

Assuming that the plaintiff is an alien, and not a citizen of Texas, the next question is, whether or not she is under any disability that would prevent her from the assertion of her title to the premises in question; in other words, whether her absence and alienage worked a forfeiture of the estate. The general principle is undisputed, that the division of an empire works no forfeiture of a right of property previously acquired. Kelly *v.* Ham-

son. (2 J. Cases, 29; 7 Pet., 87.) And, consequently, the plaintiff's right still exists in full effect, unless the new sovereignty created, within which the lands are situate, have taken some step to abrogate it. The title remains after the revolution, and erection of the new Government, the same as before. The 10th section of the Constitution of the Republic of Texas, adopted the 17th March, 1836, provided that "*no alien shall hold land in Texas, except by title emanating directly from the Government of this Republic.*"

By the 20th section of the 7th article of the present Constitution of the State, it is provided "that the rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas shall not be divested; nor shall any rights or actions which have been divested, barred, or declared null and void, by the Constitution and laws of the Republic of Texas, be reinvested or reinstated by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution." And by the 4th section of the 13th article, it is provided "that all fines, penalties, forfeitures, and escheats, which have accrued to the Republic of Texas under the Constitution and laws, shall accrue to the State of Texas; and the Legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated."

It is understood that the Legislature of Texas has not yet passed any law providing for the steps to be taken to give effect to escheats for alienage, or otherwise; at least, no such law has been referred to, or relied on, in the argument; and the course of decision in the courts of Texas appears to be, that, until some act of the Legislature is passed on the subject, effect cannot be given to the plea of alienage, or, at least, that some proceeding must be had, on the part of the Government, divesting the estate for this cause, before effect can be given to it. 15 Texas R., 495.

The defence of alienage, therefore, was properly overruled by the court below.

The counsel for the defendants insist that the estate of the plaintiff became forfeited under the Mexican laws, by her removal from the State of Coahuila and Texas to Matamoras, while under the Mexican Government, and a permanent residence taken up there.

But the removal that worked a forfeiture under Mexican colonization laws, and divestiture of the title without judicial inquiry, was a removal out of the Republic of Mexico, and settlement in a foreign country. The principle has no application in this case. 18 How., 235, (McKenny *v.* Sarvego.)

The remaining questions in the case relate to those arising upon the survey and location of the premises in question. This survey and location were made by the Government surveyor, under the direction of the alcalde and land commissioner of the municipality, who was deputed by the Governor to cause the land to be surveyed, and to convey the title in due form. The counsel for the defendants claimed the right to inquire into the regularity of this survey and location, and also into the *bona fides* of the transaction.

It must be remembered that this is a suit at law to recover the possession of the land in dispute; and that, although it may be the course of practice in the courts of the State of Texas, in a suit of this description, to blend in the proceeding the principles of law and equity, in the Federal courts sitting in the State, the two systems must be kept distinct and separate. This principle is fundamental in these courts, and cannot be departed from. The court, therefore, in a suit at law, should exclude the hearing and determination of all questions that belong appropriately and exclusively to the jurisdiction of a court of equity. In a case calling for the interposition of this court, and turning upon equitable considerations, relief should be sought by bill in equity. Many of the cases at law coming up from the District Court of this State are greatly complicated and embarrassed, from the want of the observance of this distinction in the proceedings before it. In respect to the survey and location in the case before us, we perceive no ground that could warrant the court in going behind them in a suit at law. They were made by the Government that granted the title, and there is no ground, or even pretence, for saying that they were made without authority; and hence, altogether void. If voidable, for irregularity or other cause, the question was not one for a court of law in an action to recover possession, but for a court of equity to reform any error or mistake. (9 Peters, 632; 13 ib., 368–'9; 3 Wh., 212, 221; 7 How., 844.) We think a satisfactory answer might be given to the several objections taken to the survey and location; but we prefer to place it upon the ground above stated.

The judgment of the court below affirmed.

JOHN BACON, ALEXANDER SYMINGTON, AND THOMAS ROBINS, COMPLAINANTS AND APPELLANTS, *v.* VOLNEY E. HOWARD.

By the laws of the Republic of Texas, no action would lie on a foreign judgment, and all actions of debt were prescribed in four years.

When about to form a Constitution, for the purpose of becoming a State of the Union, the Legislature passed a law permitting suits to be brought on foreign judgments, but limiting them to sixty days when the judgment was of four years standing and upward.

The plaintiffs' bill attempted to avoid the effect of the last limitation as to their judgment, which was more than four years old, on the ground that they lived more than two thousand miles distant, and could not know of the passage of the last act within time to prosecute their action.

Held, that the last-mentioned statute conferred a favor, and was not retrospective; and that plaintiffs' action was barred, whether he knew of the act or not.

The Constitution of the United States does not restrain the right of each State to legislate as to the remedy on suits on judgments in other States.

THIS case was an appeal 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 argued by *Mr. Hale* for the appellants, and *Mr. Hughes* for the appellee.

Mr. Justice GRIER delivered the opinion of the court.

The complainants are assignees of a judgment obtained by the Planters' Bank against the defendant, in the State of Mississipi. The charter of the bank has been forfeited. The complainants, as equitable owners of the judgment, demand payment by their bill. The judgment claimed by them is dated on the 19th of October, 1840, and their bill was filed on the 22d of October, 1850. Anticipating the defence of the statutes of limitation of Texas, the bill avers "that, at the time of passage of the act of Congress of the Republic of Texas, approved June 28th, 1845, entitled 'An act to authenticate foreign judgments, and to limit suits thereon,' the defendants resided in San Antonio, Texas, and the complainants in Philadelphia—more than 2,000 miles apart; and that complainants could not, according to the regular course of the mails, and with any reasonable diligence, have learned the passage of said act, and caused suit to be instituted upon the judgment within sixty days after its passage." The respondent has demurred to the bill, and assigns as a cause of demurrer, among other reasons, "That the complainants, by their own showing, are barred by the first section of an act entitled 'An act of limitations,' approved February 4, 1841, and also by the fourth section of the act referred to in the bill."

If this allegation be found correct, it will be unnecessary to notice the others.

On the 10th of January, 1841, the Legislature of the Republic of Texas enacted, "That no suit, proceeding, judgment, or decree, shall be brought, prosecuted, or sustained, in any court or judicial magistracy of this Republic, on any judgment or decree of any court or tribunal of any foreign nation, State, or Territory," &c. "But this provision is in no degree to affect the validity or obligation of contracts, engagements, or pecuni-

ary liabilities, originating abroad, or the original evidence, testimony, or proof, to establish the same," &c.

On the 5th of February, 1841, "An act of limitations" was passed, the first section of which, after prescribing shorter limitations for other causes of action, declares that "all actions of debt grounded on any contract in writing shall be commenced and sued within four years next after the cause of such action, and not after."

Without criticising the peculiar expressions used in these acts, it is obvious that their policy and object was to bar the prosecution of any claim for money or property at farthest in four years from the time when the right of action first accrued.

Now, the original cause of action, on which the judgment in question was obtained, must have existed or accrued at the latest on the 19th of October, 1840, when judgment was entered thereon in the court of Mississippi. Counting from that date, the action would have been barred on the 19th of October, 1844. But assuming that the time did not commence to run till the 17th of March, 1841, when the act of 5th February, 1841, is said to have taken effect, the action was barred on the 17th of March, 1845.

On the 23d of June, 1845, the Congress of the Republic gave their consent to the annexation of Texas to the United States, and the Convention which formed the Constitution of the State met on the 4th of July of the same year.

It would seem that doubts and apprehensions were entertained that, when Texas became a State of the Union, that section of the Constitution of the United States which prescribed that full faith and credit should be given to the judicial proceedings of each State might have the effect of reviving the claims of creditors in other States, on which judgments had been obtained. To obviate this anticipated difficulty, an act was passed on the 28th of June, 1845, "To prescribe the mode of authenticating foreign judgments, and to limit suits thereon." The fourth section of this act provides: "That all foreign judgments, decrees, and adjudications, upon which suit shall be brought in the courts of this Republic, should the same be of four years' standing and upwards, shall be forever barred and prescribed, unless sued on in sixty days from and after the passage of this act; those under four and over two years, unless sued on in six months; and those under two years, unless sued on in one year: *Provided*, the original cause of action shall remain unimpaired, and may be sued on at the election of the creditor, subject to prescription."

At first view, this act might be accused of making a very curt limitation, and to be retrospective in its operation. But

when it is recollected that it gives a new form of remedy before denied, and that it only continues the rule of limitation to which the cause of action was already subject, and in fact gave a further grace to the creditor, he has no right to complain.

Giving the complainant in this case the most favorable construction of the act of limitations of 1841, his cause of action was barred on the 17th of March, 1845. The act of June, 1845, took away no existing right, but extended the time till the 27th of August of the same year. It is, therefore, not retrospective in its operation. It confers a favor, though it be a small one. The complainants may have failed to take advantage of it, for the reasons set forth in the bill. But the Legislature has not seen fit to make any saving in the act in favor of distant creditors, and the court cannot interpolate it. The Republic of Texas had the power to prescribe such rules to its own courts as best suited their condition, and their policy cannot be mistaken. Its accession to the Union had no effect to annul its limitation laws, or revive rights of action prescribed by its previous laws as an independent State. It is true, any legislation which denied that full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of sister States would be *ipso facto* annulled after the annexation, on the 29th of December, 1845. Thereafter, the authenticity of a judgment in another State, and its effect, are to be tested by the Constitution of the United States and acts of Congress. But rules of prescription remain, as before, in the full power of every State. There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgments of other States, exclusive of all interference with their merits. The case of McIlmoyle *v.* Cohen (13 Peters, 312) leaves nothing further to be said on this subject.

The 20th section of the 7th article of the Constitution of the State of Texas exhibits the extreme solicitude of her citizens to prevent any misconstruction of their cherished policy on this subject.

It declares that "the rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas shall not be divested; nor shall any rights or actions which have been divested, barred, or declared null and void, by the Constitution and laws of the Republic of Texas, be reinvested, revived, or reinstated, by this Constitution, but the same shall remain precisely in the situation which they were before the adoption of this Constitution."

The complainant's cause of action had been twice barred before annexation, and this section of the new Constitution

leaves no room to question the policy of their laws as to a revival of rights once forfeited by laches.

In a case like the present, where the complainant has been compelled to have recourse to a court of chancery, because the Union Bank no longer exists, in whose name the action of law could be sustained, he is, of course, subject to the same rules of prescription as if he were in a court of law.

We are of opinion, therefore, that complainant's cause of action is barred by the statutes of Texas, and that the matters set forth in the bill to avoid their effect are insufficient.

The judgment of the District Court of Texas is therefore affirmed, with costs.

THE RECTOR, CHURCH WARDENS, AND VESTRY, OF CHRIST CHURCH, IN THE CITY OF PHILADELPHIA, IN TRUST FOR CHRIST CHURCH HOSPITAL, PLAINTIFFS IN ERROR, *v.* THE COUNTY OF PHILADELPHIA.

Where it does not appear either by express averment or by a necessary intendment from any matter stated in the case, nor does any entry on the record of the cause in the Supreme Court of the State show, that any of the questions of which this court is entitled to take cognizance under the terms of the 25th section of the judiciary act, arose in the cause and were actually decided by that court, the writ of error must be dismissed, for the want of jurisdiction.

THIS case was brought up from the Supreme Court of the State of Pennsylvania, by a writ of error issued under the 25th section of the judiciary act.

As the decision of the court was, that the record did not show any ground of jurisdiction under the 25th section of the judiciary act, it will be proper to state what that record was.

The acts of 1833 and 1851 are recited in the opinion of the court, and need not be repeated.

The rector and church wardens were assessed for taxes upon several pieces of property, amongst which was the following:

Lower Delaware ward, No. 8 Cherry street, Hospital lot, &c., $126.

They paid the tax upon the whole assessment, including the above, under protest, and then brought an action in the State court to recover the amount so paid. The court decided in favor of the defendants. Upon being carried to the Supreme Court of the State, that court reversed the judgment of the court below, so far as respected the tax upon the Hospital lot. The rector and church wardens, believing that the whole of the property ought to be exempted from taxation, brought the case to this court. The question which they intended to raise

was, whether or not the act of 1833 was a contract, irrepealable except with their consent. But the record presented only the following state of facts.

March Term, 1853, *No.* 145. *Docket Entries.*

The Rector, Church Wardens, and Vestrymen, of Christ Church, in the City of Philadelphia, in trust for Christ Church Hospital,	H. M. WATTS.
v.	145.
The County of Philadelphia.	W. D. BAKER.

Summons case ret'ble the first Monday of June, 1853, exit 11th May, 1853.

"Service accepted."

March 3d, 1854.—Case stated in the nature of a special vervict filed.

April 1, 1854.—Judgment entered without argument for defendants by the court. By writing filed, it is agreed that the above case may be removed by the plaintiffs to the Supreme Court, without any recognizance being given by them. Eo die assignments of errors filed.

April 4, 1854.—Argued.

December 27, 1854.—Reargued.

March 12, 1855.—Opinion by C. J. Lewis, judgment reversed, and judgment in favor of the plaintiffs in error for the sum of one hundred and twenty-six dollars, with costs. Eo die opinion filed.

The case was submitted on a printed argument, by *Mr. Watts* and *Mr. Meredith* for the plaintiffs in error, and *Mr. Porter* for the defendants.

The arguments proceeded upon the ground that the question of impairing the obligation of a contract was raised by the record; but, as the court decided that no such question was properly involved in the discussion, it is thought unnecessary to report the arguments.

Mr. Justice CAMPBELL delivered the opinion of the court.

This is a writ of error to the Supreme Court of Pennsylvania, under the 25th section of the judiciary act of the 24th September, 1789.

These parties, without any pleadings, stated a case, in the

nature of a special verdict to the Supreme Court of the State of Pennsylvania, upon which a final judgment was rendered. It appears from the case, that in April, 1833, the Legislature of Pennsylvania enacted: "That Christ Church Hospital, having for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge, and that, in consequence of the decay of the buildings of the hospital estate, and the increasing burden of the taxes, its means are curtailed and its usefulness limited; therefore, that the real property, including ground rents now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the hospital, shall be and remain free from taxes."

That in April, 1851, the Legislature of the same State enacted, "that all property, real and personal, belonging to any association or incorporated company, which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation, in the same manner and for the same purposes as other property is now by law taxable; and so much of any law as is hereby altered and supplied be, and the same is hereby, repealed: *Provided*, That nothing herein contained shall be construed to exempt cemetery companies from taxation."

It further appears, in the case stated, that the county of Philadelphia, in the year 1852, caused certain real estate and ground rents of the plaintiffs in the city of Philadelphia, and which were possessed by the plaintiffs before the date of the act first mentioned, to be valued and assessed for taxes, and that the taxes were subsequently paid to the officers of the county, under protest, by them. The Supreme Court of Pennsylvania determined that the plaintiffs were entitled to recover only for so much of the taxes assessed and paid which were levied for property in the actual occupancy of the plaintiff for hospital purposes.

It does not appear, either by express averment or by a necessary intendment from any matter stated in the case, nor does any entry on the record of the cause in the Supreme Court of Pennsylvania show, that any of the questions of which this court is entitled to take cognizance, under the terms of the 25th section of the judiciary act, arose in the cause, and were actually decided by that court. Therefore, in conformity with the established doctrine of this court, (Armstrong *v.* The Treasurer of Athens county, 16 Pet., 282; Smith *v.* Hunter, 7 How. S. C. R., 738,) the writ of error must be dismissed.

J. Temple Doswell, Plaintiff in Error, *v.* Enrique De La Lanza et al.

This court again decides, as in former cases, that a refusal of the court below to grant a new trial is not a proper subject for a bill of exception.

In an action of ejectment, where the defendant pleads the statute of limitations, he must connect his own possession with the adverse possession and title of another person which is set up as a defence. Otherwise, the plea is not good.

Under the decisions of the courts of Texas, a survey made of land beyond the limits of the surveyor's district, although invalid at the time, is rendered good by the subsequent approval of the proper county surveyor. This court adopts the rule.

Where patents for land in Texas were erroneously issued, it was proper to cancel them

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 argued by *Mr. Hale* for the plaintiff in error, and *Mr. Merriman* for the defendant.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before us by a writ of error to the Circuit Court for the district of Texas.

In his petition, the plaintiff claims two leagues of land, worth twenty-five thousand dollars, in Nueces county, San Patricio district, on the bay of Corpus Christi, and west of the Nueces; and he alleges that the defendants, on or about the 4th day of October, 1849, entered into the possession of one-fourth of the above premises, and ejected the petitioner, &c.

The defendants pleaded the general issue, and, by leave of the court, filed an amended answer, containing six pleas in bar. The first plea alleged an adverse possession of more than ten years by Enrique Villareal. The second, that he had peaceable and adverse possession for more than three years after the right accrued to the person under whom the plaintiff claims; and that he did not make entry or commence an action to try title to the land before the 16th of June, 1842; and that after that day, Henry L. Kinney, being seized of the land from Villareal, held adverse and uninterrupted possession, without entry or action by plaintiff, up to the commencement of this suit. Third, that Villareal, and those claiming under him, held adverse and peaceable possession on the 17th of March, 1841, and up to the commencement of the action.

In the fourth plea, ten years' adverse possession was alleged; and in the fifth, an adverse possession of three years. The sixth plea avers that each of the defendants, and those under whom they claim, had adverse, peaceable, and continuous pos-

session of the land for more than three years, under color of title, before the commencement of the action.

Special demurrers were filed to these pleas, except the sixth, on which issue was joined. The demurrers were sustained to the first and fourth pleas, but overruled by the court as to the third and fifth. The issues before the jury were upon the plea of not guilty, and the second, third, fifth, and sixth pleas of prescription.

On the trial before the jury, two patents issued by the Republic of Texas, dated the 10th of April, 1849, to Levi Jones, were given in evidence by the plaintiff. One of these patents purported to be issued to Levi Jones, as assignee of Miguel Basquez, for one league of land in the San Patricio district, survey No. 20, on the west side of the Nueces, on Corpus Christi bay, by virtue of head-right certificate No. 288.

The other patent was issued to Levi Jones, assignee of José Ma. Bargas, for a league of land in the same district, known as survey No. 21, on the west side of Corpus Christi bay, adjoining survey No. 20, by virtue of head-right certificate 499.

To show the position and outlines of the two leagues of land, the plaintiff gave in evidence a part of Grammont's map, duly certified by the land office.

The plaintiff also gave in evidence a deed of conveyance of the land by Levi Jones to him, dated the 2d of October, 1849. It was proved that the town of Corpus Christi is included in the surveys, and is situated on the shore of the bay. Felix A. Butcher, a witness, came to Corpus Christi first in the year 1846. He knows all or most of the defendants were in possession of the land at least one year prior to the 8th of October, 1849; and at that time the lots upon which the defendants resided were worth about ten dollars each; now they are worth one hundred dollars each, in the best localities. The occupants have made valuable improvements on the lots.

The defendants then offered to read certified copies of two patents from the record, issued by the State of Texas on the 11th of July, 1845, one to Kelsey H. Douglass, and the other to John S. Thorn, assignee, &c., for the land claimed by plaintiff. Both of these patents on the record book had written upon them a memorandum: "This patent cancelled, April 10th, 1848."

It was proved that these patents had been inadvertently issued to Douglass and Thorn, when the field-notes of the surveys had been returned in the name of Levi Jones, assignee, &c. They were cancelled on the advice of the Attorney General. The plaintiff objected to the introduction of the above copies; but the objection was overruled, and the papers admitted.

Proof was then made that Enrique Villareal held possession of a tract of ten leagues, including the land in controversy, from the year 1810 down to the year 1839, claiming it from 1810 to 1831 under a title from the Spanish Government; that in 1839 Henry L. Kinney succeeded Villareal in possession, but the deed for the land was not made to him until the following year; that Villareal was a native of Mexico, and at the time of the grant to him by the State of Tamaulipas was a citizen of that State, and held a commission in the army. The grant was alleged to have been lost, and the court held it could not be proved by parol; but documentary and parol proof were admitted to show the boundaries claimed and the possession of Villareal. A great number of facts were proved, historical and otherwise, in regard to this claim, which it is unnecessary here to state.

Objection to this part of the defence was made, but overruled, and the evidence was admitted.

The plaintiff then requested the court to give to the jury twenty-one instructions, principally in relation to the title of Villareal, which go into details of great length, but which, from the view we have taken of the case, it is not necessary to repeat.

The court refused to give any of the instructions requested by the plaintiff, but charged the jury, "that the plaintiff must recover on the strength of his own title, not on the weakness of his adversary's; that if the surveys on which the patents in evidence were issued were void when made, the plaintiff can claim no title to land under such patents; that if the surveys were made west of the Nueces river, on Corpus Christi bay, prior to the 24th of May, 1838, by the deputy surveyor of San Patricio county, they were void, because San Patricio county did not, at that time, extend west of the river Nueces; and the approval of the county surveyor, Buchanan, even if given after the 24th of May, 1838, relates back in point of time to the date of the surveys by his deputy, but does not have the effect of making good the surveys, if at the time they were made by the deputy surveyor they were out of the limits of the county; that if Villareal had acquired a title to the land, under the Government of Spain or Mexico, before his death, and if he died an alien enemy to the Republic of Texas in 1845, leaving only alien enemies as his heirs, still his title to the land in controversy did not escheat to the Republic, and consequently could not pass by the subsequent patents issued by the Republic or State; that as these instructions are sufficient for the decision of the case, the court refused the instructions asked by the plaintiff. Exceptions were taken by the plaintiff, as well to the

instructions asked by him and refused, as to those given against him, on the prayers of the defendants.

The decision of the court on a motion for a new trial, which was excepted to, affords no ground for a writ of error. Such a motion is addressed to the sound discretion of the court, on a consideration of the evidence before the jury; and this court can no more control that discretion than when it is exercised by the Circuit Court, in granting continuances or amendments of the pleadings.

As to the pleas which set up the claim and possession of Villareal, as a bar, under the statute of limitations, to the plaintiff's action, it does not appear from the evidence that the defendants are in any way connected with that title. There is nothing in the facts of the case which conduce to show an entry under it by the defendants, or that they entered under any claim of title. It is proved by one witness, that a part of the defendants, if not all of them, were in possession of the premises they now occupy, at least one year prior to the 8th of October, 1849. On the 3d of that month and year, the seizin of the plaintiff is stated in his petition. From this, it would appear that the defendants' possession was prior to the seizin of the plaintiff; so that, in regard to him, they cannot be considered as having ejected him by their entry, his legal title not having then accrued. But if the defendants entered without claim of title, which must be presumed, as they have shown no title, they become trespassers on the premises of the plaintiff after his title accrued.

Villareal died in 1844 or 1845. It is contended that he retained possession of the premises up to 1839, and that Kinney took possession in that year under him, and continued in the possession until the commencement of this action. This possession is controverted by the plaintiff, on evidence that Kinney's residence was in another county, and that he was only occasionally at Corpus Christi; but, if his possession be admitted as asserted, it is not perceived how it could inure to the benefit of the defendants under the statute of limitations, as Kinney is not a defendant, and they show no privity with his title. Possession, to be effectual, either to prevent a recovery or vest a right under the statute of limitations, must be an actual possession, attended with a manifest intention to hold and continue it. It must be, in the language of the authorities, an actual, continued, adverse, and exclusive possession for the space of time required by the statute. It need not be continued by the same person; but when held by different persons, it must be shown that a privity existed between them. Wheeler *v.* Moody, 11 Texas Rep., 372.

In the action of ejectment, the defendant may show a paramount outstanding and subsisting title for the same land in a stranger, to defeat the plaintiff; and the rule of evidence is the same in this action, although it is prosecuted under the forms adopted by Texas. A large portion of the evidence in the record, and many of the authorities cited in the Circuit Court, were to show an older and paramount title to the same land, under the Mexican Government, by Villareal, and Kinney, his assignee; but, as there are other points on which the case may be decided, the court will not consider the validity of that title.

The court instructed the jury, that if the surveys were made west of the Nueces river, on Corpus Christi bay, prior to the 24th of May, 1838, by the deputy surveyor of San Patricio county, they were void, because San Patricio did not at that time extend west of the river Nueces; and the approval of the county surveyor, Buchanan, even if given after the 24th of May, 1838, does not make them valid.

It was held, in Linn *v.* Scott, 3 Texas Rep., 6, that a survey made by a surveyor of any other county than that in which the land lies, is a nullity. But, in Horton *v.* Pace, 9 Texas Rep., 81, the court say, "We do not question the right of a surveyor to adopt a previous survey he thinks correct; but we do not admit it was the duty of the court to oblige him to adopt one shown to be incorrect." And in Warren *v.* Sherman, 5 Texas, 441, it is said a survey, whensoever made, if supported by a recommended certificate, is, in contemplation of law, valid; if otherwise, it is without legal foundation. In Lake *v.* Wafer, 16 Texas Rep., the court held, "A survey made in 1841 without certificate, and applied to the certificate of 1844, constitutes no objection to the validity of the patent." If a deputy surveyor make a survey for himself, on a certificate belonging to himself, when approved by the district surveyor, it becomes the act of the latter, and was so far valid. Howard *v.* Perry, 7 Texas Rep., 259.

Under these decisions, the Circuit Court erred in giving the above instruction. If the surveys were void when made west of the Nueces, as being without the limits of San Patricio county, they were made valid by the subsequent approval of the county surveyor, after the county limits were extended west of that river.

The cancellation of the patents stated by the acting Commissioner of the Land Office, by the advice of the Attorney General, was proper. The Commissioner, in issuing a patent, performs a ministerial duty; and if it be fraudulently or negligently issued to an improper person, the error should be cor-

rected. The divestiture of the title by the Government can only be accomplished in the mode authorized by law.

It is desirable that points of exceptions and instructions asked from the court to the jury should be as few and as concisely expressed as may be consistent with the interests of the respective parties.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

AMOS WADE, PLAINTIFF, *v.* JACOB R. LEROY AND HENRY E. PIERREPOINT.

In an action against the owners of a ferry boat, for personal injuries sustained by the negligence of its officers, it was held that the plaintiff might show that he was engaged in a particular business, and had been incapacitated from attending to it, as exhibiting the extent of the injury, and that it had occasioned expense, suffering, and loss of time which had value to him, although the nature of his occupation was not set forth in the declaration.

THIS case came up from the Circuit Court of the United States for the southern district of New York, on a certificate of division in opinion between the judges thereof.

The case is stated in the opinion of the court.

It was argued by *Mr. Gillet* for the plaintiff, on which side there was also filed a brief of *Mr. Reed*, and by *Mr. O'Connor* for the defendants, on which side there was also a brief of *Mr. Silliman*.

The following notice of the points made by the counsel for the plaintiff is taken from the brief of *Mr. Gillet:*

POINTS.

FIRST.—*Under the averments in the declaration, the plaintiff had a lawful right to prove that he was engaged in business, its character and extent.*

The amount of damages sustained by the plaintiff essentially depended upon questions, whether the plaintiff was engaged in business, its peculiar character, and the extent of it.

The plaintiff would suffer more damage if deprived of a good business, than if he had none to lose.

Its character might be such that he could not attend to it at all, or only partially so, after his injury.

If his business was large, so as to require health, strength, and talents, he would lose more than if it were small, and

easily attended to. He could hire a substitute to attend to the latter for a less sum than he could to transact the former.

The evidence offered was clearly admissible for these purposes, and went to show the damage actually sustained. If the plaintiff's business had been that of a day laborer, who could only earn a dollar per day, his actual loss would be far less than if he had been earning ten. If he had been employed on wages, the injury could have been ascertained by proving the compensation he received.

When engaged in his own business, the extent of his loss could only be ascertained by proving the nature and extent of his business, so as to show how much his services were actually worth to himself. If his business were small, and easily managed, the damage would be less than if it were large, and managed with difficulty. The manager of a large plantation would sustain more damage by loss of his time than the manager of a small patch of land. A lawyer earning ten thousand dollars per annum would sustain a greater loss in being rendered unfit for business, than would a pettifogger who could only earn a hundred or two.

SECOND.—*Future as well as present losses may be considered in estimating damages.*

When a party loses a leg or arm, in estimating his real loss, we look to his probable future under the state of his injury, to form an opinion of the damages he has sustained. If the injury is temporary, the damages will be far less than if lasting and permanent. A flesh wound will soon heal, but a lost limb cannot be restored; both should, however, be considered in estimating the damages sustained—the loss of a limb will be continually felt as long as the party losing shall live, and hence a young person will sustain a greater injury than one whose life is nearly ended. If the *mind* is destroyed, the loss to a young man, who is supposed to have more years before him than an old one, is much greater than with one whose years are drawing to a close. It follows, that the probable future of the injured party is a proper subject of consideration.

THIRD.—*The damage alleged in the declaration was special, as distinguished from particular damage.*

Particular damage is where the particular instance of damage is avowed; special damage is where the loss follows from a specific statement of a fact, which generally or naturally results from the statement, as a cause competent to entail such a consequence.

The declaration avers that the injury affected the plaintiff's brain, and affected his memory and understanding, which were impaired thereby; and that he lost his sense of hearing;

and that he would hereafter suffer much mental and bodily pain and anguish, as well as personal mortification. The damages so specified were special, but not particular—the averment is, that they resulted from the injury. If the injury complained of affected and injured his brain, and impaired his understanding, and he lost his sense of hearing, a necessary and natural consequence was, that he was incompetent to attend to any business, and especially such as that in which he was engaged.

A man who could not hear, and whose brain was injured and affected, and his memory and understanding injured and impaired, was not competent to pursue the business in which the plaintiff was engaged, even though he might have been able to attend to some kinds of business, like tending a porter's lodge, where very little memory or understanding is required. If the plaintiff were not permitted to prove these consequences, necessarily resulting from facts specifically avowed, then he would be debarred presenting a very essential part of his case, and would be prevented from recovering the whole amount of damages actually sustained. This would occasion gross injustice. When a person is made deaf, his memory and understanding injured and impaired, it is hardly possible that any pecuniary damage can make him good: he cannot be fit for business; he can do nothing and earn nothing in his business, if it should require the exercise of hearing, or memory, or understanding. Aside from the pecuniary consequences resulting from such an injury, his life must be one both monotonous and irksome, and almost wholly destitute of those pleasures and that happiness which those in full health, bodily and mentally, must ever enjoy.

FOURTH.— *When the action can be maintained without specifying any particular damage, it is not necessary to aver any particular instance of damage.*

When the law implies damage, there can be no reason for stating it with particularity. If a person loses an eye, an ear, a limb, or his general health, the law implies damage, the same as if deprived of his property or any other legal right. Words actionable in themselves imply damage, and none need be proved; but if actionable only by reason of some consequence which might or might not follow, then the *particular* damage must be averred and proved. The loss of hearing, of memory, and understanding, imply injury, and necessarily and naturally result therefrom, and no particular damage need be averred or proved. This change in the condition of a person cannot be made without producing injury to him in his pecuniary circumstances and in his enjoyments. Such an injury

would lessen, if not destroy, his ability to maintain and support his family by his own exertions.

It required no averment in the declaration to apprise the defendant that such consequences must result from the injuries specified. They are so necessary and natural that no one could mistake them. Every common understanding must arrive at the same conclusion.

FIFTH.—*The evidence offered tended to prove necessary and natural injurious consequences arising from the injury to the plaintiff, within the settled rules of law.*

The courts have furnished precedents that clearly sustain the offer of the plaintiff below, and so do the elementary writers. Mayne on Damages, the latest and best English writer, says:

"Special damage must always be expressly averred and proved, when it is so much the gist of the action, that without it no suit could be maintained."—P. 314.

"It is not, however, necessary to state or establish particular instances of damage."—P. 315.

"In all other cases, whether the action be on contract, or in tort, if the facts involve a legal injury, no actual damage need be stated."—P. 15.

"In contracts, too, there are certain damages which the law will presume; as, for instance, in an action for not delivering goods; that the plaintiff had to buy others at a loss. * * * The extent of the loss must be proved; but no notice need be given of the species of loss which will be set up. But it is different where the injury complained of is merely secondary and consequential damage."—P. 316.

"In an action for slandering a man in his trade, when the declaration alleges that he thereby lost his trade, he may show a general damage to his trade, though he cannot give evidence of particular instances."—P. 317.

"So if one, not a carpenter, sell timber which the purchaser uses to prop up his building, and, by reason of the timber being defective, the building fall and be destroyed, if the seller acted in good faith, and was ignorant of the defect, he will only be liable for the difference in price between good timber and that sold. If, however, the seller was a carpenter, who sold the timber for the express purpose of propping up the house, then he shall be liable for all the damage done to the building."—*Sedgwick on Damages*, 65.

He quotes from Chitty, at p. 575, where the rule is laid down as in the decisions I have copied.

These views are sustained by various decisions.—*Dewint* v. *Wiltse*, 9 Wen., 325.

Defendant hired plaintiff's ferry, and covenanted to maintain and keep the same in good order; but, instead of doing so, he diverted travellers from the usual landing to another landing, owned by himself, by means of which a tavern stand, belonging to the plaintiff, situated at his landing, was so reduced in business as to become tenantless. It was *held* that the plaintiff could recover. The court determined that the damages proved were a legitimate claim, and the *legal* and *natural consequence* of the breach of the covenant.

Dickinson *v.* Boyle, 17 Pick., 78, 79:

"Where the act complained of is admitted to have been done with force, and to constitute a proper ground for an action of trespass *vi et armis*, all the damage to the plaintiff, of which such injurious act was the efficient cause, and for which the plaintiff is entitled to recover in *any form*, may be recovered in such action, although in point of time such damage did not occur until some time after the act done.

"Where special or peculiar damages are claimed, such as are not the usual or natural consequences of the act done, it is proper to set them forth specially in the declaration, by way of *aggravation*, that the defendant may have due notice of the claim."

Squier *v.* Gould, 14 Wen., 159, 160:

"Where the damages actually sustained do not necessarily arise from the act complained of, and consequently are not *implied* by law, in order to prevent surprise to the defendant, the plaintiff must state in his declaration the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial."

Vanderslice *v.* Newton, 4 Comst., 130, 132:

Towing a boat from New York to Albany, or as far as it could but for the ice.

"With respect to the damages, the general rule in questions of this nature is, that the plaintiff is entitled to recover, as a recompense for his injury, all the damages which are the natural and proximate consequence of the act complained of, (2 Greenl. Ev., § 256.) Those which necessarily result from the injury are termed general damages, and may be shown under the general allegation of damages at the end of the declaration. But such damages as are the natural, although not the necessary, result of the injury, are termed special damages, and must be stated in the declaration, to prevent surprise upon the defendant; and being so stated, may be recovered."

Ward *v.* Smith, 11 Price, Exch. R., 19.—(Eng. Exc. R., 19:)

Suit in assumpsit for not performing an agreement to let the plaintiff into the possession of certain apartments and furniture.

The plaintiff proved that his wife was a milliner, and lost business in the best part of the season by not being permitted to take possession.

"A plaintiff in such an action may give evidence by particular loss sustained by breach of such an agreement, if he have stated loss generally in his declaration. Therefore, evidence of loss of business by plaintiff's wife in her trade of milliner held admissible, in such a case, as evidence of general damage, where no special damage on that ground was laid in the declaration, nor any customers named, nor any averment of her business introduced."

Baron Graham expressed himself fully upon this point.

Hutchinson *v.* Granger, 13 Vt., 386:

"General damage, or such as is the common or ordinary consequence of the act complained of, need not be specially alleged in the declaration; and if some portion of the plaintiff's general damages be alleged, this will not preclude him from giving evidence of other general damage.

"In actions for flowing land, the injury, *i. e.*, the flowing the land, and the means by which it was done, must be *substantially* alleged; but any general damage, such as rendering the land wet and unproductive, and more difficult to cultivate, and destroying crops, either in the process of growth or harvesting, need not be alleged."

Lincoln *v.* Saratoga and Schenectady Railroad Company, 23 Wen., 425:

Suit by passenger for injury to his person, when travelling upon defendant's road. Nelson, J.

Opinions as to the value of plaintiff's time had been given in evidence, and new trial granted on that account.

"Even with the jury, the damage beyond actual expenses at best rise but little above conjecture; it is so in every case where they are called upon to estimate the loss of the plaintiff's time. How serviceable it might have been to him, depends upon a calculation of the changes and vicissitudes of life, the casualties and fluctuations of business, utterly beyond the reach of human foresight. The most they can do is to bring to the discharge of their duties a careful and diligent consideration of the particular case, a knowledge and experience of the general condition and business affairs of mankind, to which all are more or less subject, a sound and enlightened judgment, and honest desire to arrive at truth and justice between the parties. No more can be expected; no less, justified. The result will usually be an approximation to reasonable indemnity, as near as the interpretation of human tribunals will admit.

"I am also of opinion that some of the questions put in respect to the effect of the injury to the limb were pushed into consequences and conjectures too remote for the subject of judicial investigation. The present and probable future condition of it were proper matters for inquiry; but the consequences of a hypothetical second fracture were obviously beyond the range of it, and calculated to draw the mind of the jury into fanciful conjectures."

Driggs *v.* Dwight, 17 Wen., 71:

"Where a party agrees to demise certain premises to another, who breaks up his establishment, and proceeds with his family and furniture to the place where the premises are situate, and the landlord refuses to give possession, the tenant is entitled to recover the damages sustained by him by such removal of his family and furniture, although special damage is not alleged in the declaration."

The English cases sustaining the principles contended for are referred to in Mayne on Damages, at the pages referred to in that work.

Mr. Silliman and *Mr. O' Connor* made the following points:

First Point.—Assuming, for the sake of the argument, that a person suffering a personal injury which disqualifies him from prosecuting a particular business in which he is engaged, may recover in an action *ex contractu* or *ex delicto* brought against the party from whose willfulness or negligence such injury resulted, the value of the employment thus lost, or that, in some more loose or general way, the nature of such business may be taken into consideration by the jury in estimating damages, then it is submitted that the established rules of pleading and evidence require, as an indispensable condition to the admission of proof, that the business and the fact of its loss be particularly set forth in the declaration.

I. Under a general allegation of damage, the plaintiff can only recover general damages. General damages are such as *necessarily* result from the injury alleged under the circumstances set forth. These the law presumes, and they need not be alleged with any particularity, nor even proved.

II. Special damages are such as result from some cause not notified to the defendant by the very description of the injury complained of, as necessarily resulting from it. Any fact which rendered it more hurtful to the plaintiff than it would have been to any other person, under the same circumstances set forth, is a special damage; and, consequently, it cannot be given in evidence, unless specially set forth in the declaration. The object of this rule is to prevent surprise. (1 Chitty's Plead-

ings, pp. 395, 396, 397, 398; 2 Greenleaf's Ev., §§ 254, 278, and notes; Sedgwick on Damages, 2d edition, p. 575.)

III. This rule is of universal application. No case has been found, nor any dictum of an elementary writer, recognising any distinction, in this respect, between actions *ex delicto* and actions *ex contractu*, or between the different forms of action, or between the various causes of action. (3 Bouvier's Institutes, § 2872; J. S. Saunders's Pleadings and Ev., 136, 800; ib., 83, 105, 151, 906, 344; ib., 865, 520, 653, 660; Pettit *v.* Addington, Peake's N. P. Cases, 63; Lowden *v.* Goodrich, ib., 46; Westwood *v.* Cowne, 1 Starkie's R., 172; Bodley *v.* Reynolds, 8 Ad. and Ellis, 780; Boyden *v.* Burke, 14 How., 575; Kendall *v.* Stokes, 3 How., 87, 90, 102; Strang *v.* Whitehead, 12 Wend., 65; Pritchett *v.* Bovey, 1 Cr. and Meeson, 778; Jones *v.* Lewis, 9 Dowlings Pr. Cases, 150; Richardson *v.* Chasen, 10 Ad. and Ellis, N. S., 756, 759; Patten *v.* Libby, 32 Maine, 378; Vanderslice *v.* Newton, 4 Comstock R,, 132, 133; Dumont *v.* Smith, 4 Denio, 322; Alston *v.* Huggins, 3 Brevard, 188; Dickinson *v.* Boyle, 17 Pick., 79; Furlong *v.* Polleys, 30 Maine, 493; Lewis *v.* Calder, 8 Burr. Penn. Rep., 479; Bogart *v.* Burkhalter, 2 Barbours S. C. R., 525; Squier *v.* Gould, 14 Wend., 160.)

IV. In slander and libel, when the action lies only by reason that the defamatory matter complained of touched the plaintiff in some particular office, employment, or relation, the averment of that office, &c., is not called by pleaders an averment of special damages. It is a part of the cause of action; but *being notified to the defendant*, it may be proved, and, of course, may have its just weight with the jury. Here there is no danger of surprise. (Ingram *v.* Lawson, 6 Bingh. N. C., 212; ib., 8 Scott, 775; 9 Carr and Payne, 326; 1 Selden's N. Y. Rep., 20; Donnell *v.* Jones, 17 Alabama, 692 to 695; S. C., 13 Alab. R., 509, 510; Delegall *v.* Highley, 8 Carr and Payne, 444; Rollin *v.* Stewart, 25 Eng. L. and Eq. R., 345.)

V. In cases of defamation, where the matter is not actionable generally, nor actionable so as to give a right to general damage, by reason of its touching the plaintiff in his particular office, employment, &c., the plaintiff is obliged to aver in his declaration the special damage on which he relies, and to prove it at the trial. All the adjudications arising under this head in our law, whether on demurrer, or in arrest of judgment, or for variance at the trial, are so many illustrations of the rule contended for in this point. (Malachi *v.* Soper, 3 Bingh. N. C., 371.)

Second Point.—As the defendants, on being charged with the injury alleged in the declaration, could not learn, from

anything in the narrative of its occurrence and consequences, that the plaintiff was connected with a particular business carried on in North Carolina, it would be a great surprise upon them to allow evidence of that fact. Therefore, the evidence mentioned in the first division should be excluded.

I. There is nothing on this subject contained in the declaration, which, according to the precedents and authorities, could be otherwise regarded than as a general averment that the plaintiff was disabled by his hurt. (Rogers *v.* Nowill, 11 Jurist, 1039; Malachi *v.* Soper, 3 Bingh. N. C., 371; 1 Strange, 666; W. Jones, 196; Buller's N. P., 7; 1 Sid., 396; 1 Saunders's R., 346; Linden *v.* Graham, 1 Duer, 670.) For proper pleading, see Collet *v.* Lond. and N. W. Railway Co., 6 Eng. L. and Eq., 305; Brewer *v.* Drew, 11 M. and Welsby, 626, 630; Hodsoll *v.* Stallbrass, 9 Car. and Payne, 63.

II. There was no difficulty in stating in the declaration the special consequential injury offered to be proven. It was not a violation of decency to place it on the record; it did not tend to burdensome prolixity; it was known to the plaintiff, and quite susceptible of being accurately described by him. There was, consequently, no excuse for its suppression. (2 Williams's Saunders, 411, note 4, 8 T. R., 133; 1 Starkie's R., 172; Lowden *v.* Goodrich, Peake's N. P. Cases, 46; 2 Greenleaf's Ev., § 278; Per Kenyon, L. Ch. J., 8 T. R., 133.) Anomalous Cases. (Driggs *v.* Dwight, 17 Wend., 71; Ward *v.* Smith, 11 Price, 19; See Tullidge *v.* Wade, 3 Wils., 19.)

III. This evidence is the more objectionable, if unaccompanied by any proof of the particular value of this large and extensive business of distilling and manufacturing turpentine, in which the plaintiff was engaged. If such evidence must be admitted, it would be much fairer to admit it with particular and certain proof of the value of the business, than in a vague, loose, and indefinite form. Far better that the defendants should be tried without notice, on evidence appealing to the judgment of the jury, than on an inflated address to their imaginations. (Fairman *v.* Fluck, 5 Watts, 518.)

Third Point.—Evidence that the injury would *permanently* disqualify the plaintiff from pursuing any business, was objectionable in a twofold point of view. In the first place, the declaration does not affirmatively allege that the injury would produce any such result, or that the defendant was a person engaged in *any* business; and secondly, inasmuch as in speaking of bodily pain, &c., the declaration has a *future* aspect, and the general allegation of consequent incapacity to attend to *affairs* is confined to the past; the idea of any probable future incapacity is impliedly negatived. The point involved in the

second division ought therefore to be certified in favor of the defendants. (Hodsoll *v.* Stallbrass, 9 C. and Payne, 63; S. C., 3 Perry and Davison, 200; Thompson *v.* Wood, 4 Ad. and Ellis, N. S., 497.)

Mr. Justice CAMPBELL delivered the opinion of the court.

This case comes before this court upon a certificate of the judges of the Circuit Court of the United States for the southern district of New York, of their division in opinion upon questions arising in the trial of the cause in that court.

It is an action against the owners of a steam ferry boat, plying between the cities of New York and Brooklyn, for the transportation of passengers, by the plaintiff, a passenger, who suffered an injury in consequence of a collision between two boats belonging to the defendants, and which was attributable to the mismanagement of the servants and agents to whom their navigation was intrusted.

The declaration charges, that the plaintiff was wounded on the head by a blow from a piece of iron that had been broken off the boat on which he was a passenger, in the collision, and thrown against him. That, in consequence of the wound, his brain was affected and injured, so that his understanding and memory were impaired. That for some time he was insensible, and his life despaired of; and before his recovery, he suffered much mental and bodily pain. That he was detained in New York, at a distance from his home, and subjected to much expense about his care, support, and maintenance, and had been hindered and prevented for a long period from transacting and attending to his necessary and lawful affairs, by him during all that time to be performed and transacted; and lost and was deprived of great gains, profits, and advantages, which he might and otherwise would have derived and acquired.

The plea was the general issue.

Upon the trial, the plaintiff offered to prove, "that before and up to and at the time of the alleged injury, the particular business in which he was engaged was that of a distiller and manufacturer of turpentine, and that he was largely and extensively engaged in that business." The plaintiff also offered "to prove, by a physician who had attended the plaintiff, that when the plaintiff, after his convalescence, left New York to return to North Carolina, he (plaintiff) could not safely attend to any business or occupation, and that the witness deemed it imprudent and indiscreet for the plaintiff thenceforth to devote himself to any business." To this evidence the defendants'

counsel objected, on the ground that the declaration of the plaintiff did not contain any specification of such business, or of its nature or extent, or contain any statement that the plaintiff was obliged or did relinquish or abandon the same. The judges were divided in opinion as to the admissibility of such evidence, and have certified the questions for the decision of this court.

The precise object for which this evidence was adduced is not stated in the certificate of the judges; but if the evidence tends to support any issue between the parties, or has a direct connection with other evidence competent to maintain the averments of the declaration, either to illustrate its meaning or to ascertain its probative effect, it cannot be rejected as impertinent, or as founded upon matter that does not appear in the pleadings of the cause. The evidence objected to conduces to prove that the plaintiff was seriously injured; that he had been confined in New York, at a distance from his home, and had incurred expense in consequence. That, before that time, he had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value; or, that he had suffered a loss of some profit; and that, after some detention in New York, he had returned to his house in an infirm condition—so infirm that his medical attendant and adviser deemed him incapable of pursuing any ordinary business or occupation, and had advised him to abstain from personal exertion.

This evidence would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character—an injury to his person, and which was followed by expense, suffering, and loss of time, which had for him a pecuniary value.

These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it. This evidence may have an application without any inquiry into any remote or contingent consequences which could not have been foreseen, or which were peculiar to the circumstances or condition of the plaintiff. The record does not inform us that the evidence was designed to aid in such irrelevant inquiries, and we cannot presume that, if admitted, the court would allow any misconstruction of its legal import, or any use of it by the jury, contrary to law.

The opinion of the court is, that the evidence is competent, and we direct that the certificate to the Circuit Court shall be made accordingly.

ROBERT HUDGINS, JOHN L. HUDGINS, ELLIOTT W. HUDGINS, AND REBECCA P. HUDGINS, EXECUTRIX OF ALBERT G. HUDGINS, DECEASED, APPELLANTS, *v.* WYNDHAM KEMP, ASSIGNEE IN BANKRUPTCY OF JOHN L. HUDGINS.

Deeds of large tracts of land made by a grantor when deeply in debt, and when suits were pending against him, and who shortly afterwards petitioned for the benefit of the bankrupt act, the possession and occupation of the land continuing the same after the sale as before, and the consideration money one-half only of the actual value, held to be fraudulent and void as against creditors.

Exceptions to the master's report respecting rents and profits not having been taken in the court below, they cannot be sustained in this court.

THIS was an appeal from a decree of the Circuit Court of the United States for the eastern district of Virginia. The bill was originally filed in the Circuit Court by Edmund Christian, general assignee in bankruptcy in said district, on the 19th of May, 1845; and upon his death, Wyndham Kemp was appointed assignee, on the 12th of May, 1852, by the District Court. After that, Kemp prosecuted the suit.

On or about the 17th of February, 1843, John L. Hudgins filed his petition in the District Court of the United States for the eastern district of Virginia, praying that he might have the benefit of the act of Congress of August 19, 1841, to establish a uniform system of bankruptcy throughout the United States, and that he might be deemed and declared a bankrupt under said law; and the usual proceedings having been taken upon said petition, the said John L. Hudgins was, on the 20th May, 1843, duly adjudged and declared to be a bankrupt; and Edmund Christian, the general assignee in bankruptcy in said district, was thereupon duly appointed, by said court, the assignee in bankruptcy of said John L. Hudgins.

Other proceedings were had in the District Court, which it is not material here to mention.

On the 17th of May, 1845, the following points and questions were adjourned to the Circuit Court for decision:

1. Is the allegation of the objectors to the discharge of the bankrupt, that the deed executed by said John L. Hudgins, bearing date the 1st day of March, 1842, to Elliott W. Hudgins, conveying all the rest of his land in York, not conveyed by a previous deed of 6th September, 1839, is a fraudulent deed within the meaning of the bankrupt law, sustained by the evidence in this cause?

2. Is the allegation of the objectors, that the deed executed by said John L. Hudgins to Houlder Hudgins, dated 19th July, 1842, stating a consideration of $4,000, is a fraudulent deed within the meaning of the bankrupt law, sustained by the proofs?

3. Is the deed of the 21st February, 1842, in which John L. Hudgins conveys to Robert Hudgins, for an alleged consideration of $5,000, his tract of land in Matthews county, proved to be a fraudulent deed within the meaning of the bankrupt law?

4. Are the allegations of the objectors, that the petitioner concealed himself and his effects, so as to prevent the execution of process, and the deeds aforesaid were made for the purpose of *eloigning* and removing his property so as to defraud his creditors, shown to be true?

5. Whether it is proved that the said John L. Hudgins has not made a true and faithful schedule of all his estate and property, nor a full and true statement of all the debts due him?

6. Finally, whether the petitioner, on any or all of the above grounds, ought to be refused a discharge from his debts?

On the 19th of May, two days after the above questions had been adjourned to the Circuit Court, the assignee filed his bill in that court, alleging that the conveyances above mentioned were fraudulent and void, and praying that they might be set aside. The proceedings which took place thereupon are set forth in the opinion of the court.

On the 27th of June, 1855, the Circuit Court passed its final decree, confirming the report of the master, and ordering the property in question to be sold by the assignee. From this decree the defendants appealed to this court.

The case was argued by *Mr. Lyons* and *Mr. Johnson* for the appellant, and by *Mr. Robinson* and *Mr. Patton* for the appellees.

This being a case where much of the arguments was employed in the examination and comparison of evidence, only the points raised upon each side can be mentioned.

For the appellants:

I. There is no proof of any fraud upon the part of Robert Hudgins, but, on the contrary, the proof is clear and unquestioned, that he paid the cash price which his deed calls for, to John L. Hudgins, which, with the charges upon the property, amounted to its full value. Neither is there any proof of fraud in this transaction by John L. Hudgins.

II. There is an abortive attempt at such proof. But if it were shown by the clearest proof that John L. Hudgins had acted with the most covinous and fraudulent design in making his conveyance, that design would not affect Robert Hudgins, unless it was shown that Robert Hudgins participated in it, or, at the least, had knowledge of it. A purchaser of property

for valuable consideration can never be affected, and have his title destroyed, because the vendor sold from a base motive—the motive to defraud his creditors—at least, unless he have knowledge of the motive.

III. Because a sale of property for valuable consideration, even by an insolvent, is not in fact or law a fraud upon any creditor who is merely a creditor at large, the fraud, if any be committed, consisting in the concealment or misapplication of the money arising from the sale; and no purpose was manifested or even entertained to defraud any judgment creditor, because the deed upon its face conveyed the property subject to the rights of the judgment creditor.

IV. Whether the deed was void as to creditors or not, it was good between the parties to it, and no decree should have been rendered, vacating the deed, and directing a sale of the property, until an account had been taken of the debts, for the purpose of ascertaining whether there were any unpaid and recoverable; and if, upon the report of such account, it appeared that there were such debts, the defendant, Robert Hudgins, had a right to redeem his land by paying them, or so much of the land might then have been sold as would satisfy them. It was error to sell the whole land, without first ascertaining that there were debts sufficient to absorb it, and without allowing the defendant the privilege of redeeming it.

V. Because the judgment creditors had no right to do more than extend the lands, unless it was shown, as it was not, that the profits would not in a reasonable time extinguish the debts. But they had no right, because by proof of their debts before the commissioner the lien of the judgment was extinguished.

VI. It was error to charge Robert Hudgins with rents and profits prior to the filing of the bill against him. Up to that time, he held and claimed the property as his own, as a purchaser for valuable consideration; and the utmost that the plaintiff could claim of him, would be the right of a judgment creditor, and his right to rents and profits is never extended retroactively beyond the filing of the bill; and in this case the error and injustice of the rule which has been applied to the defendant is most remarkable and obvious. The plaintiff charges that the conveyance to the defendant was fraudulent, and therefore he claims the right to recover of him the rent of the property in one case, and the profits in another, upon the ground that he has actually enjoyed the property in the one case, and received the profits in the other; and yet the plaintiff has taken testimony that the defendant did not occupy the property for which rent is charged, but John L. Hudgins did;

and that is relied upon as evidence of the fraud. Now, it cannot be true that he did not occupy it, and therefore merely pretended to purchase it, and therefore has been guilty of a fraud, and yet he did occupy it, and therefore is not guilty of a fraud, yet the decree practically affirms both.

And in respect to the profits. The defendant is charged with profits which there is no proof that he received.

VII. The plaintiff is seeking to recover debts, if he has any right at all, which were due primarily by Thomas Hudgins, for which John L. Hudgins was security. Thomas Hudgins, by his deed of the —— day of ——, conveyed a large amount of property to trustees, for the benefit of those creditors, giving them priority over the other creditors who are also secured by the said conveyance. The creditors accepted the conveyance, and took under it. The court should have required them to account for the property conveyed by that deed, before it authorized them to take the property of John L. Hudgins, if the property in question was his, and still more, before it authorized them to take the property from another, who claimed it as purchaser for valuable consideration, and certainly held it by a title valid against John L. Hudgins.

The property thus conveyed may have been sufficient to satisfy all the debts, and they may have been paid; the answers express the belief that they have been; an account of the trust fund could only determine the point. By accepting the deed, and taking under it, the creditors assumed the responsibility of fairly accounting for the property conveyed; they cannot use, or hold subject to their use, the property of Thomas Hudgins, and yet claim that of John L. Hudgins, or his vendor, for the same debts.

VIII. The decree, which is final, takes no notice of the rights of Robert Hudgins, as against John L. Hudgins, and makes no provision for the restitution to him of the surplus which might remain of the proceeds of the sales of the property after satisfying the debts, although there may be such surplus; and if there shall be, Robert Hudgins is certainly entitled to it, because his title, if not good against the creditors of John L. Hudgins, is good against every one else.

IX. The court did not pass upon the exceptions to the depositions, and therefore admitted the testimony excepted to.

The following authorities were relied upon in the argument: Shirley *v.* Long, 6 Rand., 736; Davis *v.* Turner, 4 Gratt., 422; Blow *v.* Maynard, 2 Leigh, 29; Fones *v.* Rice, 9 Gratt., 568; Ex parte Christy, 3 How., 292; Pettiplace *v.* Sales, 4 Mason C. C. R., 312; Hapkerk *v.* Randolph, 2 Brack. R., 132; Randall *v.* Philip, 3 Mason C. C. R., 378; Gregg *v.* Sayre,

8 Pet., 244; Clough *v.* Thompson, 7 Gratt., 26; 1 Story Eq., p. 364; 1 Story Eq., 588; Dorr *v.* Shaw, 4 John. Ch. R., 17; Smith *v.* Burton, 13 Pet., 464.

For the appellee:

1. The decree is right, and ought to be affirmed. The deed from Robert Hudgins to John L. Hudgins was contrived of fraud, with intent to defraud the creditors of the said John L. Hudgins of their lawful debts, and was therefore properly set aside *in toto*, under the Virginia act in 1 R. C., 1819, p. 372, c. 101, § 2; Chamberlayne, &c., *v.* Temple, 2 Rand., 395; Garland *v.* Rives, 4 ib., 282; Shirley *v.* Long, 6 ib., 735, and other cases cited in 1 Rob. Pract., old ed., 512, 554; and under the bankrupt act of 1841. Sands, &c., *v.* Codwise, &c., 4 Johns., 559, also 582 to 600; Codwise *v.* Gelston, 10 ib., 517; Arnold, &c., *v.* Maynard, 2 Story, 352; Hutchins *v.* Taylor, &c., 5 Law Reporter, 289; Cornwell's appeal, 7 W. and S., 311; McAllister *v.* Richards, 6 Barr, 133. For the assignee is not only vested by the law with all the rights of the bankrupt, but with the rights of creditors also. He may set aside a fraudulent conveyance of the bankrupt, which the bankrupt himself could not do. McLean *v.* Lafayette Bank, 3 McLean, 189, 587; McLean *v.* Malane, &c., ib., 199; McLean *v.* Johnson, &c., ib., 202; Everett *v.* Stone, 3 Story, 456; Peckham *v.* Burows, ib., 544; Freeman *v.* Deming, 3 Sandford's Ch. R., 332; Shauhan, &c., *v.* Wherritt, 7 How., 627; Buckingham, &c., *v.* McLean, 13 ib., 170.

2. There is no error as to the rents and profits. An account of rents and profits was decreed from the time of the act of bankruptcy, in Sands, &c., *v.* Codwise, &c., 4 Johns., 589, 600. On the same principle, it was proper here to decree rents and profits from the filing of the petition; for "the act of bankruptcy in England is tantamount to a filing of the petition under our statutes." McLean *v.* Malane, &c., 3 McLean, 200. The pendency of the petition is constructive notice thereof to the grantee in the deed. Morse *v.* Godfrey, &c., 3 Story, 391. If there was, before that time, a right in Robert Hudgins to let the avails or annual income be expended at his discretion, without responsibility to any one, there could be no such right afterwards, (4 Johns., 588.) Under the voluntary system, the assignee derives as much right to rents and profits from the petition and decree, as he derives under the involuntary system from the act of bankruptcy and the decree.

3. Even if the decree of the Circuit Court were set aside, there should be a decree against Robert Hudgins for the purchase-money remaining unpaid at the time of the bankrupt's

petition, and the land held subject thereto, as well as to the liens of the judgment creditors of John L. Hudgins.

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 eastern district of Virginia.

The bill was filed in the court below by the assignee in bankruptcy of John L. Hudgins, against Robert Hudgins and others, to set aside the conveyance of a large real estate charged to have been made by the bankrupt to the said Robert, in fraud of his creditors and of the bankrupt law of the 19th August, 1841. The deed of conveyance purports to have been executed on the 21st February, 1842, but was not recorded till the 8th August following; and conveyed, for the alleged consideration of $5,000, three tracts of land—one tract of one hundred acres, one of nine hundred, and another of seventy acres—being, in the aggregate, one thousand and seventy acres, situate in the county of Mathews, State of Virginia. The bankrupt's place of residence was upon one of the tracts. The deed of conveyance contained a clause that the lands should be subject to any judgments that then bound them by operation of law. John L. Hudgins, the grantor, was heavily in debt at the time of the execution of the deed, and judgments to a large amount were soon after recovered against him. Executions were issued upon these judgments, and the defendant endeavored, by various ways and contrivances, to conceal his person and property from the reach of them. This was in the spring and summer of 1842.

On the 17th February, 1843, John L. Hudgins presented his petition to the District Court for the benefit of the bankrupt act, annexing thereto a schedule of his debts and property—the debts exceeding $12,000; property none, except a contingent interest in a deed of trust by T. Hudgins, for the benefit of creditors. On the 20th May, 1843, the petitioner was declared a bankrupt, and on the 19th September following an order was made, providing for the creditors to show cause, on a given day, why the petitioner should not have granted to him a certificate of discharge from all his debts. The creditors appeared, and resisted the discharge. Much testimony was taken on their behalf, tending to establish the fraudulent transactions of the bankrupt with Robert Hudgins and others, which are now relied upon to set aside the deed in question. The opposition to granting the discharge resulted in the District Court adjourning several questions of law and fact to the Circuit Court, for its decision. What disposition was made of them in that court, we are not advised.

The defendant, Robert Hudgins, in order to prove the payment of the purchase-money of the lands conveyed in the deed of the 21st February, introduced two receipts from John L. Hudgins—one for $3,055, dated 6th August, 1844; the other, 12th August, same year, for $1,425—and proved the execution of the same by witnesses, who counted the money and saw it paid.

The several tracts of land conveyed were worth, as testified to by witnesses, over $10,000, double the amount of the purchase-money. The possession and occupation of the same, subsequent to the sale, seems not to have been changed. Indeed, John L. Hudgins, in his receipt of the payment of the $1,425, 12th August, 1844, describes the land as being the same as that upon which he resides, and has resided for years. He and his sons have cultivated and improved the arable land, cut and sold timber from the woodland, since the sale to the defendant, Robert, the same as before, the latter apparently exercising no control or acts of ownership over the property.

In the fore part of July, 1842, some four months after the alleged conveyance, John L. Hudgins made application to certain individuals to borrow a considerable sum of money, to relieve himself from judgments and executions then pressing upon him, and proposed giving a deed of these same lands, in trust to the lenders, as security for the loan. The writings were prepared with a view to carry into effect this arrangement, and the defendant was present, assenting to it, without disclosing that a conveyance had already been made to him.

A good deal of other evidence was given in the case, bearing more or less upon the question of fraud, which it is not material to recite, and which will be found in the record.

The court below, on the 18th May, 1848, decreed that the deed of John L. Hudgins, the bankrupt, to Robert, his brother, of the 21st February, was fraudulent and void as against creditors, and appointed the assignee in bankruptcy a receiver, to take possession of the property, and directed that a master should take an account of the rents and profits from the petition in bankruptcy to the time when the receiver took possession. The master subsequently reported the amount at the sum of $2,320.26, and on the 27th June, 1855, a final decree was entered. The cause is now before this court, on an appeal from this decree.

It was scarcely denied on the argument, and, indeed, could not be, that John L. Hudgins, the bankrupt, had been guilty of a fraudulent contrivance to hinder and defraud his creditors on the execution of the conveyance in question; but it has been strongly urged that Robert, the grantee, was not privy to

the fraud, and hence was a *bona fide* purchaser for a valuable consideration. We shall not, therefore, deem it material to refer to any portion of the mass of evidence in the case, except so far as it bears upon the connection of the grantee with this question of fraud.

The answer of the defendant to the bill is not very satisfactory. The bill charges that the deed, though it bears date 21st February, 1842, was really executed on or about the 2d of July following, the time it was put on record; and that it was antedated in pursuance of the fraudulent purpose charged against the parties. The answer does not notice or deny this allegation. Again, the bill charges that the deed was not delivered at the time it bears date; nor, in fact, delivered at all to the grantee in any other way than the putting of it on record by the grantor himself. This charge is not noticed or denied; neither is the allegation denied, that the grantee remained in the possession and enjoyment of the property after the conveyance, the same as before. And this averment, besides being thus virtually admitted, is fully established by the proofs in the case.

The consideration or purchase-money agreed to be given for the three tracts of land conveyed was less than one-half the value, as proved by uncontradicted testimony. The deed contained a clause, that the lands should be subject to any judgments that were then a lien upon them; and it was urged, on the argument, that these judgments should be taken into the account, on fixing the amount of the purchase-money. But the answer is, that it does not appear, from any evidence in the case, that judgments existed against John L. Hudgins at the date of the deed. We have examined the proofs attentively, and find none; nor have any been referred to in the briefs of the counsel. It also appears that Robert, the grantee, some four months after the date of his deed, and when the title to the lands in question was in him, if the conveyance had been really made at its date, was present, and participated in a negotiation for a loan of money to John L. Hudgins, and which was to be secured by a deed from him of these very lands, in trust, to the persons advancing the money.

The conduct of the defendant, Robert, in this instance, furnishes the foundation for a strong inference, either that the deed had not then been executed and delivered, or, if it had been, that the grantee held it for the use and benefit of John L. Hudgins, the grantor. In either view, the fact affords a well-founded suspicion of the *bona fides* of the transaction between the parties.

In respect to the payment of the purchase-money, of which

very formal proofs have been given of the principal part of it, the effect in support of the conveyance is very much impaired by the fact that John L. Hudgins, in the schedule of his estate annexed to this petition in bankruptcy, 23d February, 1843, takes no notice of this indebtedness to him, by Robert, the grantee, and the truth of the schedule is verified under oath. This was a year and two days after the date of the deed, and when the purchase-money was unpaid, if the facts are true, as insisted by both the parties subsequently, upon the question of payment. They now admit this did not take place till August, 1844. No attempt has been made to account for or reconcile this inconsistency, if not worse, on the part of John L. Hudgins. Without pursuing the examination of the proofs in the case further, we will simply say, that after the fullest consideration of the facts in the case, we are satisfied with the conclusion arrived at by the court below upon this question.

But it is insisted that, admitting the conveyance to be void as it respects the creditors of John L. Hudgins, the court below erred in ordering a sale of the property, without having first ascertained the debts of the bankrupt, and permitting the grantee in the deed to redeem on paying them, or directing only so much of the land to be sold as would be sufficient to pay the debts.

The answer to this is, that the defendant, Robert Hudgins, made no offer to pay the debts on ascertaining the amount, and, for aught that appears, the whole of the property will be no more than sufficient to pay the liabilities of the bankrupt. If there should, by chance, be any surplus, it belongs to the court in bankruptcy to dispose of it. Whether it should go to the bankrupt or to his grantee, will be for that court to determine.

It is also insisted, that the court below erred in decreeing the rents and profits of the lands in controversy against the defendant, Robert Hudgins, for the reasons that it is not shown that he was in the possession and enjoyment of the same; and, also, that the court erred in decreeing these rents and profits from the filing of the petition in bankruptcy, instead of from the decree declaring John L. Hudgins a bankrupt.

The short answer to each of these objections is, that no such exceptions were taken to the report of the master, and are therefore not properly before us. That was the time and place to have presented these questions, and the omission precludes any question here on the matter.

The decree of the court below affirmed.

ELLIOTT W. HUDGINS AND JOHN L. HUDGINS, APPELLANTS, *v.* WYNDHAM KEMP, ASSIGNEE IN BANKRUPTCY OF JOHN L. HUDGINS.

In this case, as in the preceding, no exceptions having been taken in the court below to a master's report respecting rents and profits, the questions cannot be decided by this court.

THIS was a branch of the preceding case, was argued by the same counsel, and included within the same principles.

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 eastern district of Virginia.

The bill was filed by the assignee of the bankrupt, J. L. Hudgins, as in the preceding case, against E. W. Hudgins, a son, to set aside two deeds of conveyance of lands, as executed and delivered by the bankrupt to hinder and delay creditors—one dated 6th September, 1839, conveying three hundred acres lying in the county of York; the other dated 1st March, 1842, conveying, by estimation, seven hundred acres, in the same county—the latter for the consideration of $3,000. This deed was made a few days after the one set aside in the case of the assignee against Robert Hudgins. The case depends upon substantially the same evidence. Portions of it, tending to connect this defendant with the conduct of the grantor, in conveying away his property in fraud of his creditors, as respects the deed of the 1st March, 1842, are, if possible, somewhat stronger than that in the preceding case.

The court, on the 18th May, 1843, decreed that the deed was fraudulent and void, and that the assignee in bankruptcy take possession of the property as a receiver; and, further, that the deed of the 6th September, 1839, was not made in fraud of creditors, but was valid as against the complainant. The court also directed an account of the rents and profits, from the time of the petition in bankruptcy to the time of the receiver taking possession. The master subsequently reported rents and profits to the amount of $659.72; and on the 27th June, 1855, a final decree was entered.

The court decreed that the defendant, Elliott W. Hudgins, pay to the complainant $659.72, with interest from 2d June, 1848; and that, if the proceeds of the property directed to be sold in the case of the plaintiff against Robert Hudgins and others, should not be sufficient to satisfy the debts proved against the bankrupt, then the plaintiff is authorized to sell the lands in question, as particularly specified and directed in the said decree.

The only question arising on the master's report in this case, and the decree in pursuance thereof, is, that the rents and profits should not have been charged prior to the decree in bankruptcy. The answer to this objection is, that no such exception was taken to the report, and cannot, therefore, be noticed here. The case, in all its essential parts, falls within the views presented in the preceding one of this plaintiff against Robert Hudgins and others, and must abide the like result.

The decree of the court below is affirmed.

ISAAC BROWN, APPELLANT, *v.* JOSEPH P. SHANNON ET AL.

Where a bill is filed to enforce the specific execution of a contract in relation to the use of a patent right, this court has no appellate jurisdiction, unless the matter in controversy exceeds two thousand dollars.

The jurisdiction, where the bill is founded upon a contract, differs materially from the jurisdiction on a bill to prevent the infringement of the monopoly of the patentee, or of those claiming under him by legal assignments, and to protect them in their rights to the exclusive use.

The penalty of the bond taken, when an injunction is awarded, is no evidence of the amount or value in dispute.

THIS was an appeal from the Circuit Court of the United States for the district of Maryland.

The case is stated in the opinion of the court.

It was argued by *Mr. Schley* for the appellant, and submitted on a printed argument by *Mr. Latrobe* and *Mr. Gwinn* for the defendants.

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

This is an appeal from the decree of the Circuit Court for the district of Maryland.

The bill was filed by Joseph P. Shannon & Company, Gelston & Matthews, Lapouraille & Maughlin, and Griffiss & Cate, who composed four different partnership firms in the city of Baltimore, separately engaged in the business of planing, who all joined in the bill of complaint against Brown, the appellant, praying that he might be enjoined from the use of certain planing machines, mentioned in the bill, in the city of Baltimore. Upon the hearing, a perpetual injunction was granted accordingly, and from that decree this appeal was taken.

From the manner in which the bill is framed, there is some

difficulty in determining whether the complainants are seeking the aid of this court to prohibit the infringement of a patent right assigned to them, or to enforce the specific execution of two contracts with the appellant, exhibited with the bill; for the right claimed under the patent, and the right claimed under the contracts, are so mingled together in the statements and allegations of the complainants as to leave some doubt upon that point. And the first question, therefore, for this court to determine, is, upon which of these two grounds does the bill seek for relief? The jurisdiction of the Circuit Court in the one case is materially different from its jurisdiction in the other; and, while this court can exercise no appellate power in a case arising under contracts like those exhibited, unless the amount or value of the matter in controversy exceeds two thousand dollars, it may yet lawfully exercise its appellate jurisdiction when a far less amount is in dispute, if the party is proceeding either at law or in equity for the infringement of a patent right to which he claims to be entitled. Upon looking, however, carefully into the bill, we think it must be regarded and treated as a proceeding to enforce the specific execution of the contracts referred to, and not as one to protect the complainants in the exclusive enjoyment of a patent right. It states that three of the partnership firms named as complainants—that is to say, Joseph P. Shannon & Company, Gelston & Matthews, and Lapouraille & Maughlin—were, by regular assignments, entitled to the exclusive use of Woodworth's planing machine in the State of Maryland, east of the Blue Ridge. That the appellant had used these machines in the city of Baltimore, without any right derived from the patentee, and that, in consequence of this infringement of their rights, various suits and controversies had taken place between them and Brown, who claimed the right to use the machines in question, as the assignee of a patent of Emmons. The bill then proceeds to state that, in order to put an end to these controversies and suits, these appellees, and the appellant, entered into the contract of the 19th of January, 1853, which is exhibited with the bill.

By this contract, the portion of the appellees of which we are now speaking, and the appellant, agreed that each of the said three partnership firms and the appellant should have the right to use the Woodworth patent at one establishment, anywhere within the territorial limits above mentioned, not exceeding five machines at such establishment; and that each of the said parties should also have the right to use Emmons's patent.

There are other stipulations in this agreement which it is not material to state for the purposes of this opinion.

The bill further states that Brown afterwards, on the 15th of June, 1853, assigned to Griffiss & Cate, the other complainant, all his right to use the Woodworth patent, which right he had derived from the contract before mentioned; and also the right to use the Emmons patent, the right to which he had derived from the administrator of Emmons. This contract states that the assignment was made in consideration of fifteen hundred dollars, paid the appellant by Griffiss & Cate. And the complainants allege that, after this assignment, Brown continued to use the said five machines in his establishment in Baltimore, although he had no right to do so, as they were all Woodworth's planing machines; and that he is not only a wrong-doer in using a patented invention without a license, and as such liable to be restrained by a court of equity, but that such use is a fraud upon the parties to each of the two contracts into which he had entered, as above stated. That the object of the contract of January 19, 1853, was to restrain the use of the Woodworth machine and the Emmons machine, so far as that right was to be used, to four establishments in the city of Baltimore, with the limited number of machines in each; and that the use of them by Brown, after he had substituted Griffiss & Cate in his place, was a fraud upon this contract, from the binding operation of which he could not withdraw himself, and a fraud also upon his contract with Griffiss & Cate. And the gravamen of the bill, and the ground upon which relief is sought, is summed up in the paragraph immediately preceding the prayer for relief, in the following words:

"And your orators are further advised, that the misconduct of the said Brown in the premises is a fraud upon the parties to the agreement of the 19th of January, 1853, as well as upon the parties to the agreement of the 15th of June, 1853, which it is the peculiar province of a court of equity to restrain."

It is to prevent the fraudulent violation of these contracts, therefore, that the complainants seek the aid of the court, and ask for an injunction; and it being a proceeding founded on a contract between the parties, this court has no appellate power, unless the matter in controversy is of the value of more than two thousand dollars. Now, the matter in controversy is the right of the appellants to use these five machines while the Woodworth patent continued—that is, until the 29th of December, 1856.

But it appears by the record that Brown sold this right to

Griffiss & Cate for $1,500. He admits, in his answer, that he sold and assigned it for that sum; nor does he suggest that it was worth more. The establishment of Griffiss & Cate, like that of the appellant, was in the city of Baltimore. And if $1,500 was the just value of the right in controversy on the 15th of June, 1853, there is no reason for supposing that it was more on the 10th of October in that year, when this bill was filed, or at any time since; on the contrary, the period for the duration of the right under the contract was daily diminishing as the termination of the patent was approaching, and a diminution on the value of the right would be a natural and necessary consequence. It is evident, therefore, that the value of the matter in controversy is not sufficient to give appellate jurisdiction to this court.

It has, however, been suggested in the argument at the bar, that the value may be estimated by referring to the penalty of the bond taken by the Circuit Court when the injunction was granted. But this rule would be entirely too vague and uncertain for judicial purposes. It is the practice of all courts, in taking bonds of this description, to prescribe a penalty more than enough to cover all possible damages which the respondent may sustain by reason of the injunction. There was nothing before the Circuit Court when the penalty in this case was prescribed, but the bill of the complainants. And although the bill disclosed a controversy where the matter in dispute was worth in the market but $1,500; yet, when the answer came in, and testimony was taken, it might show that the matter in dispute was of far greater value. The court could not foresee whether this would be the case or not, and hence the necessity and propriety of prescribing a penalty that would cover all possible contingencies. The respondent, however, as we have said, admits that he sold the privilege now in dispute for the sum mentioned in the bill, and does not say that it was worth more, or was of greater value in his hands than in those of Griffiss & Cate. The sum mentioned in the bill, and for which the privilege in question was sold by the appellant, must therefore be taken as the true value of the matter in controversy; and being less than $2,000, whatever errors may be apparent in the proceedings and decree of the court below, we have yet no power under the act of Congress to revise and correct them, and the appeal must be dismissed for want of jurisdiction in this court.

THE UNITED STATES, APPELLANTS, *v.* HENRY CAMBUSTON.

The regulations for the colonization of the Territories of the Government of Mexico, made 21st November, 1828, in pursuance of the act of the General Congress, August 18, 1824, provided: 1st. That the Governors of the Territories should be empowered to grant vacant lands, among others, to private persons who may ask for them, for the purpose of cultivating and inhabiting the same. 2d. That every person soliciting lands shall address to the Governor a petition, expressing his name, country, and religion, and describing as distinctly as possible, by means of a map, the land asked for. 3d. The Governor shall proceed to obtain the necessary information, whether the petition contains the proper conditions required by the law of the 18th August, 1824, both as regards the land and the petitioner, in order that the application may be at once attended to; or, if it be preferred, the municipal authority may be consulted, whether there be any objection to the making of the grant. 4th. This being done, the Governor will accede or not to such petition, in conformity to the laws on the subject. 5th. The definitive grant asked for being made, a document, signed by the Governor, shall be given, to serve as a title to the party interested, wherein it must be stated that the grant is made in exact conformity with the provisions of the law; in virtue of which, possession shall be given. 6th. The necessary record shall be kept, in a book provided for the purpose, of all the petitions presented and grants made, with maps of the lands granted, and a circumstantial report shall be forwarded quarterly to the Supreme Government.

Where there was no evidence, with respect to a grant of land in California, that any one of these preliminary steps had been taken, this court cannot confirm the claim.

The decisions of this court in cases of claims to land in Louisiana and Florida are not applicable where precise and recent regulations exist, directing the manner in which land shall be granted.

There are also strong grounds of suspicion with respect to the *bona fides* of the grant in question; but as the claimant may not have had an opportunity of producing evidence in the court below, the case will be remanded to that court for further proceedings.

THIS was an appeal from the District Court of the United States for the northern district of California, which affirmed a decree of the land commissioners in favor of a grant of land to Cambuston.

The facts are stated in the opinion of the court.

It was argued by *Mr. Black* (Attorney General) for the United States, and *Mr. J. Mason Campbell* for the appellee.

Mr. Black made the following points:

1. Assuming the paper on which the claim is based to be genuine, it is, nevertheless, void and worthless, for want of a petition and inquiry.

2. The grant is inoperative, for want of evidence that it was delivered while the Governor had power to make it.

3. The grant is fraudulent, fictitious, and simulated.

Mr. Campbell's points were the following:

1. That the grant itself is evidence, as of the power of Pico

to make it, so also of the observance by him of all the necessary preliminaries, and that there is no proof to the contrary. (United States *v.* Peralta, 19 How., 347; United States *v.* Arredondo, 6 Pet., 729, 731; United States *v.* Delassus, 9 Pet., 134; Minter *v.* Crommelin, 18 How., 88; Bagnell *v.* Broderick, 13 Pet., 448.)

2. That the possession of the grant is evidence of its delivery to the grantee by Pico, and the presumption of law is that such delivery was made when it might be lawfully, and that there is no evidence to the contrary.

3. That the absence of an approval by the Departmental Assembly, or of a survey, &c., will not defeat the grant. (United States *v.* Fremont, 17 How., 560; United States *v.* Reading, 18 How., 7; United States *v.* Cruz Cervantes, 18 How., 553; United States *v.* Vaca, 18 How., 556; United States *v.* Larkin, 18 How., 563.)

4. As no allegation of fraud was made, either before the commissioners or before the District Court, it cannot be entertained in this court, though, if entertained, the circumstances of the case conclusively show the fairness of the transaction. (United States *v.* Larkin, 18 How., 557.)

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 California, affirming a decree of the land commissioners.

The claimant below gave in evidence the following document, purporting to be a grant of a large tract of land on the upper waters of the Sacramento river, from a Mexican Governor of California, dated 23d May, 1846:

Pio Pico, Constitutional Governor of the Department of California:

Whereas Mr. Henry Cambuston has petitioned, for his own personal advantage, for a tract of unoccupied land in the valley of the Sacramento, joining on the north to Antonio Osio, on the south Mr. Sutter, on the east Mr. Flugge, and on the southwest the river Sacramento—the investigations being previously made according to the custom, and in conformity with the law of the 18th of August, 1824, and the regulations of the 21st of November, 1828—in virtue of the powers which have been conferred on me, in the name of the Mexican nation, I grant the tract of land expressed, lying out of the boundaries of the before-mentioned landholders, declaring it his estate by the present letters, provided it shall be approved by the extreme Departmental Assembly, and under the following conditions:

1st. He may, without prejudice to the crossings, roads, or attendances, fence it, enjoying it freely and exclusively, devoting it to any use or cultivation, as best may suit his convenience.

2d. When the title shall be confirmed, he shall demand of the respective judge judicial possession of it, by virtue of this despatch, by which the boundaries shall be designated with the necessary landmarks.

3d. The claim of land, for which this grant is made, has an area of eleven square leagues of pasture, if there is that outside of the property of the others, whose boundaries are to be respected; and if there should not be, the grantee shall be satisfied with that which remains.

The judge who gives possession shall cause it to be surveyed according to the ordinance, leaving the residue for the convenient uses of the nation.

Consequently, I command that he hold the present title as true and valid.

It shall be recorded in the respective book, and be delivered to the party interested, for his security and other uses.

Given in the city of Los Angeles, on this common paper, for want of sealed, on the 23d day of May, 1846.

(Signed) PIO PICO.

(Signed) JOSE MATIAS MORENO.

This document was deposited, by the claimant, with Edward Canbey, Assistant Adjutant General of the Army of the United States, on the 10th July, 1850, who at that time had charge at Monterey of the Government archives. These archives have since been transferred to the office of the Surveyor General, kept at San Francisco. There is no evidence in the case that it was ever seen in or out of the possession of the claimant, from its date (23d May, 1846) down to the time of depositing it, as above mentioned, except that derived from one witness, who appears to have been interested in the grant, and whose testimony, therefore, must be laid out of the case. Although the document in terms directs that it shall be recorded in the proper book of records, no record of the same was given in evidence, nor its absence accounted for. It recites, in the usual way, that the claimant had presented to the Governor a petition for a grant of the land, and also that the customary examinations had been made into the circumstances and fitness of making the grant to the petitioner. No petition was produced at the trial, nor any report by any officer as to the reasons and propriety of conceding the tract asked for, nor any evidence accounting for the non-production of either.

The case stands, so far as the claim of title is concerned, upon the naked document itself, purporting to be a donation of the eleven square leagues of land, together with evidence tending to establish its genuineness, and slight proof in respect to the possession of the tract.

The original document was not produced either before the commissioners or the District Court, and the only proof of its genuineness was the testimony of two witnesses who had seen the signatures of Governor Pico and the Secretary Moreno, on file at the Surveyor General's office. One of them (Crosby) says he believes the signature of Pico to be genuine, but has no knowledge of the handwriting of Moreno; the other, (Castro,) that he knows the signatures of both Pico and Moreno, and that they are genuine. There is another witness, (Morenhont,) who says that he had seen Moreno write once, and had corresponded with him; and that, so far as he can judge, it is his genuine signature. This witness, however, cannot be relied on, as he is the person interested in the claim.

The regulations for the colonization of the territories of the Government of Mexico, made 21st November, 1828, in pursuance of the act of the General Congress, August 18, 1824, provided: 1st. That the Governors of the territories should be empowered to grant vacant lands, among others, to private persons who may ask for them, for the purpose of cultivating and inhabiting the same. 2d. That every person soliciting lands shall address to the Governor a petition, expressing his name, country, and religion, and describing as distinctly as possible, by means of a map, the land asked for. 3d. The Governor shall proceed to obtain the necessary information, whether the petition contains the proper conditions required by the law of the 18th August, 1824, both as regards the land and the petitioner, in order that the application may be at once attended to; or, if it be preferred, the municipal authority may be consulted, whether there be any objection to the making of the grant. 4th. This being done, the Governor will accede or not to such petition, in conformity to the laws on the subject. 5th. The definitive grant asked for being made, a document signed by the Governor shall be given, to serve as a title to the party interested, wherein it must be stated that the grant is made in exact conformity with the provisions of the law in virtue of which possession shall be given. 6th. The necessary record shall be kept, in a book provided for the purpose, of all the petitions presented and grants made, with maps of the lands granted, and a circumstantial report shall be forwarded quarterly to the Supreme Government. There are many other provisions in the system of

regulations, relating to the disposition of the public lands, adopted on the 18th November, 1828, which it is not at present material to notice. Those specified have a special bearing upon the case before us. And, in view of them, it will be observed, according to the facts as presented at the trial before the commissioners, and afterwards before the District Court, to which we have already referred at large, that not one of the preliminary steps made requisite by the act of the Mexican Congress of 1824, and the regulations of 1828, to a grant of the public domain by the Governors, has been observed; at least, no evidence was given, before either of these tribunals, of the observance of any one of them. And we do not see how they can well be dispensed with, as they are not only expressly prescribed by the regulations as essential to guard against improvident grants, but constitute an essential part of the record of the title. It is true, the document recites that a petition was presented, and that the customary investigations had been made in respect to the application. But this cannot be regarded as conclusive, or even satisfactory evidence of these facts, when the question is raised, whether or not the alleged grant is made in conformity with the requirements of the law—in other words, whether the preliminary conditions had been complied with, which enabled the Governor in the particular case to make the grant, especially in respect to those preliminary proceedings which are required to be made matters of record, and of which record evidence should have been produced, or its non-production satisfactorily accounted for.

The question here is not whether the fact of the habitual grant of lands by Mexican Governors of the Territory of California to settlers, and, also, whether the customary mode and manner adopted in making grants, do not furnish presumptive evidence both of the existence of the power and of a compliance with the forms of law in the execution? We agree, that the affirmative of these questions has been frequently determined by this court, in cases involving Spanish titles in the Territories of Louisiana and Florida. (6 Peters, 729, 731; 9 ib., 134; 19 How., 347.) But no such presumptions are necessary or admissible in respect to Mexican titles granted since the act of 18th of August, 1824, and the regulations of 21st November, 1828. Authority to make the grants is there expressly conferred on the Governors, as well as the terms and conditions prescribed, upon which they shall be made. The court must look to these laws for both the power to make the grant, and for the mode and manner of its exercise; and they are to be substantially complied with, except so far as modified by the usages and customs of the

Government under which the titles are derived, the principles of equity, and the decisions of this court. (17 How., 542.)

We think, for the reasons above stated, that the case in the court below was too defective to have warranted a confirmation of the title to the claimant, as it was unsupported by the evidence; and also, for the further reason, for aught that appears in the proofs, the alleged grant has never been recorded in the proper book, or, indeed, in any book of the Spanish records. This is expressly required by the regulations of November, 1828, and enjoined in the grant itself. The record should have been produced, or its non-production reasonably accounted for.

In the examination of the evidence in this case, we have found it very difficult to resist a suspicion as to the *bona fides* of the grant in question. It is a pure donation, without pecuniary consideration or meritorious services rendered to the Government of Mexico. It is unaccompanied, as we have seen, with the forms and usages always observed in disposing of the public lands. Although purporting to be made on the 23d May, 1846, it was unknown to any person besides the grantee himself, and another interested party, till filed among the public archives, 10th July, 1850, after the cession of California, by Mexico, to this Government. It was made but a month and a half before the country was taken possession of by the arms of the United States, and made by a person who had but recently expelled from the Territory by force its lawful Governor, (Micheltorena,) and taken possession of it himself. Whether or not Pico had been recognised by the existing Government in Mexico, at the time the grant is dated, does not appear. Micheltorena was overthrown by the joint forces of Castro and Pico, in the spring or fore part of the summer of 1845. (See Captain Sutter's evidence, in original record in Reading's case, 18 How., p. 1; also, Report of General Cass to Senate, on California Claims, February 23, 1848.)

Civil commotion raged throughout the Territory, from this period down to the 7th July, 1846, when the authority of Pico and Castro themselves was subverted, and possession taken and held by the arms of the United States, until the cession of the country to this Government by the treaty of Guadalupe Hidalgo.

The grant purporting to have been made by Pico, so near the time when the Government of the Territory had passed from his hands, and, indeed, during the very heat and conflict of the struggle in which his power was overthrown, it, and all others similarly situated, should be inquired into and scrutinized with great care, both as to the authority of the Governor

to make them, and the *bona fides* of its exercise, in order to prevent imposition and frauds.

The court below appears to have been very much pressed with the unsatisfactory character of the evidence, and with doubts as to the genuineness of the title, and seems to have yielded rather to the apparent acquiescence of the representative of the Government, in the decision of the commissioners, than to any settled convictions of its own judgment.

We should not hesitate to reverse the decree below, and direct a decree against the claimant, were it not that the mode and manner of conducting the case, both before the commissioners and the District Court, on behalf of the Government, may have misled him; for, if the objections here stated had been made at the proper time before either of the tribunals, it may have been in his power to have removed them by the introduction of further evidence. It would be unjust, therefore, to deprive him, under the circumstances, of the opportunity to furnish such evidence.

We shall therefore reverse the decree, and remand the case to the court below for a further hearing.

FRANK DYNES, PLAINTIFF IN ERROR, *v.* JONAH D. HOOVER.

The Constitution of the United States gives to Congress the power to provide and maintain a navy, and to make rules for its government.

In the exercise of this power, Congress provided for the punishment of desertion and of other crimes not specified in the articles, which should be punished according to the laws and customs in such cases at sea.

Where a seaman was charged with deserting, and the court martial found him guilty of attempting to desert, the court had jurisdiction over the subject-matter, and an action of trespass for false imprisonment will not lie against the ministerial officer who executes the sentence for attempting to desert.

It is only where a court has no jurisdiction over the subject-matter, or, having such jurisdiction, is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered *coram non judice*, that an action will lie against the officer who executes its judgment.

The authorities upon this point examined, and also the legal powers of courts martial.

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.

Dynes was a seaman in the navy, who was tried by a court martial upon a charge of desertion, who found him not guilty of deserting, but guilty of attempting to desert; and sentenced him to be confined in the penitentiary of the District of Columbia at hard labor, without pay, for the term of six months from the date of the approval of the sentence, and not to be again

enlisted in the naval service. Whereupon, the President of the United States directed Hoover, the marshal of the District, to commit him to the penitentiary.

The proceedings of the Circuit Court are stated in the opinion of the court.

The case was argued by *Mr. Charles Lee Jones* for the plaintiff in error, and by *Mr. Gillet* for the defendant. There was also a brief on that side, filed by *Mr. Cushing*, the late Attorney General.

Mr. Jones commenced his argument with a review of some of the principles of military law pertinent to the issue; after which, he proceeded to state his points, of which there is room to notice only the following, viz:

That the judgment and sentence of the court martial was an absolute nullity, and affords no sort of justification to any one executing process under it.

The following well-settled principles of law cannot be controverted: "That when a court has jurisdiction, it has a right to decide every question before it; and if its decision is merely *erroneous*, and not *irregular and void*, it is binding on every other court until reversed. But if the subject-matter is not within its jurisdiction, or where it appears, from the conviction itself, that they have been guilty of an excess, or have decided on matters beyond and not within their jurisdiction, all is void, and their judgments, or sentences, are regarded in law as nullities. They constitute no justification; and all persons concerned in executing such judgments, or sentences, are trespassers, and liable to an action thereon." (1 Peters, 340; 2 Peters, 169; Griffith *v.* Frazier, 8 Cranch, 9; 14 How., 144; Wicks *v.* Caulk, 5 Harris and Johns., 42; Bigelow *v.* Stearns, 19 Johns., 39; Case of the Marshalsea, 10 Co. R., 76; Terry *v.* Huntington, Hardres R., 480; Shergold *v.* Hollway, 2 Strange, 1002; Hill *v.* Bateman, 1 Strange, 710; Perkin *v.* Proctor, 2 Wilson, 382; Dr. Bouchier's Case, cited, 2 Wilson, 386; Martin *v.* Marshall and Key, cited, 2 Wilson, 386; Parsons *v.* Lloyd, 3 Wilson, 341; Miller *v.* Seare, 2 Wm. Black. R., 1145; Crepps *v.* Durden, Cowp., 640; Groome *v.* Forrester, 5 M. and S., 314; Warne *v.* Varley, 6 Term, 443; Brown *v.* Compton, 8 Term, 424; Moravia *v.* Sloper, Willes R., 30; Peacock *v.* Bell, 1 Saunders, 74; 8 Term, 178; 2 Wm. Black., 1035; The King *v.* Dugger, 1 Dowl. Ry., 460; 3 Campbell's R., 388; Doswell *v.* Impy, 1 Barn. and Cress., 169; 13 Johns., 444.)

"A court martial is one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.

It is an inferior court in the most technical common-law sense of those words. It is called into existence for a special and limited purpose, and to perform a particular duty; and when the object of its creation is accomplished, it ceases to exist. The law will intend nothing in its favor. The decision of such a tribunal, in a case without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers." (Wise *v.* Withers, 3 Cranch, 337; *Ex parte* Watkins, 3 Peters, 208; Mills *v.* Martin, 19 Johns., 32; Smith *v.* Shaw, 12 Johns., 267; Brooks *v.* Adams, 11 Pickering, 442; Duffield *v.* Smith, 3 Sergt. and Rawle, 599; 3 Greenleaf's Ev., § 470; Warden *v.* Baily, 4 Taunt., 67; Frye *v.* Ogle, 1 McArthur, Ap., No. 24, and Hickman, Ap., No. 17; Moore *v.* Bastard, 2 McArthur, 194, 200; 1 McArthur, chap. 10, § 9, p. 264, 272; Hannaford *v.* Hunn, 2 Carr. and Payne, 148; Wharton's American Law of Homicide, p. 52.)

Two essential vices appear on the face of the proceedings of the court martial in question, either of which would alone render their whole proceedings irregular and void.

1. The finding was in a cause *coram non judice*, it being for an offence of which the plaintiff was never charged, and of which the court had no cognizance.

2. The subject-matter of the sentence, the punishment inflicted, was not within their jurisdiction, and is a punishment which they had no sort of permission or authority of law to inflict. (See Hickman, p. 149, 152, and 1 McArthur, 158.)

1st. The court martial was brought into existence by the order or precept of the Secretary of the Navy, and the plaintiff "legally brought before it," for the trial of his guilt or innocence of the following "charge and specification of a charge preferred by the Secretary of the Navy," and to no other legal intent or purpose whatsoever:

"*Charge.*—Desertion.

"*Specification.*—In this, that on or about the twelfth day of September, in the year 1854, the said Frank Dynes deserted from the United States ship Independence, at New York.

"J. C. DOBBIN, *Secretary of the Navy.*"

Now, here is a charge, with its specification, drawn up with every desired legal requisite of certainty and perspicuity, notifying the accused of the circumstances and facts to be brought in issue, and warning him of the evidence essential to establish his innocence. Of this charge, and of this charge only, had the court martial jurisdiction to try him, (see 2 McArthur, p. 221,) and their decision as to his guilt or innocence upon this charge, would be as absolute and final as would be the decision of any other court on matters within their jurisdiction.

But the court martial acquitted him of the only charge legally brought before them, the only subject-matter whereof they had cognizance, but found him guilty of another offence, of which they had no sort of jurisdiction—an offence as yet unknown to the law, not enumerated in the naval articles as one of the crimes within the cognizance of a court martial—thus convicting him of an offence not included in the charge or specification before the court, but a new offence, depending upon different facts and circumstances, and against the accusation of which they gave him not the least time or slightest warning to defend himself.

The finding of the court was as follows:

The court "do find the accused, Frank Dynes, seaman of the United States navy, as follows: Of the specification of the charge, guilty of attempting to desert; of the charge, not guilty of deserting, but guilty of attempting to desert."

This finding is in direct violation of the oath which, by the 36th article of the act of Congress for the government of the navy, each member of the court is required to take, "before proceeding to trial," that he "will truly try, without prejudice or partiality, the case now depending." And of the 38th article, which declares that "all charges on which an application for a general court martial is founded, shall be exhibited in writing to the proper officer, and the person demanding the court shall take care that the person accused be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; nor shall any other charge or charges than those so exhibited be urged against the person to be tried before the court," unless under the circumstances there enumerated, "in which case reasonable time shall be given to the person to be tried, to make his defence against such new charge." (See Macomb on Courts Martial, § 35 and § 36, p. 26; De Hart, p. 102; Tytler, 217.)

It is true that, at common law, the jury may frequently find the prisoner guilty of a minor offence, included in the charge, or of a part of the offence therein specified; as on an indictment for petit treason he may be found guilty of murder or of manslaughter, for both these offences are included in the charge, as is also the offence of manslaughter in the charge of murder; and under an indictment charging an assault with intent to murder the party, may be convicted of a simple assault only; or under an indictment charging an assault with intent to abuse and carnally know, the defendant may be convicted of an assault with intent to abuse simply. (1 Chitty's Crim. Law, 250, 251.)

In these cases, every fact and circumstance which is a neces-

sary ingredient in the offence is set forth in the indictment, and the party is enabled to determine the species of offence he will be called upon to answer, and the evidence necessary to establish his innocence.

But on an indictment for felony he cannot be convicted of a misdemeanor, because the offences are distinct in their nature, and of a distinct legal character.

Nor can a party be convicted, on an indictment for a specific offence, of an attempt to commit that offence. (4 Blac. Com., p. 306, note.) Thus, on an indictment for burglariously breaking and entering a dwelling-house and stealing the goods mentioned, the party may be acquitted of the burglary, and convicted of the larceny, it being included in the charge; but he cannot be acquitted of the burglary and stealing, and convicted of a burglary with intent to steal, or to commit any other felony, for they are distinct offences. (See Vandercomb and Abbott's case, 2 Leach C. L., 828 to 833; 1 Russell on Crimes, 831; Com. *v.* Roby, 12 Pickering, 505, 506, 507; 4 Blac. Com., 306, note.)

So, on an indictment for murder, he cannot be acquitted of the murder, and convicted of an assault with intent to murder. He is before the court charged with a specific offence, and is prepared only to defend himself against that charge, and the matter therein specified; he may entirely rely upon the evidence of the very man of whose murder he is charged to prove that no homicide has been committed. It would then be in violation of every principle of law to convict him, without warning, of a different offence, depending on different facts and circumstances; thus the fundamental doctrine of the law requires the proof admissible, much less the finding or verdict, to correspond with the allegations, and to be confined to the point in issue.

Courts martial, following these principles of the common law, may also find a party guilty of a minor offence included in the charge. As on a charge of desertion, they may acquit of that charge, and find the party guilty of "absence without leave," for this offence is of a like nature, and all its ingredients are included in the charge, for absence is the principal question in issue. (Tytler, 321, 322, 323; Adie, 185, 186, 187.) But attempting to desert is altogether a distinct offence, depending upon different facts and circumstances, of which the party has had no notice. He may be conscious of not having deserted, and may expect to establish his innocence of that charge by circumstances and facts which would render his being guilty of such an offence absolutely impossible. Then would it not be of the very essence of tyranny, in violation of

all those immutable principles of right and justice which are the foundation of martial as well as every other law, to find him guilty, and to inflict a punishment for this other offence never before the court, and of which he never had the least time or notice to make his defence?

Besides, "absence without leave" is, by the British mutiny act, and the 21st article of the act of Congress for the government of the army, (April 10, 1806, 2 Stat. at Large, p. 362,) made a military offence within the cognizance of an army court martial.

But "attempting to desert" is not enumerated by the articles for the government of the navy as an offence within the cognizance of a naval court martial. A naval court martial derives its sole being from, and is the mere creature of, the act of Congress, and has no jurisdiction of any other offences than such as are therein enumerated as within their cognizance. "When a new court is erected, it can have no other jurisdiction than that which is expressly conferred, for a new court cannot prescribe." (4 Inst., 200.)

But it may be contended that the 32d article covers this offence, which article is in these words: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs at sea." Such a construction would be leaving the definition of crimes "at sea" indeed, and a shoreless and uncharted sea, and would render the previous minute enumeration of what offences might be tried and punished by a court martial quite useless. The probable proper construction to put on this article is, that it refers to such offences as are not of sufficient magnitude to be punished by a court martial, and leaves them to be punished according to the usages of the sea. However this may be, the offence at any rate should have been legally brought before the court by a charge and specification preferred by the proper authority, and it might then have been within the jurisdiction of the court to have decided whether or not they could take cognizance of it under the 32d article; as it is, the cause was *coram non judice*, and their judgment and sentence is not voidable, but absolutely void. (Hickman, 179, 149; 1 McArthur, 171; 2 ib., 221, 298, 199.)

The ground on which the judgment of the House of Lords, in the Banbury case, was held not to conclude the question, "was because the proper course had not been pursued to bring the question of peerage in judgment before the Lords, and therefore it was *coram non judice*, for the resolutions of the Lords, in that case, were taken upon a petition from the de-

fendant to the House itself; whereas, the proper course for the trial of the right of peerage is by petition from the claimant to the King, who thereupon refers it to the Lords." "Here was no judgment. A court can give no judgment in a thing not depending, or that does not come in a judicial way before the court." (2 Salk., 511; Burdett *v.* Abbott, 14 East, 106; Skinner R., 522, 524.)

"If a judge of an ecclesiastical court excommunicates a party for a cause of which he hath not legal cognizance, or where the party has not been previously served with a citation or monition, nor had due notice, an action lies against him." (Beaurain *v.* Scott, 3 Campbell's R., 388; 3 Black. Comm., 101.)

The argument of *Mr. Jones* and that of *Mr. Gillet*, upon the legality of using the penitentiary as the place of punishment, are omitted.

Mr. Gillett made the following points:

First.—*The naval court martial had jurisdiction of the offence of which the plaintiff was convicted.*

Among the powers conferred upon Congress by the 8th section of the first article, are the following:

"To provide and maintain a navy.

"To make rules for the government and regulation of the land and naval forces."

The 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land or naval forces."

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations.

In the exercise of the powers thus conferred upon the legislative department, the act of the 23d of April, 1820, (2 U. S. L., p. 45,) was passed.

The 17th article of said act provides—

"And if any person in the navy shall desert, or entice others to desert, he shall suffer death, or such other punishment as a court martial shall adjudge."

The 32d provides—

"All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea."

Congress specified a limited number of offences, and among

them desertion; and then, in the thirty-second article, made provision for all possible cases which could occur in the naval service.

Among the offences which may be committed, is the attempt to desert. Desertion is where a person, bound by his enlistment to remain in service, in violation of his duty escapes from the control of those in command. An attempt to desert is where the motive to desert is conceived, and an effort made to carry it into effect, but which is not fully accomplished, owing to the want of success, or to a change of purpose. Such an offence deserves punishment in a degree but little below successful desertion. It is clearly one of the unspecified offences provided for in the 32d article.

The 35th article provides for the appointment of courts martial. These courts are created for the purpose of trying all cases arising in the naval service.

The 38th article provides, that charges shall be made in writing, which was done in this case. It appears, by the record, that the court was lawfully constituted; that the charge was made in writing; that Dynes appeared and pleaded to the charge. If he had been found guilty of desertion, no complaint could have been made against the conviction for want of jurisdiction in the court. But, as it appears that the court, instead of finding him guilty of the high offence of desertion, which authorizes the punishment of death, convicted him of the inferior offence of attempting to commit the crime, it is assumed that the court had no jurisdiction of the case. This assumption cannot be sustained.

It is a well-settled rule, that where a person is charged with a high offence, he may be convicted of a lower one of the same class.

In the People *v.* Jackson, 3 Hill N. Y. R., 92, Cowen, J., in delivering the opinion of the Supreme Court, said:

"The case is, in principle, like a conviction of manslaughter under an indictment for murder; or of simple larceny, under an indictment for burglary or robbery. The indictment charges facts enough, and more than enough, to make out a misdemeanor; and the prosecution in such case is never holden to fail, merely because all the alleged circumstances are not proved, if such as are proved make out a crime, though of an inferior degree. This has been uniformly held by the English courts, where the crime proved is of the same generic character with that charged; for instance, where the proof is of an inferior felony, and the indictment charges a higher."

In the People *v.* White, 22 Wen., 167, 176, the Supreme Court of New York laid down the same rule.

Roscoe, in his work on Criminal Evidence, p. 99, cites numerous cases to prove that this rule is correct and sound.

The same principles are laid down in Phillipps's Evidence, p. 203.

In Chitty's Criminal Law, 1st vol., pp. 250, 251, the same rule is stated, and many cases cited to prove it correct.

These rules are equally applicable to court-martial cases.

Writers on courts martial lay down similar rules.

O'Brien says: "When the offence named in the charge admits of less degrees of criminality, the court may find the specification to amount to only one of these lesser degrees of the same crime." P. 265.

De Hart says: "In the deliberation of the court upon the finding to be declared, it is necessary also to observe the distinctions which may be made between the crime as alleged in the charge, and the degree of offence proved. A court martial, therefore, may in some instances find a prisoner guilty of the offence in a less degree than that stated. For example, a prisoner charged with desertion may be acquitted of the charge, and found guilty of absence without leave. Here it is manifest that the offence proved is of the same character as the one charged, but differing in degree, arising from the intention of the accused party. So, in all such, or similar findings of a court martial, must there exist a kindred nature between the offences, as it would clearly be a violation of justice to find a prisoner guilty of a crime differing in kind, and therefore not depending upon degree of culpability, from that with which he stands charged."

"It is evident, too, that as a prisoner stands charged with a specific offence, and necessarily defends himself from the accusation as laid, a court martial, although empowered to find him guilty in a less degree, cannot find a higher degree of guilt than that alleged in the charge." Pp. 184, 185.

Simmons says: "It is scarcely necessary to remark, that the punishments peculiar to desertion cannot be awarded on conviction of *absence without leave*, however aggravated; and that an offender, charged with desertion, may be found guilty of the minor crime, absence without leave, and receive judgment accordingly." Pp. 338, 339.

These authorities show that the same rule which prevails in the judicial courts is applied by military tribunals, where less technical nicety prevails. The great object in view in courts martial is to secure justice in the simplest manner possible. De Hart says, (p. 146,) "The same technical nicety which courts of civil jurisdiction observe in criminal cases is not desirable or necessary in the proceedings of a court martial, and

exceptions made to form or matter are only admitted by them when such appear essential to abstract justice." Certainly, abstract justice does not, in this case, require technical nicety. Justice has been fully administered, in a manner common to criminal tribunals and courts martial, and then no error has been committed.

The authorities above cited show that, on a charge for a higher offence, the accused could be tried and convicted of a less one of the same generic character. Were this not so, if the proof failed to show the accused guilty of the higher offence, he would escape all punishment, as the trial and acquittal for such higher offence might be pleaded in bar to an indictment for the inferior one. The court having had unquestioned jurisdiction in the case presented in the charge and specification contained in the record, it clearly included whatever could be tried under them. The cases show that the accused could be tried for the lesser offence covered by the more extensive one, formally presented against him. It follows, that the court had ample jurisdiction to try and determine it. Having the authority to try the plaintiff, the decision upon the question of his guilt is conclusive upon him, and is not the subject of review in this court; though, if it were, its correctness would not be questioned after reading the evidence.

SECOND.—*As the court had jurisdiction, no errors committed in its exercise can be reviewed or corrected by this court.*

Courts martial have original jurisdiction in all offences committed by persons in the naval service, when convened according to law, and such offences are brought to their consideration in the manner specified in the statute. No reviewing tribunal has been established, although the Secretary of the Navy and the President, in effect, act as revising officers, where their concurrence is required before the adjudication of the court can be carried into effect. The decisions of courts martial are as conclusive as those of any other tribunal. Their jurisdiction is general over a class, and is exclusive as to all naval offences. Whether they exercise it wisely or erroneously, while they keep within such jurisdiction, is not the subject of review by other courts. The matter becomes *res judicata.*

In this case, the question of the guilt of the plaintiff is finally and conclusively settled. The court had full power to direct punishment. In some cases the statute defines that punishment, but it is generally left to the discretion of the court trying the accused.

The plaintiff insists that the court exceeded its jurisdiction in requiring him to be imprisoned for six months, at hard labor, in the penitentiary of the District of Columbia. The 32d arti-

cle of the act of 1800 is referred to as proof of this. It is in these words:

"All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea."

It is contended by the plaintiff, that the punishment adjudged is not according to the laws and customs in such cases at sea. But this does not appear. Those prescribed in the statute itself are applicable to the cases therein specified. The present case relates to those not distinctly enumerated in the statute, but to such as are authorized by the laws and customs in cases at sea. Who shall determine this question? Is it a question of law, or of fact?

If it is a question of law, it was clearly one for the court martial sitting to determine, and their decision is final, and not reviewable here. It was the duty of that court to pass upon this very question, when they were determining the punishment to be inflicted. It was clearly within their jurisdiction, and it was their duty to consider and pass upon it. They did so, and their decision is binding upon the parties to that trial, and cannot be reviewed here.

If it were a question of fact, it was equally the duty of the court martial to consider and determine it upon the evidence before them; and that determination is equally conclusive as if it were a question of law.

It is clear, that the question of punishments authorized by the laws and customs of sea is one purely of fact. Such customs and laws are not written in books, but exist as matters of fact, resting in tradition and practice. This court cannot know them as a matter of law, and certainly not as a matter of fact. How can this court say that imprisonment at hard labor is not a common punishment for offences, where not specified in the statute, in case of offences at sea? Imprisonment is clearly one mode of punishment for many offences known to our laws, including those regulating the naval service, although not specified in words. There are some thirty crimes specified in the statute, where the punishment is within the discretion of the court martial. This may be, by being shut up in the hold, or confined on the deck of a ship, or confinement at such place, at sea or on land, as the court think proper. The sentence may include hard labor or not, at the discretion of the court.

There is nothing in the statute to show that the undefined crimes and punishments may not be dealt with in the same manner. No law or usage is shown in the record on this subject. It follows, that there is no law or usage to restrain the

court in relation to the punishment that may be inflicted in the non-enumerated cases. If the plaintiff had believed that, in adjudicating the punishment, the court martial had exceeded the customary and lawful punishment for such offences, he should have framed an issue of fact upon that point, and have gone to the jury upon it, instead of raising an issue of law, where such fact cannot be determined. Instead of doing so, he comes here and asks this court to determine, as a matter of fact, the laws and usages of the sea, where the statute has failed to define them. This court cannot be lawfully called upon, in suits of law, to pass upon any such question.

The very points now in dispute were legitimately before the court martial for its determination. The accused could be heard upon all questions of law and fact. He gave such evidence, as to both, as he saw fit. The court considered the case as presented, and disposed of these same questions as a part of its duty, and thus they become finally and conclusively settled; and the proceeding having been approved by the Secretary, this court is bound to consider them rightfully settled. But, if it should not, still the adjudication is binding upon it. This view of the case is sustained by the highest authority.

In Martin *v.* Mott, 12 Wheat., pp. 19, 29, 30, this court held that "the authority to decide whether the exigencies contemplated in the Constitution of the United States and the act of Congress of 1795, in which the President has authority to call forth the militia 'to execute the laws of the Union, suppress insurrections, and repel invasions,' have arisen, is exclusively vested in the President, and his decision is conclusive upon all other persons."

In Watkins case, 3 Peters, 193, p. 202, the question of the effect of a judgment was fully considered in this court. In delivering the opinion, Story, J., said:

"A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it."

In Wilcox *v.* Jackson, 13 Peters, 498, p. 511, this court, speaking of the conclusiveness of judgments, said:

"This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed."

In Elliott *v.* Piersol, 1 Peters, 328, p. 340, this court held: "Where a court has jurisdiction, it *has a right to decide every question which occurs in the cause;* and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court."

Mr. Justice WAYNE delivered the opinion of the court.

The plaintiff brought an action for assault and battery and false imprisonment, charging that the defendant imprisoned him in the penitentiary of the District of Columbia. The defendant pleaded the general issue, and several special pleas, in which he denied the force and injury, and set up, that he, as marshal of the District of Columbia, imprisoned the plaintiff by virtue of the authority of the President of the United States, in the execution of a sentence of a naval court martial, convened under an act of Congress of the 23d of April, 1800; which sentence was approved by the Secretary of the Navy, which was final and absolute, and denying the jurisdiction of the court. The plaintiff filed a retraxit, admitting that there was no battery, other than the imprisonment in pursuance of the sentence of the court martial.

The charge by the Secretary of the Navy was desertion, with this specification: "that on or about the twelfth day of September, in the year of our Lord one thousand eight hundred and fifty-four, Frank Dynes deserted from the United States ship Independence, at New York." He pleaded not guilty. After hearing the evidence, the court declared, "We do find the accused, Frank Dynes, seaman of the United States navy, as follows: Of the specification of the charge, guilty of attempting to desert; of the charge, *not guilty of deserting*, but guilty of *attempting to desert;* and the court do thereupon sentence the said Frank Dynes, a seaman of the United States navy, to be confined in the penitentiary of the District of Columbia, at hard labor, without pay, for the term of six months from the date of the approval of this sentence, and not to be again enlisted in the naval service." This conviction and sentence was approved by the Secretary of the Navy, on the 26th of September, 1854. The prisoner was then brought from New York to Washington, *in custody;* and the President, reciting the trial and sentence, made the following order upon the defendant, the marshal, in relation to carrying the judgment of the court into execution. "The prisoners above named (the plaintiff, Dynes, being one among others) having been brought to the city, by direction of the Secretary of the Navy, in the United States steamer Engineer, you are hereby directed to receive them from the commanding officer of said vessel, and commit them

to the penitentiary in the District of Columbia, in accordance with their respective sentences." These facts formed a portion of the defendant's pleas, to which the plaintiff demurred, pointing out the following causes of demurrer:

1. Because the said court martial had no jurisdiction or authority whatever to pass such sentence as that pleaded and set forth in said plea.

2. Because the sentence is illegal and void.

3. Because the President of the United States had no jurisdiction or authority whatever to write such a letter to the defendant as that pleaded and set forth in said plea, nor in any manner whatever to direct the defendant to commit the plaintiff to the penitentiary in the District of Columbia, in accordance with said sentence.

4. Because the said letter, and the said directions therein contained, are unconstitutional, illegal, and void.

5. Because the said plea is altogether vicious and insufficient in law, and wants form.

There was a joinder in demurrer and judgment for the defendant.

This presents the question, whether the defendant, as marshal, was authorized to execute the direction to receive the plaintiff, then in custody of the captain of the United States steamer Engineer, to deliver him to the keeper of the penitentiary of the District of Columbia.

The demurrer admits that the court martial was lawfully organized; that the crime charged was one forbidden by law; that the court had jurisdiction of the charge as it was made; that a trial took place before the court upon the charge, and the defendant's plea of not guilty; and that upon the evidence in the case the court found Dynes guilty of an attempt to desert, and sentenced him to be punished, as has been already stated; that the sentence of the court was approved by the Secretary, and that by his direction Dynes was brought to Washington; and that the defendant was marshal for the District of Columbia, and that in receiving Dynes, and committing him to the keeper of the penitentiary, he obeyed the orders of the President of the United States in execution of the sentence. Among the powers conferred upon Congress by the 8th section of the first article of the Constitution, are the following: "to provide and maintain a navy;" "to make rules for the government of the land and naval forces." And the 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land or naval forces." And by the 2d section of the 2d article of the Constitution it is declared that

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States."

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

In pursuance of the power just recited from the 8th section of the first article of the Constitution, Congress passed the act of the 23d April, 1800, (2 Stat. at Large, 45,) providing rules for the government of the navy. The 17th article of that act is: "And if any person in the navy shall desert or entice others to desert, he shall suffer death, or such other punishment as a court martial shall adjudge." The 32d article is: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The 35th article provides for the appointment of courts martial to try all offences which may arise in the naval service. The 38th article provides that charges shall be made in writing, which was done in this case. The court was lawfully constituted, the charge made in writing, and Dynes appeared and pleaded to the charge. Now, the demurrer admits, if Dynes had been found guilty of desertion, that no complaint would have been made against the conviction for want of jurisdiction in the court. But as it appears that the court, instead of finding Dynes guilty of the high offence of desertion, which authorizes the punishment of death, convicted him of attempting to desert, and sentenced him to imprisonment for six months at hard labor in the penitentiary of the District of Columbia, it is argued that the court had no jurisdiction or authority to pass such a sentence; in other words, in the language of the counsel of the plaintiff in error, that "the finding was *coram non judice*, it being for an offence of which the plaintiff was never charged, and of which the court had no cognizance. That the subject-matter of the sentence, the punishment inflicted, was not within their jurisdiction, and is a punishment which they had no sort of permission or authority of law to inflict."

But the finding of the court against the prisoner was what is known in the administration of criminal law as a *partial verdict*, in which the accused is acquitted of a part of the accusation against him, and found guilty of the residue. As when there is an acquittal on one count, and a verdict of guilty on

another. Or when the charge is of a higher degree, including one of a lesser, there may be a finding by a *partial verdict* of the latter. As upon a charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry. So, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault.

The objection is ingeniously worded, was very ably argued, and, we may add, with a clear view and knowledge of what the law is upon such a subject, and how the plaintiff's case must be brought under it, to make the defendant responsible on this action for false imprisonment. But it substitutes an imputed error in the finding of the court for the original subject-matter of its jurisdiction, seeking to make the marshal answerable for his mere ministerial execution of a sentence, which the court passed, the Secretary of the Navy approved, and which the President of the United States, as constitutional commander-in-chief of the army and navy of the United States, directed the marshal to execute, by receiving the prisoner and convict, Dynes, from the naval officer then having him in custody, to transfer him to the penitentiary, in accordance with the sentence which the court had passed upon him. And this upon the principle, that where a court has no jurisdiction over the subject-matter, it tries and assumes it; or where an inferior court has jurisdiction over the subject-matter, *but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice*, that trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the execution of its judgment. Such is the law in either case, in respect to the court, which acts without having jurisdiction over the subject-matter; or which, having jurisdiction, disregards the rules of proceeding enjoined by the law for its exercise, so as to render the case *coram non judice*. (Cole's case, John. W., 171; Dawson *v.* Gill, 1 East., 64; Smith *v.* Beucher, Hardin, 71; Martin *v.* Marshall, Hob., 68; Weaver *v.* Clifford, 2 Bul., 64; 2 Wils., 385.) In both cases, the law is, that an officer executing the process of a court which has acted without jurisdiction over the subject-matter becomes a trespasser, it being better for the peace of society, and its interests of every kind, that the responsibility of determining whether the court has or has not jurisdiction should be upon the officer, than that a void writ should be executed. This court, so far back as the year 1806, said, in the case of Wise and Withers, 3 Cr., 331, p. 337 of that case, "It follows, from this opinion, that a court martial has no jurisdiction over a justice of the

peace as a militiaman; he could never be legally enrolled; and *it is a principle*, that a decision of such a tribunal, in a case *clearly without its jurisdiction*, cannot protect the officer who executes it. The *court and the officer are all trespassers.*" (2 Brown, 124; 10 Cr., 69; Mark's Rep., 118; 8 Term R., 424; 4 Mass. R., 234.)

I add two cases from the 2d of Horace Gray's reports of the Supreme Judicial Federal Court of Massachusetts, furnished me by Mr. Justice Campbell, of Pifer *v.* Person, 120; Clark *v.* Whipple, in May and Kent, 410.

But the case in hand is not one of a court without jurisdiction over the subject-matter, or that of one which has neglected the forms and rules of precedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed as they are directed to be by the statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void. Whatever the sentence is, or may have been, as it was not a trial by court martial taking place out of the United States, it could not have been carried into execution but by the confirmation of the President, had it extended to loss of life, or in cases not extending to loss of life, as this did not, but by the confirmation of the Secretary of the Navy, who ordered the court. And if a sentence be so confirmed, it becomes final, and must be executed, unless the President pardons the offender. It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence. When confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the *subject-matter or charge*, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury.

Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment. In England, it has been done by the civil courts, ever since the passage of the 1 Mutiny act of William and Mary, ch. 5, 3d April, 1689. And it must have been with

a direct reference to what the law was in England, that this court said, in Wise *v.* Withers, 3 Cr., 337, that in such a case "the court and the officers are all trespassers." When we speak of *proceedings* in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law.

Courts martial derive their jurisdiction and are regulated with us by an act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from *the definition of the crime* that it comprehends, and that the Legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognised to be such by the practice of courts martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts martial. And when offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance. With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court martial has no *jurisdiction over the subject-matter of the charge* it has been convened

to try, or shall inflict a punishment *forbidden by the law*, though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress. (Harman *v.* Tappenden, 1 East., 555; as to ministerial officers, Marshall's case, 10 Cr., 76; Morrison *v.* Sloper, Wells, 30; Parton *v.* Williams, B. and A., 330; and as to justices of the peace, by Ld.. Tenterden, in Basten *v.* Carew, 3 B. and C., 653; Mules *v.* Calcott, 6 Bins, 85.)

Such is the law of England. By the mutiny acts, courts martial have been created, with authority to try those who are a part of the army or navy for breaches of military or naval duty. It has been repeatedly determined that the sentences of those courts are conclusive in any action brought in the courts of common law. But the courts of common law will examine whether courts martial have exceeded the jurisdiction given them, though it is said, "not, however, after the sentence has been ratified and carried into execution." (Grant *v.* Gould, 2 H. Black, 69; Ship Bounty, 1 East., 313; Shalford's case, 1 East., 313; Mann *v.* Owen, 9 B. and C., 595; in the matter of Poe, 5 B. and A., 681, on a motion for a prohibition.) A judge, or any person acting by authority as such, where he has over the subject-matter, and over the person, a general jurisdiction which he has not exceeded, will not be liable to have his judgment examined in an action brought against himself; but if jurisdiction be wanting over the subject-matter, and over the person, such judgment would be examinable. (Hammond *v.* Howel, 1 Mod., 184; Garnett *v.* Ferrand, 6 B. and C., 611; Moslyn *v.* Fabugas, Cow., 172; Bonham's case, 8 Co., 114; Greenwell *v.* Burwell, 1 Le Roy, 454; by Holt, C. J., 1 Le Roy, 470; Lumley *v.* Lance, 2 Le Roy, 767; Basten *v.* Carew, 3 B. and C., 649. The preceding cited cases relate to judges of record. As to judges not of record, ecclesiastical judges, Acherly *v.* Parkerson, 3 M. and S., 411. Commissioners of court of bequests, Aldridge *v.* Haines, 2 B. and Ad., 395. As to returning officer of election, Ashby *v.* White, 2 Ld. Raym., 941; Cullen *v.* Morris, 2 Start, 577.)

In this case, all of us think that the court which tried Dynes had jurisdiction over the subject-matter of the charge against him; that the sentence of the court against him was not forbidden by law; and that, having been approved by the Secretary of the Navy as a fair deduction from the 17th article of the act of April 23d, 1800, and that Dynes having been brought to Washington as a prisoner by the direction of the Secretary, that the President of the United States, as constitutional commander-in-chief of the army and navy, and in virtue of his

constitutional obligation, that "He shall take care that the laws be faithfully executed," violated no law in directing the marshal to receive the prisoner Dynes from the officer commanding the United States steamer Engineer, for the purpose of transferring him to the penitentiary of the District of Columbia; and, consequently, that the marshal is not answerable in this action of trespass and false imprisonment.

We affirm the judgment of the Circuit Court.

Mr. Justice McLean dissented.

DAVID D. WITHERS, PLAINTIFF IN ERROR, *v.* RANSOM BUCKLEY, DANIEL WILSON, NEWTON HUFF, HUGH R. DAVIS, DOUGLAS H. COOPER, CHARLES VAUGHAN, AND JAMES METCALF.

This court has no jurisdiction, under the 25th section of the judiciary act of 1789, of the question whether or not a law of a State is in opposition to the Constitution of that State.

Therefore, where it is alleged that the Constitution of a State declares that private property shall not be taken for public uses, and that the highest court of the State has sustained the validity of a law which violates this constitutional provision, this court has no power to review that decision.

The fifth article of the amendments of the Constitution of the United States was intended to prevent the Government of the United States from taking private property for public uses without just compensation, and was not intended as a restraint upon the State Governments.

A law of the State of Mississippi, for improving the navigation of a river which empties itself into the Mississippi, is not in conflict with the act of Congress providing for the admission of that State into the Union, which act guaranties the free navigation of the Mississippi river.

Being admitted upon a footing of equality with the other States, the State of Mississippi had the rightful power to change the channels or courses of rivers within the interior of the State, for purposes of internal improvement.

And, moreover, the law in question does not propose to affect the navigation of the Mississippi river, but only a small stream running into it.

THIS case was brought up from the High Court of Errors and Appeals of the State of Mississippi, 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. Benjamin* for the plaintiff in error, and *Mr. Carlisle* for the defendants. There was also a brief filed by *Mr. Yerger* for the plaintiff in error, and by *Mr. Badger* and *Mr. Carlisle* for the defendants.

The points made on behalf of the plaintiff in error are taken from the brief of *Mr. Yerger:*

I. There is no doubt of the jurisdiction of the court of equity upon the case stated by the bill. (4 Cush. Rep., 86; 3 Wend. Rep., 636; 2 John. Ch. Rep., 165; 6 Paige's Rep., 262.)

II. Apart from any public or private nuisance, the bill alleges special injury to the complainant, which is within the principle of the above-cited decisions, and others hereinafter cited.

III. We contend that the act of 1850 is unconstitutional. First, because it provides no compensation to the complainant; and, secondly, that it is void, because prohibited by the ordinance of Congress.

1. As to its unconstitutionality. The land of complainant is on the waters of Old river and the Narrows. The water runs through it. This is not a navigable stream, according to common-law meaning of the term. But a grant of land on or bounded by such a stream as this, passes the right to the land to the middle of the stream. The use of the water also, as an incident, passes by a grant, and is as sacred a right as the land itself. (See Morgan *v.* Reading, 3 Smedes and Mar.; 2 John. Ch. Rep., 165.)

Where a grant of land is on a stream above the ebb and flow of the tide, the land passes, and the water also, subject only to the right of the public to navigate it. The use of the water is a part of the freehold. (Angel on Water-courses, pp. 1—11, 12, 13—29; Co. Litt., 4; 2 Brown Com., 142; Bullen *v.* Raynells, 2 N. Ham., 255.)

In all cases, above the ebb and flow of the tide, a right of property in the water passes with a grant of the land, and it cannot be divested or taken away without compensation, as the above authorities show.

The case from Harrington's Rep., and from 2 Peters Rep., were cases of navigable waters according to common law, as the cases show, in which case there can be no individual right to the water.

In the case in 8 Cowen, 146, the only injury to plaintiff was the temporary erection of bridges to build the pier, and that it was like materials used in building, it might be a temporary inconvenience to a neighbor, &c. (See pages 150 and 151.)

It may be said that the principle of the common law, as to streams where the tide ebbs and flows, applies to the waters of the Mississippi and the streams which flow into it.

But this was the great point, argued most laboriously, and decided by the High Court of Mississippi, in the case of Morgan *v.* Reading, 3 Sm. and Mar., 366, and numerous other authorities are against it. (See also Gardner *v.* Village of Newberry, 2 John. Ch. Rep., 165; Belknap *v.* Belknap, 2 John. Ch., 463; 3 Paige Rep., 577; 1 Dev. Rep., 121; 6 Paige Rep., 262; 4 Mason, 379.)

IV. But the ordinance of Congress also prevents the Legis-

lature from obstructing the navigation of the Mississippi and its waters. It may improve them, but it cannot obstruct, by damming up the water, or diverting it from its natural course, so as to entirely deprive its navigation. (Hutchinson's Code, 55, 57, 59.)

The case in 1 McLean's Rep. is directly in point. It decides that a private injury must be alleged; that the mere fact of a right to navigate, without using or intending to use the right, and without private injury alleged, would not do. But when the navigation was obstructed, and a private injury was alleged, equity would interfere. (See pages 343, 344, 346, 350, 351, 352, 353.)

Act of 1819, p. 106, declares Homochitto navigable, and the bill alleges that from time immemorial the grantors of plaintiff and himself used the water to supply this place, and to transport cotton and supplies to and from his place.

Mr. Carlisle, after commenting upon the points presented by the counsel for the plaintiff in error, presented the following view of the case:

The jurisdiction of this court is assumed upon the allegation, which the plaintiff in error is to maintain, that the statute of Mississippi is unconstitutional; because it purports to authorize the taking of private property for public use, without just compensation; and because it is repugnant to the 4th section of the act of 1st March, 1817, (3 Stat., 349.)

But the bill does not show any case of taking private property for public use. The complaint is of an apprehended consequential injury, resulting from diverting the waters of the Homochitto. No land of the complainant lies on that river. It is a navigable river, lying wholly within the territorial limits of the State of Mississippi. As such, it is subject to the power exercised by this statute; and its waters are not the subject of private property in any sense of the words "private property" in the Constitution, or in any sense which can interfere with the full exercise of the power in question, according to the discretion of the Legislature. If the plaintiff in error suffer loss through the lawful exercise of this public power, it is *damnum absque injuria*.

Least of all (it is submitted) can a party so situated restrain by injunction the exercise of such a power.

As to the supposed conflict with the act of 1817, the obvious answer is, that the statute is not to obstruct the Homochitto, but to improve its navigation. "Old river and the Narrows" are not "navigable rivers and waters," in the meaning of that act. Besides, even if they were, it is submitted that the plain-

tiff in error, upon the case made by his bill, would have no standing either at law or in equity, and has no right to call upon this court to pronounce upon the constitutionality of the statute of Mississippi.

Mr. Justice DANIEL delivered the opinion of the court.

Upon a writ of error to the High Court of Errors and Appeals of the State of Mississippi, under the authority of the 25th section of the act of Congress of September 24th, 1789, establishing the judicial courts of the United States.

The plaintiff in error, by his bill in the State court, alleged that he is the owner of a large and valuable plantation in the State of Mississippi, situated on what is called *Old river*, being a former bed of the Mississippi river, but which was cut off and made derelict by a change in the course of the Mississippi in the year 1796. That the Homochitto river, in said State, empties its waters into the said Old river at a point above, or north of, the complainant's plantation, and at low stages of the waters of the Mississippi the waters of the Homochitto pass around through the bed of Old river, and out by the narrows thereof into the Mississippi. That the flow of the waters of the Homochitto removes the deposits of mud occasioned by the overflow of the Mississippi, and thus keeps open the outlet of Old river, to the great advantage of the complainant, and of others similarly situated on Old river.

That the Legislature of Mississippi, by a law approved on the 5th of March, 1850, entitled "An act regulating and defining the powers of the commissioners of Homochitto river," appointed the defendants commissioners for the purpose of "improving the navigation of the Homochitto river, and any outlet from the same, through Old river and Buffalo bayou to the Mississippi river, and for removing any obstructions in said streams, and excavating and digging a canal unto the Buffalo from the Homochitto river, or from Old river into the Buffalo." That said canal commences on Old river below the mouth of the Homochitto river, and above the lands of the complainant, and will neither begin, pass through, nor terminate upon, the lands of the complainant. That the complainant and his grantors have ever enjoyed and used the waters flowing through his and their lands, for agricultural and domestic purposes, and for navigation in transporting their crops to markets, and receiving supplies therefrom; first when Old river was a part of the Mississippi, and since the cut-off in 1796, by the waters supplied to Old river from the Homochitto, and the back waters of the Mississippi in time of floods. That, by the said laws of Mississippi, no compensation is provided

for the injury to be done to the complainant by the diversion of the waters of the Homochitto and Old river from the lands of complainant, and the destruction of the navigation which said waters afford to his plantation, because said canal or contemplated outlet is not to be made upon the complainant's lands. The bill of the complainant then charged that the laws of Mississippi are invalid for having omitted to provide compensation for the injury to be inflicted by them upon the complainant, and are, by that omission, in violation of the fundamental laws both of the United States and of the State of Mississippi, the Constitutions of both of which declare that private property shall not be taken for public use without just compensation being made therefor; and are also in violation of the act of Congress of March 1st, 1817, authorizing the people of Mississippi to form a Constitution, and of the ordinance passed on the 15th of August, 1817, in pursuance of the act of Congress, both the act of Congress and ordinance providing that the Mississippi river, and the navigable rivers leading into the same, shall be common highways, and forever free, as well to the inhabitants of Mississippi as to other citizens of the United States.

To this bill a demurrer was interposed by the defendants in error, and the cause having been carried to the High Court of Errors and Appeals of Mississippi, by that court the demurrer was sustained, and the bill dismissed, with costs.

The correctness or incorrectness of the decree of the High Court of Errors and Appeals is the subject of inquiry and decision now before this court. In the prosecution of our inquiry, it is proper to disembarrass it of matters with which it has been attempted to associate or surround it; matters having no just connection therewith, and the introduction of which tends only to obstruct and obscure the elucidation of truth.

Thus it is charged in the complainant's bill, that the law authorizing the improvement of the Homochitto river is void, because it violates the Constitution of Mississippi, by omitting to provide a compensation for the injury which might be done to individuals by carrying that law into effect; the Constitution of the State having declared that private property shall not be taken for public use without just compensation being made therefor. In answer to this charge it is sufficient to state, that this court never has, and does not, assume the right to pronounce authoritatively upon the wisdom or justice of the legislation of the States, when operating upon their own citizens, and upon subjects of property clearly within their own territory and appropriate cognizance, except so far as the Constitution of the United States

expressly, or by inevitable implication, may have made it the duty of this court to control the action of the State Governments. Nor has it been deemed the province of this court to abrogate or overrule the interpretation put upon their own respective statutes by the courts of the several States, whether such interpretation had reference to the ordinary rights of person or property, or to the nature and extent of the legislative powers vested by the Constitutions of the several States, and their coincidence with acts of legislation performed under the delegation of those powers. These are functions wisely and necessarily left by this court untouched in the State tribunals, the assumption of which by the Federal judiciary, as it would embrace every matter upon which the Governments of the States could operate, would, in effect, amount to the annihilation of those Governments. The doctrine of this court as here stated has been clearly affirmed.

In the case of Jackson *v.* Lamphire, in 3d of Peters, on page 289 of that volume, this court has declared that it "has no authority on a writ of error from a State court to declare a State law void on account of its collision with a State Constitution, it not being a case embraced in the judiciary act, which alone gives power to issue a writ of error to the State court." This court say, "that they will therefore refrain from expressing any opinion on the points made by counsel in relation to the Constitution of New York." See also the ruling of this court upon the construction of State laws, in the cases of Polk's Lessee *v.* Wendal et al., in 9th Cranch, p. 87, and of the West River Bridge Company *v.* Dix et al., 6 How., p. 507. The conformity, therefore, to the State Constitution, of the statute appointing the commissioners of the Homochitto river, and prescribing their powers and duties, was a question appropriately belonging to the State court, and its decision of that question is not properly subject to re-examination here.

The statute of Mississippi is next assailed, on the charge that it violates the 5th article of the amendments of the Constitution of the United States, of which the clause in the Constitution of Mississippi, relied on by the plaintiff in error, is a literal transcript. In this charge is instanced another effort to confuse and obstruct the only legitimate inquiry arising on the record before us, viz: that which relates to the authority of the High Court of Errors and Appeals of Mississippi, for their decree pronounced in this cause.

To every person acquainted with the history of the Federal Government, it is familiarly known, that the ten amendments first engrafted upon the Constitution had their origin in the apprehension that in the investment of powers made by that

instrument in the Federal Government, the safety of the States and their citizens had not been sufficiently guarded. That from this apprehension arose the chief opposition shown to the adoption of the Constitution. That, in order to remove the cause of this apprehension, and to effect that security which it was feared the original instrument had failed to accomplish, twelve articles of amendment were proposed at the first session of the first Congress, and the ten first articles in the existing series of amendments were adopted and ratified by Congress and by the States, two of the twelve proposed amendments having been rejected. The amendments thus adopted were designed to be modifications of the powers vested in the Federal Government, and their language is susceptible of no other rational, literal, or verbal acceptation. In this acceptation this court has repeatedly and uniformly expounded those amendments in cases having reference to retroactive statutes, to the right of eminent domain, to the execution of plans for internal improvement; in opposition to which, the clause in the fifth article of the amendments of the Constitution has been urged. In all such cases, this court has ruled, that the clause in question was applicable to the Federal Government alone, and not to the States, except so far as it was designed for their security against Federal power. Indeed, so full, so emphatic, and conclusive, is the doctrine of this court, as promulged by the late Chief Justice Marshall, in the case of Baron *v.* The Mayor and City Council of Baltimore, in the 7th of Peters, pp. 247–'8, that it would seem to require nothing less than an effort to unsettle the most deliberate and best-considered conclusions of the court, to attempt to shake or disturb that doctrine. An extract from the reasoning of the Chief Justice, so full, so unanswerable on this point, may not be unfruitful of benefit as a guide to the future. After stating that the case was brought before the court in virtue of the 25th section of the judiciary act, the Chief Justice proceeds: "The plaintiff in error contends that it comes within that clause of the 5th amendment to the Constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

"The question thus presented we think of great importance, but not of much difficulty.

"The Constitution was ordained and established by the people of the United States for themselves; for their own govern-

ment, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular Government as its judgment dictated. The people of the United States framed such a Government for the United States as they supposed best adapted to their situation, and best adapted to promote their interests. The powers they conferred on this Government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the Government created by the instrument. They are limitations of power granted by the instrument itself; not of distinct Governments, framed by different persons, and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions they have imposed such restrictions on their respective Governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge *exclusively*, and with which others interfere no farther than they are supposed to have a common interest."

Again, adverting to the causes which led to the proposal and adoption of the amendments of the Constitution, the same judge remarks, ib., p. 250—and these remarks embrace the whole series of articles adopted—"In almost every Convention in which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government; not against those of the local Governments.

"In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State Governments. This court cannot so apply them." (Vide also the cases of Fox *v.* The State of Ohio, 5 How., 411, and of The West River Bridge Company *v.* Dix et al., 6 How., 507.)

From the aforegoing view, it follows that neither the Constitution and laws of Mississippi, as interpreted by the High Court of that State, nor the provision of the fifth article of the amendments of the Federal Constitution, as construed by this court, can have any just applicability to the legitimate inquiry now before us.

The remaining objection to the decree of the High Court of

Errors and Appeals—that which is most directly pertinent to the present controversy—is that founded upon the allegation, that the law of Mississippi, of March 5th, 1850, creating the board of commissioners of the Homochitto, for the purpose of improving the navigation of that river, and of any outlet from the same through Old river and Buffalo bayou to the Mississippi, and for excavating a canal into the Buffalo from the Homochitto, or from Old river to the Buffalo, is a violation of the act of Congress of the 1st of March, 1817, authorizing the people of the Mississippi Territory to form a Constitution, which act declares "that the Mississippi river, and the navigable rivers and waters leading into the same, shall be common highways, and forever free as well to the inhabitants of the State of Mississippi as to other citizens of the United States."

In considering this act of Congress of March 1st, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign Government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee *v.* Hogan, 3 How., p. 223. The act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient Government, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, or might be productive of a change in the value of private property. Such consequences are not unfrequently and indeed unavoidably incident to public and general measures highly promotive of and absolutely necessary to the public good. And here it may be asked, whether the law complained of, and the measures said to be in contemplation for its execution, are in reality in conflict with the act of Congress of March 1st, 1817, with respect either to the letter or the spirit of the act? On this point may be cited the case of Veazie et al. *v.* Moor, in 14 How., 568.

By the allegations of the bill it appears that this trace or channel, which is distinguished by the appellation of Old river, is not in fact, and never was, a separate navigable river. It

was once the bed or channel of the Mississippi, but, by natural causes, the latter many years since changed its bed or course, thereby rendering derelict the former bed or channel, which would be wholly without water, except what occasionally is forced into it from freshets in the Mississippi, and that which is received from the current of the Homochitto. With no propriety of language, then, can it be pretended that the contemplated communication between the Homochitto and the Buffalo bayou would be the violation of a law which declares that the waters of the Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and forever free as well to the inhabitants of the State as to other citizens of the United States. Old river was once the bed or a portion of the Mississippi, but never a separate navigable river flowing into the Mississippi. Any improvement, therefore, in the facilities of reaching the Mississippi by another river, cannot be an obstruction in what never was, in any correct sense of the phrase, a navigable river leading or flowing into the Mississippi.

But, for argument, let it be conceded that this derelict channel of the Mississippi, called Old river, is in truth a navigable river leading or flowing into the Mississippi; it would by no means follow that a diversion into the Buffalo bayou of waters, in whole or in part, which pass from Homochitto into Old river, would be a violation of the act of Congress of March 1st, 1817, in its letter or its spirit; or of any condition which Congress had power to impose on the admission of the new State. It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the State. Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied. Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guarantied by the very nature of the Federal compact. Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, water-courses, and highways, situated within the State. Thus situated, as appears on the face of the bill, are the derelict bed of the Mississippi, called Old river, the Homochitto river, the Buffalo bayou, and the line of the canal by which it is proposed that

the two last shall be united for the more easy and certain access to the Mississippi.

The act of the Legislature of Mississippi, therefore, is strictly within the legitimate and even essential powers of the State, is in violation of neither the Constitution nor laws of the United States, and presents no conjuncture or aspect by which this court would be warranted to supervise or control the decree of the High Court of Errors and Appeals of Mississippi. We are therefore of the opinion that the decree of that court be affirmed.

DAVID A. SECOMBE ET AL. *v.* FRANKLIN STEELE.

When a transcript of a record of another court was attached to the answer as an exhibit, and portions of it particularly referred to, and the record of the entire case pleaded, a decree, certified by the clerk, which had been executed by the parties, must be considered as part of the record, although it had not the signature of the judge. The signature of the judge is not the only evidence by which a decree can be authenticated.

Property was agreed to be sold, and the payment was to be made by a deposit of the price in one of two banks, in Boston, and a certificate delivered to the vendor. The vendee made the deposit in another bank, in Boston, and tendered the certificate to the vendor, within the time limited, and the vendor having refused to receive it, he tendered the purchase-money and interest, and that being refused, he filed his bill for a specific performance, and paid the money into court. Held, under the circumstances, to be sufficient.

Creditors of the vendor, who recovered judgments and sold the property, pending a suit for a specific performance, in which the purchase-money had been paid into court, are not necessary parties to the suit, nor are the purchasers at the sheriff's sale under such judgments.

Under a statute of Minnesota, the court of chancery might divest the title of the defendant in the land, without requiring him to make a conveyance.

THIS case was brought up, by writ of error, from the Supreme Court of the Territory of Minnesota.

By stipulation of counsel, Secombe was made the representative of numerous other parties engaged in a common cause.

The chronological history of the case was this.

In the latter part of 1851, suits were pending between Steele and Arnold W. Taylor, with regard to their respective interests in a parcel of land near St. Anthony's Falls, of which they were tenants in common.

On the 17th of January, 1852, Taylor executed his bond of conveyance of the property to Steele, for the consideration of twenty-five thousand dollars, one thousand of which was to be paid in cash, and the remaining twenty-four to be deposited to the credit of Taylor, within sixty days, in the Merchants' or Suffolk Bank, in Boston.

On the 19th of January, 1852, this bond of conveyance was

recorded in the proper office, under the following provisions of the Minnesota Revised Statutes, chap. 47, p. 215:

"SEC. 1. All bonds, contracts, or agreements, concerning any interest in lands in this Territory, made in writing under seal, attested by one or more witnesses, and acknowledged before some person authorized by law to take acknowledgments of deeds, may be recorded in the office of the register of deeds of the county where the land lies."

"SEC. 3. Each and every bond, contract, or agreement, made and recorded according to the provisions of the first section of this chapter, shall be notice to, and take precedence of, any subsequent purchaser or purchasers, and shall operate as a lien upon the lands therein described, according to its import and meaning."

One of the questions which arose in the case was with reference to the import and meaning of the bond.

It was alleged by Steele that, on the 17th of March, 1852, he tendered to the Suffolk Bank, and also to the Merchants' Bank, in Boston, the sum of twenty-four thousand dollars, and requested a certificate of deposit therefor; but that each of the banks refused to receive the money. In consequence of such refusal, he deposited the money in the Bank of Commerce, at Boston, and received a certificate of deposit from that bank. On the 5th of May, 1852, he tendered this certificate to Taylor, who refused to receive it or to execute a deed of conveyance.

On the 25th of May, 1852, Steele filed a bill in equity, (that form of proceeding not having been then abolished,) praying for a specific performance of his contract with Taylor, and paid into court the sum of $24,240. He also obtained an injunction prohibiting Taylor from selling or encumbering the property, &c. Taylor answered the bill, and moved to dissolve the injunction, which motion was overruled, and the case stood for hearing upon bill and answer in July, 1852.

During the winter of 1852–'3, whilst the cause was pending as above described, Secombe and other creditors of Taylor obtained judgments against him, sued out executions which were levied upon the property included in his bond to Steele, and at the sheriff's sale the plaintiffs in error became purchasers, receiving deeds for their respective purchases.

In March, 1853, Secombe and the other purchasers petitioned to be admitted as parties to defend the suit against Taylor, which petition was granted, and a certain time given for the filing of their answers.

In April, 1853, Steele moved to vacate this order and dismiss the petitions.

Affidavits were filed on both sides, and on the 4th of May, 1853, the order was vacated, and the petitions dismissed.

From this order, Secombe took an appeal to the Supreme Court of the Territory.

On the same 4th of May, a decree was made by the court, whereby Taylor was ordered to execute conveyances to Steele, and the sum of $24,240, which had been deposited in court, was ordered to be paid to Taylor. This decree was founded on the consent of Steele and Taylor, filed in court.

Pending the above appeal, Steele instituted the suit now under the consideration of this court against Secombe and fifty-three other persons, who claimed under the sheriff's sales. It was an action at law, brought under a local statute, by way of petition. The plaintiff was in possession, and brought the suit against the persons who claimed an estate or interest in the property. The petition was constructed like a bill in chancery, and, after reciting the facts in the case, concluded thus: "wherefore the plaintiff demands judgment, determining the title to the said real estate so conveyed to him by the said Arnold W. Taylor to be in the plaintiff, and requiring the defendants, respectively, to release their said adverse claims to estates or interests therein to the plaintiff," &c.

The defendants answered; the plaintiff demurred; the court sustained the demurrer, and gave the defendants leave to file an amended answer.

The amended answer introduced the record of the former suit; when the plaintiff moved to strike out all that part of the answer, and demurred to the residue. The court sustained the motion and demurrer, and gave judgment for the plaintiff, which on appeal was affirmed by the Supreme Court of the Territory.

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

It was argued by *Mr. Carlisle* and *Mr. Badger* for the plaintiffs in error, and by *Mr. Cushing* and *Mr. Gillet* for the defendants.

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

I. That Taylor's estate in the lands was the subject of execution; and that the same passed to the plaintiffs in error, in respective parcels, subject to whatever equity Steele might establish in the then pending suit in equity. It was the legal estate which was seized and sold. But even if it were otherwise, it was still the subject of execution. (Revised Statutes,

p. 363, sec. 91—p. 346, sec. 139—p. 361, secs. 76, 77; 2 Story's Eq. Jur., secs. 1049-'50-'51.)

II. That the title thus acquired was "by operation of law," or, in other words, by involuntary assignment; and therefore not even a decree thereafter passed against Taylor would have affected such title; his assigns, by operation of law, not being parties to the same. (Story Eq. Pl., sec. 342 and notes—sec. 351 and note; Sedgwick *v.* Cleaveland, 7 Paige, 290; Boring *v.* Lemmon, 5 H. and J., 225; Bennet *v.* Williams, 5 Ohio, 462; Deas *v.* Thom, 3 J. R., 543; Storm *v.* Davenport, 1 Sandf. C. R., 135.)

III. That, by virtue of the title so acquired, the plaintiffs in error were subrogated to Taylor's rights in respect of the purchase-money, in the event of Steele's equity upon the lands being established. Therefore, they had an "adverse claim, estate, or interest," in the lands, which was to be "determined" in this suit. For the lands stood as security for the purchase-money, and they holding the legal titles could not be decreed to convey, or otherwise be divested of the same, without their consent, except on payment of the purchase-money. (Moyer *v.* Hinman, 17 Barb. S. C. Rep., 137, and cases cited by the court in that case; Tomlinson *v.* Blackburn et al., 2 Iredell's Eq. Rep., p. 509, and cases then cited by the court.)

IV. In fact there was no decree even against Taylor. What is erroneously printed as part of the record, under title of "Copy of consent for decree," and "Copy of decree," never were part of the record, nor in this cause for any purpose. But if such decree, by consent, had been passed, it would have been, in effect, the mere act of the parties. It is for this reason that no rehearing or appeal lies in such case. (Webb *v.* Webb, 3 Swan, 368; Lansing *v.* Alb. Ins. Co., Hopk., 102; Bradish *v.* Gee, Amb., 229; Harrison *v.* Ramsey, 2 Ves., 288; Belt's Supp., 413.)

Disregarding these principles, the court below so proceeded as to debar these plaintiffs in error from setting up any "adverse claim, estate, or title," in these lands, whether by reason of defect in Steele's equity, or by way of holding the legal titles as security for the purchase-money; and this in a suit brought against them "to determine such adverse claim, estate, or title," and while their appeal was pending from the decree dismissing their petitions in the original suit between Taylor and Steele.

The special errors which have led to this result, and which are now assigned, are as follows:

1st. The Supreme Court of Minnesota erred, in that it did not reverse the order of the District Court in this suit, grant-

ing the motion of the plaintiff, Steele, to strike out portions of the answer of Secombe, (by stipulation answering for all the defendants.)

a. The first, fourth, fifth, and eighth portions of the said answer, stricken out by the said order, were directly responsive to allegations contained in the plaintiff's complaint, tendering material issues necessary to be decided in order to the "determining the adverse claim, estate, or interest," of the defendants; for which purpose, only the action was authorized by statute, (*ubi supra,*) and even if not absolutely material, they were issues tendered by the plaintiff, and it was not for him to object that the defendants occupied the ground which he had opened.

b. The second portion of the said answer, so stricken out, tendered to the plaintiff a material issue. The action being "for the purpose of determining such adverse claim, estate, or interest," it is difficult to perceive how the defendants could be denied the right to show that the land which they had purchased was clear of the pretended equity of Steele. This portion of the answer was equivalent to a plea of non-performance of the conditions of the bond, and whether such plea was true or false, in fact, was the very matter to be tried. But the court refused to allow any such issue to be made.

c. The sixth and seventh portions, so stricken out, alleged fraud and collusion between Steele and Taylor, to defraud and defeat the creditors of Taylor, and purchasers at the sheriff's sale; and were therefore proper to be inquired into, in law and fact, as at once impeaching the plaintiff's alleged right, and fortifying the defendants' titles.

2d. The said court erred, in that they did not reverse the order and judgment of the District Court sustaining the demurrer to the residue of the defendants' answer.

a. The first special cause of demurrer assigned, is to the effect that the bond to convey, on conditions performed, vested such a title in Steele as absolutely precluded these plaintiffs in error from setting up any "adverse claim, estate, or title," in the land, whether as free of the pretended equity of Steele, or (conceding it) as security for the payment of the purchase-money. This pretension is based upon the supposed effect of the recording of the bond. But it is evident that the record has no other effect than that of constructive notice of the contents of the bond.

b. The second cause assigned is, that the answer assumes that the title of Steele is founded upon the proceedings in equity; whereas, the demurrer asserts that it is wholly independent of that suit. This is shown to be erroneous, if the principles hereinbefore asserted are correct. Although Steele's

alleged equity was founded on the bond, his right to the lands upon which the plaintiffs in error held this "adverse claim, estate, or interest," was not determined, unless it was determined in that suit. And if they had such "adverse claim, estate, or interest," it is evident that there was never any adjudication thereon, since they were dismissed from that suit, and their appeal from that decree was still pending.

c. The third cause assigned is, that whereas the answer sets up that there was no decree as against Taylor, yet it appears from the "paper-book," exhibited with the answer, that there was such a decree. But it will be observed that it is only certain specified papers which are referred to in the answer, and reference is made to the paper-book for true copies of these only. Besides, it has already been shown that this was only the *form* of a decred, not signed or enrolled; and that even if it had been signed or enrolled, it was by consent, and is only the act of the parties; and that it could not affect the "adverse claim, estate, or interest," of the plaintiffs in error, which was the subject-matter of this suit.

The counsel for the defendant in error maintained the following propositions:

1. The agreement between Steele and Taylor for the sale of the land was a *bona fide* and fair transaction, and is unimpeached, and constituted a valid lien upon said land, and Steele's interest therein was unaffected by the purchase of Secombe and others.

2. That Steele performed the agreement on his part, and the title in him became complete upon the execution of the deeds to him by Taylor.

3. That Steele paid Taylor the full face of the agreement is not denied, but is admitted by the pleadings and proved by the record attached to the defendants' answer, and especially by their petitions to share in the money paid into court by Steele for Taylor.

4. That the deeds from Taylor to Steele conform to the terms of the agreement and the requirement of the decree.

5. Under the decree, the title was perfect without the execution of the deeds.

6. The pleadings in the equity case, and also in this suit, show facts upon which a court of equity would compel a performance by Taylor of his agreement to convey to Steele.

7. That at the time of the sheriff's sales, under which the defendants claim, Taylor had no estates in the land which he could have transferred, the land belonging to Steele, and the purchase-money to Taylor, the claim of the latter upon the

land being that of security for the payment of the purchase-money.

8. The answers of the defendants present no material issuable facts.

9. That there is nothing before this court except the questions arising upon the answers after being amended by the order of the court, the final judgment being upon the remaining portions of the answer.

10. That the decree in the suit between Steele and Taylor cannot be impeached collaterally, but only by direct proceedings.

11. That the defendants had no right to intervene in the equity suit.

12. No appeal will lie from the motion to strike out portions of the defendants' answers.

13. Every material fact to show the right of Steele to the land is admitted in this case, and no fact set up in the answers shows any right in the defendants.

14. From the admitted facts in this case, if Taylor had conveyed to the defendants, instead of to Steele, the latter, on the performance of the agreement now shown by him, could have compelled them to convey to him.

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes before this court upon a writ of error to the Supreme Court of the Territory of Minnesota.

The defendant in this court (Steele) instituted a suit in the District Court of Ramsey county, Minnesota Territory, against fifty-four defendants, to determine the validity of their "claim," "estate," or "interest," in certain real property at St. Anthony's Falls, in that county, of which he was possessed, and in which he claimed to have an estate in fee simple, under certain conveyances, which are appended to his complaint. This complaint shows that, in 1849, the plaintiff and Arnold W. Taylor were tenants in common of a parcel of land which includes the property in dispute, and so occupied it until 1852. A portion was laid off into town lots, some of which were sold; expensive mills and other improvements were projected and partially completed on it; and controversies arose, and suits were pending between them, when the parties, in January, 1852, came to an agreement of sale. By this agreement, Taylor contracted to sell to the plaintiff his interest in the real property unsold, and the money and securities taken for the lots sold, for the sum of twenty-five thousand dollars, and upon the condition that the plaintiff should acquit him from the payment of a certain demand, and assume his liabilities on

certain contracts for labor and building materials. Of this sum, one thousand dollars were to be paid presently, and the remainder was to be paid in sixty days from the date, at the Merchants' or Suffolk Bank, at Boston, and a certificate of deposit furnished to Taylor at St. Anthony's Falls; and in case of a default, the deposit of one thousand dollars was to be a forfeit. But if the payment was made in the manner stipulated, conveyances were to be executed by Taylor; and meanwhile he was to remain in the possession of the mill. The conveyances referred to in these articles were not executed until May, 1853, and purport to have been made in obedience to a decree of the District Court of Ramsey county, in a suit commenced by Steele against Taylor.

The complaint of Steele against the fifty-four defendants is, that they claimed an "estate," "interest," or "right," in that property, have from time to time declared that they were owners thereof, and have executed conveyances for a portion, and offer to sell or dispose of other parts, contrary to the right of the plaintiff.

The object of the suit is, to relieve the title of the plaintiff from the mischief of these adverse claims; to quiet his possession by means of a decretal order requiring the defendants to release them, or, in case of their failure to do so, that the judgment of the court may stand and be recorded in its stead. This proceeding is authorized by the revised statutes of Minnesota, ch. 74, sec. 1.

The twelve persons who are plaintiffs in this court, and were defendants in the District Court, appeared there, and severally claimed title to parcels of land included in the conveyances of Taylor to the plaintiff. Their claims respectively rest upon the facts, that between November, 1852, and April, 1853, judgments were rendered against Taylor in the District Court, upon which executions issued, and levies and sales were made of those parcels before May, 1853, in the regular course of judicial proceeding. At these sales the defendants were either purchasers or derive title from such persons.

The defendants aver that their title is paramount to that of the plaintiff; for that the plaintiff is not entitled to any benefit from the articles of agreement executed by Taylor, in January, 1852, and then recorded, because he failed to comply with the obligation to pay twenty-four thousand dollars as agreed to by him.

And to avoid the recitals in the deeds, to the effect that they were executed under a decretal order of the court, they say that in May, 1852, the plaintiff filed a bill in the District Court, to compel Taylor to a specific performance of the contract of

January preceding. That upon the bill the judge made an order for the payment of the twenty-four thousand dollars into court by Steele; and, upon the fulfilment of this fiat, that an injunction should issue to restrain Taylor from selling, conveying, or encumbering the property, or in anywise intermeddling with it. That an injunction and subpœna issued, and that Taylor appeared, answered, and unsuccessfully moved to dissolve the injunction, in July, 1852. That no other act was done by the plaintiff until April, 1853, when the rights of the defendants had attached by those purchases from the sheriff. That in March, 1853, the defendants applied to the District Court to be made defendants in the cause, which application was finally unsuccessful, and that the plaintiff and Taylor then fraudulently closed their controversy by a decree rendered by consent, under which the conveyances were made, and that their object was to defeat the claims of these defendants.

That, by this arrangement, the terms of the contract of January, 1852, were not adhered to, and that the twenty-four thousand dollars were not paid as stated in the deed.

It was a question in the District Court, as well as in this court, whether the decree and the agreement leading to it, that form a part of the record here, properly belong to the case. The defendants in the District Court maintained that it was pleaded by them. They are found in an exhibit to the answers—an exhibit which purports to be a transcript from a record in the Supreme Court of Minnesota, as furnished on an appeal from the District Court of Minnesota by the defendants, upon the decree disallowing their claim to be made defendants. Portions of this transcript are referred to in the answers, as forming material papers in the chancery suit, and the whole suit is referred to in the answers to support its allegations; and it is specifically set up and pleaded. We think, therefore, that the record of that suit, as it appears in the exhibit, must be taken as authentic, in deciding upon the sufficiency of the answer as a bar to the plaintiff's complaint. The decree purports to have been made by the court; it is formal, and disposes of the cause, and is only defective in not having the signature of the judge. But it comes from the legal custody, has been accepted by the parties, and acted on by them; and was certified to the Supreme Court of the Territory, as a paper in the cause. We do not regard the signature of the judge as indispensable to its authenticity. The statute that directs the signature must be considered as directory; and other evidence to establish its verity as a record of the court may be considered.

In the District Court, the plaintiff moved to strike out por-

tions of the answer, for insufficiency and on other grounds, and demurred to the residue. His motion and demurrer were sustained, and a final decree rendered for the plaintiff. This decree was affirmed on appeal to the Supreme Court, and the defendants in that court prosecute their writ of error to this court. The statutes of Minnesota prescribe: "That the court must in every stage of an action disregard any error or defect in the pleadings and proceedings which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of such error or defect." The question to an appellate court in the present case is, do the answers of the defendants, as pleaded by them, disclose a valid claim to the property in dispute, so as to bar the petition of the plaintiff for relief? No objection is taken to the validity of the contract of January, 1852, between the parties, Steele and Taylor. The record of that contract is notice to subsequent purchasers; and Steele, by the statutes of the Territory, was entitled to have "precedence of" them, and "a lien upon the land, according to the import and meaning of the contract." (Rev. Stat., ch. 47, sec. 3.)

It is not denied that the plaintiff paid one thousand dollars at the execution of the contract, nor that the twenty-four thousand dollars were paid within sixty days into a bank at Boston—a bank of solvency and credit—nor that a certificate of deposit within a reasonable time afterward was offered to Taylor, at St. Anthony's Falls; nor that, upon his refusal to take the latter, the money and interest were immediately tendered to him; and, upon a farther refusal, that relief was sought from a court of chancery, whose order for the payment of the money into court was promptly complied with. The precise grounds of complaint are, that neither the Merchants' nor Suffolk Bank was made the depository of the money; and a certificate from one of them has never been tendered to Taylor, and that he has the right to rely upon the letter of his contract. No specification has been made of any injury or inconvenience suffered by him, as a consequence of the deposit having been made in the Bank of Commerce, rather than the banks mentioned in the agreement. And the plaintiff avers, that the only reason for the change was, the refusal of those banks to give a certificate of the kind mentioned.

At law, if there is an express agreement for the payment of the purchase-money, and the delivery of the conveyance of the land by a particular day, and at a particular place, the parties will be bound by it, and time will be of the essence of the contract. But, in equity, the estate bargained and agreed to be sold becomes the property of the purchaser as soon as the

agreement is concluded. It will descend to his heirs at his death, or may be devised by him; while the purchase-money vests in the vendor, and forms a part of his personal estate. In the ordinary case of the purchase of an estate, the assignment of a particular day or a specified place for the perfection of the title is considered as merely formal, the general object of the contract being the sale of an estate for a given sum, and the stipulation signifying that the purchase shall be completed promptly, and in a reasonable manner, regard being had to the circumstances of the case, and the nature of the title and property. Time may be made of the essence of the contract by express stipulation, or it may become essential by considerations arising from the nature of the property, or the character of the interest bargained. And the principle of the court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case.

But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it. (Hiperall *v.* Knight, 1 Y. and C., 416.) In Parkin *v.* Thorald, (16 Beav., 59,) the master of the rolls said: "A contract is undoubtedly construed alike both in equity and at law; nay, more—a court of law is the proper tribunal for determining the construction of it. But courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that, by insisting on form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, A has contracted to sell an estate to B, and to complete the title by the 25th October; but no stipulation is introduced, that either party considers time of the essence of the contract. A completes the title by the 26th; at law, the contract is at an end, and B may bring an action for the non-performance of the contract, and obtain damages for the breach; but equity holds, that unless B can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action or to avoid the performance of the contract; not, certainly, on the ground that the 25th October was not a part of the contract, but on the ground that it is unjust that B should escape the performance of a contract which has been substantially performed by A, by reason of some omission in a formal but immaterial portion of it." Upon a view of the chancery record, our conclusions are, that the plaintiff, in good faith, attempted a literal per-

formance of his contract with Taylor; that the deposit of the money due, in a bank of solvency and credit, other than those named in the contract, did not inflict an injury upon Taylor, and the offer of its certificate of deposit, *prima facie*, was a substantial performance of its requirements. That his subsequent offer of the money and the interest that had accrued, and, on the refusal of Taylor to receive it, his prompt application to chancery, and payment of the money into court, relieve the plaintiff from every imputation of laches or delay. The District Court expressed an opinion corresponding to this, in July, 1852, in denying the motion to dissolve the injunction, and this was a virtual decision of the cause in that court.

These transactions occurred before the judgments against Taylor, under which the land was afterwards sold, were rendered by the District Court. The District Court had the parties before it, and held the defendant (Taylor) under restraint, by injunction, and the purchase-money in its custody. It had been empowered by a statute of the Territory "to pass the title to real estate by a decree, without any other act to be done on the part of the defendant, when, in its judgment, it was the proper mode to carry its decree into effect." (Rev. Stat., Minn., p. 466, sec. 33.) But, before the transfer to the plaintiff had been made, judgments were obtained and docketed against Taylor, which were "a lien upon all the real property of the debtor in the county owned by him at the date of the judgment, or afterwards acquired." The influence of these judgments, and of the levy of the executions upon the land described in the agreement of January, 1852, and the sale under those executions, remains to be considered. The twelfth of the "Ordinances in Chancery" of Lord Bacon is, that no decree bindeth any that cometh in *bona fide* by conveyance from the defendant before bill exhibited, and is made no party, neither by bill nor the order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of the suit, or the court made acquainted with, the court is to give order upon the special matter according to justice. The rule has been applied with steadiness to all cases of transfer during the progress of a cause, notwithstanding the hardship of individual cases, from considerations of public policy and convenience. Suits would be interminable, if the rights of the parties could be disturbed by mesne conveyances, and a necessity imposed for the introduction of other parties upon the record. The apparent exception to the rule arises when an event occurs which deprives the party on the record not only of his interest in the subject of

the suit, but also of his faculty to comply effectively with the decree of the court. In such a case, additional parties are necessary to enable the court to make an operative decree. The Court of Chancery ordinarily acts *in personam;* and, in cases like the present, perfects the title of the purchaser by requiring the vendor to execute a title conformably to the agreement. But, in cases of bankruptcy and insolvency, the bankrupt or insolvent is stripped of his rights of property and of his capacity to defend suits in which he is a party. In such cases the assignees are commonly made parties, (Dan'l Pr., 328;) but there are opposing authorities—Cleveland *v.* Boerun, (23 Barb., 201.) And it has been decided that a purchaser under an execution issued on a judgment rendered *pendente lite*, need not be made a party in such a case. (Scott *v.* Coleman, 5 Mon., 73.)

The statute we have cited from the code of Minnesota enlarges the powers of the Court of Chancery of that Territory, and enables it to act *in rem.* It may pass the title without any act of the defendant. The bill, subpœna, and injunction, placed the property wholly under the control of the Court of Chancery, and new parties were not requisite to enable the court to vest the title in the equitable claimant.

This principle is not peculiar to courts of chancery; but the maxim that "*pendente lite nihil innovetur*," is applied in real and mixed actions by the common law. (2 Dana, 25; 9 Cowen, 233.)

Was there a valid exercise of the jurisdiction of the court, and did the decree pass the title to the purchaser? Had the plaintiff any duty to perform, in regard to the application of the purchase-money, in the registry of the court? Some authorities affirm that a purchaser of the legal title at a judicial sale immediately succeeds to the rights of the debtor, and that the equitable claimant under an executory contract becomes responsible to him for the purchase-money remaining unpaid. (Mayer *v.* Hinman, 17 Barb., 137; 16 Serg. and R., 18.) Other authorities recognise the right of the purchaser to the benefit of the contract from the time that the equitable claimant has notice of the sale and conveyance by the sheriff. (Mayer *v.* Hinman, 3 Kiernon, 180; 2 Ired. Eq., 507; 4 Madd. R., 506, note;) while other well-considered cases deny that the purchaser at the sheriff's sale obtains a title which can be interposed to impede the progress of the legal title to the purchaser by articles, or operates as a transfer of his debt for the unpaid purchase-money from his vendor to the claimant under the judgment. (Chinn *v.* Butts, 3 Dana Ky. R., 547; Lodge *v.* Lysely, 4 Simon, 70; Whitworth *v.* Gauvain, 3 Hare, 416; Scott *v.* Coleman, 5 Mon., 73.) The case reported in 3d Dana was a contest between two

purchasers—one under an executory contract, and the other under a judgment against the vendor while a part of the purchase-money remained unpaid. The holder of the sheriff's title recovered in an ejectment; and the questions decided arose on a bill for relief filed by the defendant upon his elder equitable title. The court say, that "the purchase of the entire legal title, with notice of an outstanding equity, arising from a previous sale of the land by the same vendor to a stranger, does not *per se* transfer to the purchaser any right, legal or equitable, to any portion of the unpaid consideration remaining due to the vendor from the first buyer; and if there should be any extraneous ground for an equitable substitution, it should be asserted and shown by the purchaser before the stranger holding the prior equity had made full payment to the vendor. If there be such an equity, it is against the vendor, and not against the debtor; and, whether it exist or will ever be asserted, the debtor cannot be presumed to know."

Without attempting to reconcile these cases, or to discover whether that is possible, it is evident that the present case does not fall within the limits of either of them. The right of the plaintiff to precedence over the judgment creditor, or the purchaser under his execution, does not depend upon the exercise of the extraordinary jurisdiction of the Court of Chancery, and is not confined by the rules under which that court administers that jurisdiction. His priority is a legal right, reposing upon the legislative authority. Before the judgment creditor had established his debt, the plaintiff had acquired possession of the property, and had paid his money into court. His purchase-money was thus paid. If the purchasers from the sheriff acquired any title to that money by their purchase of the land, it is evident that it should have been asserted by a direct appeal to the court, and not by an adversary proceeding at law for the land. If a person *pendente lite* takes an assignment of the interest of one of the parties to the suit, he may, if he pleases, make himself a party by bill, but he cannot by petition pray to be admitted as a party defendant; all that the court will do is to make an order that the assignor shall not take the property out of court without notice. (Dan'l Ch. Pr., 329; Wiswall *v.* Simpson, 14 How. S. C. R., 52.)

We do not consider that the act of Taylor in consenting to a decree, or the act of the plaintiff in accepting one, is evidence of any fraud, or of a conspiracy against the defendants in this suit. The decree was a consequence of the opinion of the court upon the cause as presented by the pleading, on the motion to dissolve the injunction; and so far as the equities of the parties are to be considered, the decree embodies them.

There is no other specification of fraud, and the general charges of fraud, unaccompanied by a statement of the facts constituting the fraud, have no effect or influence.

We are of opinion that there is no error in the record, and the judgment of the Supreme Court of Minnesota Territory is affirmed.

THE COMMERCIAL BANK OF MANCHESTER, COMPLAINANT AND APPELLANT, *v.* HENRY S. BUCKNER.

The Circuit Court of the United States has no power to entertain an original bill brought by a creditor, who has come in and proved his debt against the bankrupt, for the purpose of annulling or vacating a discharge and certificate in bankruptcy, obtained in the District Court upon imputations of fraud, done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who had taken a dividend out of the bankrupt's estate.

The District Court, which passed the decree in bankruptcy, can take cognizance of such a case.

Whether or not such a bill could be filed by a creditor who had not come in and proved his debt, and who was not a party to the decree in bankruptcy, is a question which the court does not now decide.

Nor has the Circuit Court the power, under its general jurisdiction over frauds, to give relief either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, had assented to the bankrupt's discharge and certificate, and had taken a dividend out of the bankrupt's estate.

A demurrer only admits facts which are well pleaded.

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

It was a bill filed by the bank upon the equity side of the Circuit Court, against Buckner, under the circumstances fully detailed in the opinion of the court.

It was argued by *Mr. Day* for the appellant, and by *Mr. Benjamin* and *Mr. Bayard* for the appellee.

Mr. Day filed an elaborate printed argument, consisting of more than one hundred pages. Of the several points of the case included in this argument, it is necessary to omit the discussion of the following propositions, viz:

1. Are the charges of fraud sufficient to invalidate the discharge in bankruptcy?

2. The equity side of the court has jurisdiction over the case, upon the ground of its general jurisdiction over frauds.

3. Whether the case made by the bill is of such a nature and character as to give equity jurisdiction.

4. Nor does the fact that the fraud from which relief was

sought, is fraud in obtaining a judgment in discharge in bankruptcy, at all militate or vest the chancellor of jurisdiction.

Mr. Day then sustained the right of the Circuit Court to interpose in this case, upon the ground that the discharge in bankruptcy should be treated as a nullity.

True, a court of equity does not presume to direct or control a court of law; but, it considers all the equities between the parties, and acts upon the person of the party seeking against good conscience to avail himself of an advantage which, under all the equitable circumstances of the case, it is against conscience for him so to do, and restrains or deprives him of such advantage. (20 Conn. R., 556; 2 St. Eq., secs. 875, 194; 1 Atk., 630; 1 Sch. and Lef., 205–'6; 2 P. Wm., 424; 2 Ves. jun., 135; 3 P. W., 395.)

And so, even at law, (notwithstanding the general rule that no court, except an appellate one, has authority or power to set aside the judgment of another court of competent jurisdiction, for error or irregularity,) where the main object, as in this case, is not to annul the judgment of another court, but simply to avoid the effect of such judgment when it is set up as a bar, by replying that it was obtained by fraud, the party has a right to show, in any court, that the judgment was obtained by fraud and imposition, and thus indirectly to treat it as a nullity. (2 La. R., 139–'40; 11 ib., 521; 25 Vt. R., 339; 2 Kernan's R., 165, and auth. cited; 3 Cranch's R., 300, 307–'8, 310–'11; 3 Foster's N. H. R., 535; 3 Sum., 604; Shedden *v.* Patrick, 28 Eng. L. and Eq. R., 56, and the numerous cases cited by counsel on page 60; 72 Eng. C. L., 513; 15 J. R., 121; 6 Pet., 729–'30; Don *v.* Lipman, 5 Clark and Finn. R., 1, 20, 21; St. Conf. L., sec. 603.)

For if such be not the law, then a party would be allowed to profit by his own fraud, "a position altogether inadmissible." (Per Thompson, C. J., in Borden *v.* Fitch, 15 J. R., 121.)

But, be this as it may on general principles, yet, according to the express provisions of the bankrupt act, it is competent for any court to treat the discharge and certificate, when interposed as a barrier to prevent a recovery on a pre-existing demand, as null and void, whenever the fraud is shown. (5 U. S. Stat., 443–'4; 8 Ired. N. C. R., 142; Mabry et al. *v.* Herndon, 8 Alab. R., 848, 864; 11 Humphrey's R., 289; 3 Dess. R., 269–'70; 3 Cranch R., 300, 307; 9 Ga. R., 9, 14, 15; 15 Alab. R., 553–'4; 2 Zab. R., 541; 25 Vt. R., 339. See also Robt. Fraud. Conv., 520; 1 Dall., 380; 1 Bin. R., 263; 3 Har. and J., 13; 6 ib., 82; 5 Bin. R., 247.)

Fraud vitiates everything into which it enters. It is like the deadly and noxious simoom of arid and desert climes. It

prostrates all before its contaminating touch, and leaves death only and destruction in its train. No act, however solemn, no agreement, however sacred, can resist its all-destroying power.

All acts into which fraud enters are nullities.

Neither a *bona fide* debt nor an actual advance of money will sustain a security infected with fraud. (Per Sandford, Chancellor, 2 Sandf. Ch. R., 631.)

In the case of Downer *v.* Rowell, (25 Vt. R., 339,) the Supreme Court of Vermont, in construing the bankrupt act, says: "The statute in effect declares, that in case the discharge and certificate were superinduced by fraud, they may be impeached on that ground, as being null and void."

And if a judgment is null and void, it is the same thing as though it had never been rendered, and is "unavailable for any purpose," (Per Thompson Ch. J., in Borden *v.* Fitch, 15 J. R., 140; 11 S. and Mar. R., 464; 11 La. R., 533; 11 Eng. Ch. R., 448–'9;) and may be collaterally disallowed and disregarded. (Slocum *v.* Wheeler, 1 Day's Con. R., 429, 449; 6 How. Miss. R., 285; 8 Sm. and Mar. R., 519.)

Such being the law, then, there can be no ground for saying that the discharge and certificate should have been annulled by a direct action, instituted for that purpose, in the bankrupt court. (2 Kernan's R., 166; 8 Alab. R., 855, 864.)

Indeed, it has been held, by high authority, that the District Court never had any jurisdiction to entertain such a proceeding. (Mabry et al. *v.* Herndon, 8 Alab. R., 855.)

But if it could be shown, or was conceded, that the bankrupt act gave such jurisdiction to that court, yet, as the act has been unconditionally repealed, with no saving clause in the repealing act, except for the purpose of finally completing and determining causes then pending, the District Court is clearly without any jurisdiction for such a purpose. (4 Seld. R., 265.) For the law is well settled, that whenever a statute from which a court derives its jurisdiction is repealed, the jurisdiction of the court is gone, even as to suits then pending, except so far as it is expressly saved by the repealing act, and that the original act conferring jurisdiction is to be regarded as though it had never existed. (Dwarris on Stat., 676; Miller's Case, 1 Wm. Blak. R., 451; 4 Yeates R., 394; 5 Cranch, 281; 11 Pick., 350; 21 Pick., 373; 1 Hill, 324; 5 Blackf. R., 195; 15 Con. R., 242; 4 Humph. R., 427; 4 Seld. R., 265, 269.)

No action of nullity, then, was or could by any possibility be necessary to entitle the complainants to recover, either at law or in equity, on their original demands.

Nor was it at all necessary to apply to the District Court

for leave to impeach the discharge and certificate. Chief Justice Ruffin, in 8 Ired. R., 142, says it is the duty of the court "to hold a discharge obtained by fraud as ineffectual and void, whenever the fraud shall appear. The remedy of the creditor is not an application to the court of bankruptcy, upon the ground of fraud newly discovered, but by replying the fraud of the bankrupt to the plea of discharge, so as thereby to avoid the bar." And the same doctrine is laid down by the Supreme Court of Alabama, in 8 Alab. R., 864.

In Sims *v.* Slocum, (3 Cranch, 300, 307,) Chief Justice Marshall says: "When the person who has committed the fraud attempts to avail himself of the act, so as to discharge himself from a previously-existing obligation, or to acquire a benefit, the judgment thus obtained is declared void as to that purpose."

And in Mabry et al. *v.* Herndon, (8 Alab. R., 856–'7,) Chief Justice Collier, also, in an elaborate opinion, said: "Thus we see, that although the statute contemplated a boon to the debtor, viz: a release from indebtedness, it exacted, on his part, perfect integrity in yielding up everything that was liable to his debts. If this was not done, but something was wilfully withheld to which the creditors were entitled, the fact of concealment is denounced as a fraud; and upon its being made known, the court was required to refuse its sanction to the bankrupt's discharge. And if the proceedings are formally consummated by a final decree, and a certificate consequent thereupon, it is competent for any court of judicature, upon the fraud being established, to treat the certificate as a nullity." (See also Mitf. Eq. Pl., 239.)

The Supreme Court of Tennessee, in the case of Gupton *v.* Connor, (11 Humph. R., 289,) well says: "If the fraud appear pending his suit against his creditors, no decree of discharge could be made. If it appear afterwards, its effect is to annul and destroy the discharge and certificate, as though they had never been obtained."

And in Cogburn & Powell *v.* Spence & Elliott, (15 Alab. R., 553–'4,) the Supreme Court of Alabama very truly remarks: "The bankrupt act does not intend, nor in any manner undertake to restrain a creditor who has a cause of action against a bankrupt, from sueing him, although the bankrupt may have obtained his final certificate of discharge. It only gives the bankrupt a complete defence against the cause of action when sued. That the whole scope of the act was to furnish the bankrupt with a complete defence to suits brought against him, is still more apparent from the fact that the certificate is not a bar, if the debt is of a fiduciary character, or if the discharge

be obtained by fraud. The act, therefore, only intends to arm the bankrupt with a perfect defence against all debts discharged by the certificate obtained in pursuance of the act. The creditor may, however, sue on his demand; otherwise, he could not dispute the *bona fides* of the certificate, and the bankrupt must rely on his certificate in bar of the suit."

Chancellor Desaussure, too, in Lowe *v.* Blake, (3 Dess., 269, 270,) in relation to an insolvent discharge, uses this strong and forcible language: "That in case there was any fraud or concealment in obtaining this discharge, this court is not bound to give effect to the discharge obtained in any other court. That it is essential to the jurisdiction of this court to detect fraud, and to prevent its having its intended effect; and even formal judgments at law cannot resist its all-searching power; and when the frauds on which they have been obtained are exposed, such judgments are decreed to be nullities. If the discharge was obtained by fraud or concealment, it was a mere nullity, like every other judgment or sentence of a court obtained by fraud or surreptitiously."

So in Card *v.* Walbridge and others, (18 Ohio, 411, 423,) which is a case directly in point, it being a bill to subject certain property to the payment of certain debts, and to have the certificate of bankruptcy declared void, as having been obtained in fraud of the law, the court, in sustaining the jurisdiction, says: "The great question in the case is one of fraud, which has to be established before the complainant can proceed one step in his cause, and comes within the original powers of a court of chancery."

"The appropriate remedy," (says Chancellor Walworth, Alcott *v.* Avery, 1 Barb. Ch. R., 347, 352,) "of the complainant in this court, where he wishes to contest the validity of the defendant's discharge subsequent to the decree, and to obtain satisfaction of the decree out of subsequently-acquired property, is to file a supplemental bill, stating the obtaining of the decree, the alleged or pretended discharge of the defendant, under the bankrupt act, subsequent to such decree, and the fraud of the defendant which renders the alleged discharge invalid; and praying that the decree may be carried into full effect against the defendant and his property, notwithstanding his pretended discharge." (See also 9 Ga. R., 9, 14.)

The counsel for the defendant thus stated the point on which the decision of the court turned:

1. The District Court has exclusive jurisdiction to impeach the decree of discharge in bankruptcy, or recall the certificate. It may adjourn any point arising in any case in bankruptcy to

the Circuit Court, but the latter has no jurisdiction of an original bill to annul or avoid the decree of the District Court, as prayed for in this suit, though the Circuit Court would, as well as a State court, have jurisdiction to inquire into the validity of the discharge if pleaded in bar and impeached for fraud, or its effect if a subsequent express promise of payment by the bankrupt were alleged.

The bankrupt proceedings are in the nature of proceedings *in rem*, and not subject to collateral inquiry in another than the court which decreed the discharge. (Bankrupt Law of 1841, secs. 4 and 6, 5 Stat., 444; Shawhan *v.* Wherrit, 7 How., 643; N. Am. Ins. Co. *v.* Graham, 5 Sandf., 197.)

Mr. Justice WAYNE delivered the opinion of the court.

The decision which we are about to give would not be satisfactory, unless it shall be preceded by a statement of the facts of the case as they are disclosed by the pleadings. We shall adopt that which was given by the counsel who argued the cause, with but little alteration or addition.

The appellants allege, in their bill, that during the years 1841 and 1842, the defendant, Henry S. Buckner, together with M. B. Hamer, who died in April, 1842, and Frederick Stanton, were partners in trade, doing commercial business in New Orleans, under the firm of Buckner, Stanton, & Co., Buckner being the resident partner there; and in Natchez under the firm of Stanton, Buckner, & Co., Stanton conducting it; and at Yazoo city under the firm of M. B. Hamer & Co., Hamer being the resident partner at that place. The three firms were distinct and separate, and kept their books and accounts accordingly. It is alleged that the three firms and the three members of them became hopelessly insolvent in the year 1841, and that they continued to transact business together until Hamer's death; that after his death the two survivors carried on the business of the three firms until their bankruptcy. On the 21st July, 1842, Stanton filed his petition in the United States District Court for the southern district of Mississippi, both individually and as a member of the three firms, was decreed a bankrupt on the 8th November, 1842, and received his certificate of discharge on the 21st February, 1843. On the 18th July, 1842, Buckner made a similar application to the District Court in New Orleans, was decreed a bankrupt on the 5th September, 1842, and received his certificate of discharge on the 5th December, 1842. It is also said that their applications for their discharges in bankruptcy were made by Buckner and Stanton in concert, with a view to future business.

It appears at the time of these applications they were indebted

to the appellants in the sum of $49,020.14, besides interest, on twelve promissory notes and on one bill of exchange, all which had become due in January, 1842. Three of them were payable on or before the 6th January, 1839; three others on the 3d April, 1839; four on or before the 3d March, 1841; and the last in the month of January, 1842, six months before Buckner filed his petition in bankruptcy. Buckner acknowledged the indebtment in his schedule filed with his petition in bankruptcy. The complainants proved a portion of their claim in the bankruptcy proceedings of Stanton. It is admitted that they received a small dividend from the assets of the firm; but they aver they did so in ignorance of the frauds upon the bankrupt law, committed by Buckner and Stanton, of which they knew nothing until the year 1853, when they discovered the frauds. And they further allege that they would not have proved their claim, nor have received a dividend, if they had known the frauds; and they assert that the certificates of discharge are null and void, by reason of the frauds.

It is then stated in the bill that the three firms had existed before 1837, in which year they suspended payment, but that they never recovered from their embarrassments, though they had resumed business. It is again alleged that their affairs were hopeless in 1841, and that executions on judgments obtained against Stanton as a member of the firm were in that year returned *nulla bona.*

That all the indebtment of the firms which made them insolvent was due prior to the 1st March, 1842, at which time the frauds began. That then, Buckner and Stanton had agreed that they would take the benefit of the bankrupt law, and, in contemplation of doing so, committed the fraud stated in the bill.

Twelve different charges of fraud are specified, all of them being payments to preferred creditors, in fraud of the general creditors—contrary to the provisions of the act of the 19th August, 1841. No charge of any other fraud is made, except a transfer of some property in New Orleans, upon the understanding that Buckner was to have the right to redeem it on payment of the debt, and that the arrangement had secured for him an ultimate profit, in fraud of creditors. They also say, that it was because of the fraud of Buckner and Stanton in concealing a knowledge of the facts from them, that they were induced to believe the discharges valid; and so they did not proceed to enforce their claims at law or in equity, but that they had found them out only within two years. How or from what source they had made the discovery they do not state distinctly, though to support the charge they file an exhibit of

notes discounted for Stanton, Buckner, & Co., by the Commercial Bank of Natchez, which were applied to their credit, and a list of protested notes of Stanton, Buckner, & Co., taken up by them in May, 1842—two months before Stanton filed his petition in bankruptcy. Two letters from Stanton to Stephen Duncan—one of them dated at Natchez, on the 14th August, 1842, and the other on the 14th September, 1842—are made exhibits; both relate to the affairs of the firm, and to particular transactions of them, which the appellants allege were frauds committed by Stanton and Buckner, in giving preferences to certain creditors, in contemplation of bankruptcy. And they further declare, that since the bankruptcy of Stanton and Buckner, the books of Stanton, Buckner, & Co., had, by some means, passed into the possession of Buckner; that if produced, the fraudulent preferences which had been made would be shown, and that they would also disclose other fraudulent preferences made by Stanton for himself and the firm of Stanton, Buckner, & Co., in the spring and summer of 1842, in contemplation of bankruptcy.

The bill is closed with a prayer that the first decree of the District Court, discharging Buckner, should be declared void and of no validity, as far as the rights of the complainants, as set forth in the bill, could be affected by it, and that Buckner should be perpetually enjoined from setting it up against their rights; and that Buckner should be adjudged to pay them the original sum due by him, with interest thereon; to which is added a prayer for general relief.

The defendant demurred to the bill, and, for causes of demurrer, says:

I. That the said complainants have not, by their said bill, made such a case as entitles this court to entertain jurisdiction of this cause under the Constitution and laws of the United States.

II. That the said complainants have not, by the said bill, made such a case as entitles this court to entertain jurisdiction, or grant relief in equity; the remedy of complainants, if any they have, being at law, and not in equity.

III. That the said complainants having, by their own showing in said bill, made proof of their claims, and received dividends thereon, in the bankruptcy proceedings which resulted in the discharge of this defendant, are not permitted by law to impeach the validity of said discharge in manner and form as sought by said bill; and having been parties and privies to the judgment of discharge in favor of this defendant, are forever precluded in law from contesting the validity and effect of

said judgment, on any such grounds as are alleged in said bill.

IV. That the said complainants have not, by the said bill, alleged any cause sufficient in law to authorize this court to set aside the decree of discharge in bankruptcy in favor of this defendant, rendered by the District Court of the United States, as set forth in said bill.

V. That the said complainants, by the allegations of said bill, show that the claims held by them, if they ever were due to them by this defendant, have become discharged by lapse of time, and barred by the statute of prescription and limitation.

VI. That the said complainants, by the allegations of said bill, show such laches as by the principles and rules of equity deprives them of any right to claim relief or remedy in this court.

VII. That the said complainants have not, by the showing contained in their said bill, made out a case entitling them to relief either at law or in equity.

Wherefore this respondent demands the judgment of this honorable court, whether he shall be compelled to make any other or further answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) BENJAMIN, BRADFORD, & FINNEY, *Solicitors.*

I certify that, in my opinion, the foregoing demurrer is well founded in point of law.

(Signed) J. T. BENJAMIN, *of Counsel.*

Henry S. Buckner, being duly sworn, deposes that the foregoing demurrer is not interposed for delay.

(Signed) HENRY S. BUCKNER.

Sworn to and subscribed before me, this 1st of October, 1855.

(Signed) J. W. GURLEY, *Commissioner.*

The stating part of the bill of the complainants, their prayer for relief, and the demurrer of the defendant, suggest that our first point of inquiry in this case should be into the power of the Circuit Courts of the United States to entertain an original bill, to annul or vacate a decree discharging a bankrupt, either in whole or in part, for any of those frauds upon the act of the 1st August, 1841, which would prevent the bankrupt from receiving a discharge. No such jurisdiction is given by the act to the Circuit Courts. The jurisdiction of these courts

under the act exists in three cases: First, when a question has been adjourned into a Circuit by the District Court, under the 6th section of the act. Second, by appeal, as that is given, under the 4th section, to the bankrupt, when a majority of his creditors in number and value, who shall have proved their debts, shall file their written dissent from his discharge. Third, the jurisdiction given to the Circuit Courts by the 8th section, in suits by an assignee of the bankrupt, against any person claiming an adverse interest, or by such person against the assignee for property, or rights of property, transferable to or vested in the assignee under the act. If we cannot find such a jurisdiction in the Circuit Courts in the act of 1st August, 1841, it is in vain to look for it elsewhere, for the purposes for which this bill has been brought.

The inquiry then must be, if the Circuit Court has jurisdiction, to annul the decree of the discharge given to the bankrupt by the District Court, for frauds upon that act, which would have prevented him from receiving a discharge and certificate. In other words, has not the District Court of the United States, in which the bankrupt's discharge was given, and that court only, the power to inquire into frauds upon the act discovered after the bankrupt has received his discharge, with a view to annul it, and to give to his creditors, who have proved their debts, the benefit of the property he may have concealed, or the preferences he may have given, or transfers of property he may have made in contemplation of bankruptcy? It seems to us that the jurisdiction given by the 6th section of the bankrupt act to the District Court is plenary and exclusive for such a purpose. The words of the 6th section are: "That the District Court, in every district, shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily in the nature of summary proceedings or equity, and for this purpose the said District Court shall be deemed always open. And the district judge may adjourn any point or question arising in any case of bankruptcy into the Circuit Court for the district, in his discretion, to be there heard and determined, and for this purpose the Circuit Court of such district shall be deemed always open. The jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such

assignee and the bankrupt; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt, and other *remedial process*, to the same extent the Circuit Courts may here do in a suit pending therein in equity. And it shall be the duty of the District Court, in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules and regulations and forms shall be subject to be altered, added to, revised, or annulled, by the Circuit Court of the same district, and other rules and regulations and forms be substituted therefor."

Our reflections upon this section as a whole, and particularly upon that clause or sentence of it which extends the jurisdiction of the court to all controversies between the bankrupt and a creditor, *who shall claim any debt or demand under the bankruptcy*—to all cases between creditors and the assignee of the estate, whether the latter continues in office or has been removed, and to all controversies between the assignee and the bankrupt—have brought us to the conclusion that it was meant to give jurisdiction to the District Court, either at the suit of the assignee or of the creditor, just in such a controversy as the complainants have made by their bill; with the power in the court, in a suit of either the assignee or the creditor, or both combined, to inquire into the fraudulent preferences alleged to have been given by the bankrupt in contemplation of bankruptcy; and when they shall have been satisfactorily proved, to revoke the decree of discharge which had been given to him, to prevent it thereafter from being pleaded as a bar to any suit which may be brought against him, for any demand which was provable under the act. Or the assignee alone may sue the bankrupt and his accomplices in the District Court, for any preferences he may have given to creditors in contemplation of bankruptcy, to recover the amount of such preferences, as a part of the bankrupt's estate for distribution among his creditors who have proved their debts under the act, and with the additional object of revoking the bankrupt's discharge by a decree of the court. In either suit for the latter purpose, the assignees and the creditors who have proved their debts under the act, may be the parties on the one side, and the bankrupt and those who conspired with him to commit the fraud upon the act, should be made parties on the other. If it be intended only to recover the amounts of fraudulent

preferences, as a part of the bankrupt's estate, the assignee may sue the bankrupt and those who have received them, or the latter alone, giving to the bankrupt prior reasonable notice, specifying in writing the fraud or concealment which it is the object of the suit to investigate, so that he may be present at the trial to defend himself; or to petition the court to be made a party defendant to the suit, for the same purpose. And in such a case, the jurisdiction of the District Court should be exercised summarily, in the nature of summary proceedings in equity, such being the direction in the sixth section of the act, for all proceedings in bankruptcy under it.

These conclusions are verified into unquestionable certainty, by considering in connection other parts of the bankrupt bill.

By the third section of it, the property of the bankrupt, of every kind whatever, from the time of his discharge, by mere operation of law, is deemed to be divested out of him, and becomes vested by force of the decree in the assignee who may be appointed for the benefit of such of the bankrupt's creditors who have come in and proved their debts, for the purpose of becoming distributees equally of the bankrupt's estate, to the exclusion of all creditors who have not done so. Then, by the second section, the amount of preferences which may have been given in contemplation of bankruptcy, are declared to be a part of the bankrupt's estate. It is the duty of the assignee to sue for them, and the bankrupt who has made them, when they have been proved, cannot be allowed a *discharge under the provisions of the act.* And that this disability to receive a discharge was meant to apply prospectively to preferences which might be given, and retroactively to such as had been given in contemplation of bankruptcy, or to such preferences, whether given before the decree of discharge or after it, is manifest from the whole language of the fourth section, particularly that part which makes a *bona fide* surrender by the bankrupt of all his property and rights of property, for the benefit of his creditors, one of the prerequisites of his being discharged from all of his debts; and declares, that if the bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary to the provisions of the act; or, if he admits a false and fictitious debt against his estate, that he shall not be entitled to such discharge or certificate. Further, the 5th section declares, that no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity *therefor*, but shall be deemed *thereby* to have waived all right of action and suit against such bankrupt; which, while it excludes such a creditor from bringing a suit at law or in

equity in any other court for his original debt, which had been proved against the bankrupt, cannot be construed to mean that he could not resort to the District Court, which had been deceived into granting the discharge, for the purpose of investigating the frauds which may have been committed by the bankrupt before a discharge had been granted to him, but not discovered until afterwards; and for the further purpose of obtaining from the District Court an annulment of the discharge which had been obtained from it by perjury and fraud. In this we do not differ from the counsel of the complainants, for much of his argument was intended to show that the creditors of a bankrupt are not without a remedy for frauds committed by him, but not discovered until after he had received his certificate of discharge. That was the case of Haxton *v.* Corse, (2 Bar. Ch., 507,) decided by Chancellor Walworth. The chancellor's language is, that he could not conclude, "notwithstanding the general language contained in the fifth section of the act, that the creditors who come in and prove their debts shall not be allowed to maintain any suit at law or in equity therefor, and that the law-makers did not intend that the proving of debts by creditors should be an absolute abandonment of all claim against the future acquisitions of their debtor, if his discharge was refused, or if it was void for any of the frauds specified in the act." We admit the principle, that creditors so circumstanced have a remedy, but not that they may use it in any suit at law or in equity in the Circuit Court. The bankrupt law has given to the District Court a plenary and exclusive jurisdiction in all matters and proceedings in bankruptcy. We say plenary and exclusive jurisdiction in the District Court. This court has said so in Shawhan et al. *v.* Wherritt, (7 How., 643.) Besides, on the authority of the same case, we say, as all the proceedings in all cases in bankruptcy are made matters of record by the thirteenth section, *that a party to one of them* cannot be permitted to impeach it collaterally in another suit in another court, brought by him there to recover from the bankrupt his original debt, whilst he continues to occupy his relation to the assignee and the bankrupt, under the discharge of the latter, as one of the creditor distributees of his estate. The District Court has by the act plenary and exclusive jurisdiction of the matter, and no other court can annul the decree of the bankrupt's discharge, either partially, for the benefit of a particular creditor, or wholly, to deprive the bankrupt of its operation.

This we say, with direct reference to the parties in this suit, who were parties to the decree of the bankrupt's discharge, who proved their debts, and who have taken a dividend from

his estate. We do not mean to say anything of the Circuit Court's jurisdiction in a *suit brought by a creditor who had not come in and proved his debt, and who is not a party to the decree in bankruptcy.* These are points which will no doubt be well considered by counsel before a suit shall be brought; directly in connection with the power given to such a creditor to impeach the discharge, when the bankrupt shall plead it in bar of a suit. But the manner of bringing such a suit by such a creditor, how, when, or in what court, it should be brought, we shall not decide until such a case shall be brought regularly here for adjudication.

We will now consider another point in the case, necessarily arising from the frame of the bill, which was argued by the counsel for the complainants, with some earnestness. It is, whether the Circuit Court had jurisdiction of *the subject-matter of the bill*, on account of the frauds alleged against the defendant.

The complainants, in their bill, state minutely the original indebtment of the bankrupt to them, particularize the fraudulent preferences he had given to other creditors in contemplation of bankruptcy, admit that they were parties to the bankrupt's discharge, and had taken a dividend; and then they ask for the intervention of the Circuit Court in equity, to set aside the bankrupt's discharge as to them, *because it had jurisdiction in cases of fraud;* and that it would adjudge, that the defendants shall pay to them their original debt, with interest, on account of their ignorance of the frauds of which they complain, until within two years before they brought their bill. And for the same cause they say, that they had not brought their action at law upon their original cause of the defendant's indebtment.

The bill of the complainants, then, is a suit to recover from the defendant the debt which they had proved in bankruptcy. It has generally been thought, and has been frequently decided judicially, that the fifth section of the bankrupt act was a bar to a suit where a party proves his claim and takes a dividend. In England, though such suits were attempted in the earlier administration of her bankrupt laws, such an action would not be thought of now for a moment. The words of our statute are, "and no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity *therefor*, but shall be deemed *thereby* to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." How, then, can it be, that a creditor, coming in and proving his debt and receiving a dividend, can be

allowed to sue the bankrupt for it afterwards, either at law or in equity, when it is declared, in positive and unmistakable words, that if the creditor, before proving his debt, had commenced an action for it, or had obtained a judgment for it, he shall be deemed to have surrendered it, and to have waived all right of action and suit, either in law or in equity, against such bankrupt, for the debt which he has proved? It cannot be done; and the disability of such a creditor to sue the bankrupt is in perfect harmony with every other part of the statute of the 19th August, 1841, and with all the rights of creditors which are meant to be secured by it.

Moreover, the exclusion of such a creditor to sue the bankrupt, is sustained by all of the decisions in the courts of England upon the statutes of bankruptcy.

Lord Hardwicke said, in *ex parte* Groome, 1 Atk., 119—when such a right was claimed by a creditor upon a similar provision in the statute of George II, chap. 30, sec. 7, (by no means so expressive as that just cited from the act of the 19th August, 1841)—"I think that the privilege of creditors to come in, and of bankrupts to be discharged from debts, is coextensive and commensurate, and very equitable, for it would otherwise make an irregularity among the creditors; for a creditor whose debt was due before the taking out of the commission shall, perhaps, have more than five shillings in the pound; and the creditor whose debt was not due till a second distribution shall come in and have as much as the other creditor, and likewise have a remedy open to him for the rest against the bankrupt." Therefore a creditor shall not prove his debt, receive a dividend, and proceed afterwards in an action at law against the bankrupt. In such cases in England, the creditor is put to his election, whether he will come in and prove his debt, or pursue his remedy at law. With us, he has the same privilege. In *ex parte* Goodwin, 1 Atk., 152, Lord Hardwicke said: "This court will not suffer a *petitioning creditor* to arrest a bankrupt, and for this reason—because a commission of bankruptcy is considered both as an action and an execution in the first instance; and after the petitioning creditor had laid hold of all of the bankrupt's effects, it would be a great absurdity for the same person to be permitted to arrest him likewise." In regard to the creditor having made an election, his Lordship ruled, in *ex parte* Ward, 1 Atk., 153, that a *petitioning creditor* determines his election by taking out a commission, and cannot sue the bankrupt at law, though for a debt distinct from what he proved.

In *ex parte* Ward, 1 Atk., 153, it was also ruled that a petitioning creditor's right of election does not exist after the bankrupt has received his certificate; and when the creditor has

already proceeded at law, he is not at liberty to come in and prove his debt under the commission, without relinquishing his proceedings at law, unless by order of the great seal, for the purpose of giving his assent or dissent to the certificate. In Capon's case, 1 Atk., 219, Lord Hardwicke declared, "it was by no means to be done that a creditor was to receive a proportionable benefit under the commission, and still pursue the bankrupt's person at law;" and he would not permit the creditor, in that case, who had proceeded at law after he had received two dividends, to assent to or dissent from the bankrupt's certificate, until he had refunded the dividends he had taken under the commission. In Lindsay's case, 1 Atk., 220, he petitioned to be discharged from a commitment at the suit of his creditor, Henkle, who had proved his debt. The Lord Chancellor said the creditor must either waive his proof under the commission, or make his election to proceed under it; but, notwithstanding, if he elects to proceed at law, he may still assent or dissent to the certificate.

In Dorvillier's case, his creditor had proved a debt for £800 under the commission, and being the majority in value of all the creditors, had chosen himself assignee, as he had the right to do under the statute. He brought an action at law for the debt which he had proved against the bankrupt. The bankrupt petitioned that his creditor should make his election to proceed under the commission or to proceed at law. The Lord Chancellor doubted whether, by choosing himself assignee, was not making an election; but upon the creditor's having elected to proceed at law, he discharged him as a creditor under the commission, but still allowed him to assent or dissent to the bankrupt's certificate.

In Aylott *v.* Harford & Richards, bail of Lowe, 2 Blackstone's Reports, 1317, the creditor had proved his debt under the commission, and had voted in the choice for assignees, and had subsequently made an agreement with the bankrupt that he should keep open his hotel for business. The bankrupt absconded. The creditor brought an action against the bail of the bankrupt, contending that, as Lowe had absconded, he had forfeited the protection of his commission, and that the bail was to follow the fate of his principal. De Grey, C. J., refused to fix the bail, and said, there are some instances in which the Court of Chancery permits a creditor to do certain acts, such as proving his debt and voting for assignees, without binding him to come under the commission and renounce his legal remedy. But the plaintiff has gone much further, especially by the transaction of the 25th of August. He has made his election, has acquiesced under the commission, and he shall

not, on a subsequent unforeseen event, at the distance of twelve months, desert the commission, and come on the bail by surprise. (White *ex parte*, 2 Ves. Rep., 9; 2 Bro. C. C., 114.)

These citations, then, show how the comprehensive equity of Lord Hardwicke, upon an indefinite statute of George II, anticipated the more perfect legislation of 49 George III, c. 121, s. 14, and that of 6 George IV, c. 16, s. 59, upon the same subject.

The first provides, "that after the 29th June, 1809, it shall not be lawful for any creditor, who has or shall have brought any action or instituted any suit against any bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission for any purpose whatever, or to have the claim of debt entered upon the proceedings under such commission, without relinquishing such action, a suit, and all benefit from the same; and that the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed by him." The statute of George IV is, "that no creditor who has brought an action or instituted a suit for a demand arising prior to the bankruptcy, or which might have been proved, shall prove a debt or enter a claim for it, without relinquishing such action or suit, and all benefit from the same, the proving a debt or entering a claim to be deemed an election." Our statute is as comprehensive as either of those, and was taken from them, though not expressed in the same words. Indeed, the three are an embodiment of the decisions of the courts which were made from Lord Hardwicke's time in the administration of the bankrupt law; and the construction of the English statutes in their courts since has been in conformity with the earlier decisions.

In Adames *v.* Bridge, (8 Bingh. Rep., 314,) in an action of debt upon a bond, in which a rule *nisi* had been obtained to stay proceedings commenced in 1831, it appeared by an affidavit that the defendant had been a bankrupt in 1816, and that the plaintiff had elected to prove under the commission sued out at that time. Tindall, C. J., ruled that plaintiff, having proved under a commission of bankruptcy in 1818, was estopped to sue for the same debt after the passing of 6 George IV, c. 16, though that repeals 49 George III, c. 121, and makes proof of a debt an election not to sue. The Chief Justice added, the fallacy in the argument is in considering the election to prove as an incomplete act. It was a complete act to effect a discontinuance, and after such a lapse of time, the rule must be dis-

charged with costs. In some of its features, that case is not unlike that which we have been considering.

Joseph *ex parte* (18 Ves., 340) establishes the same principle; also, Dickson, (1 Rose, 98;) Boslock's case, (1 Dea. and Chit.,) the same. A like interpretation has been given to the fifth section of the act of 19th August, 1841, by Chief Justice Tenney, (in 31 Maine Rep., 192,) in the case of Humphrey and Small, and by Mr. Justice Hardy, in the case of Buckner & Stanton *v.* Calcote, (in 28 Miss., 390.) Both are able constructions of the statute of the 19th August, 1841, from the statute itself, and they command our entire assent.

Our conclusions in this case are, that the Circuit Courts of the United States have not jurisdiction to annul or vacate the discharge and certificate in bankruptcy obtained in the District Court, upon imputations of fraud done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who has taken a dividend out of the bankrupt's estate. These conclusions relieve the case of all difficulty, and make it unnecessary for us to discuss any of the other points which were made by counsel on either side in the argument.

We add a word more. It was frequently urged in the argument, by the counsel for the complainants, that the demurrer of the defendant was a confession of the frauds alleged in the bill, and that therefore the Circuit Court had jurisdiction to give relief.

Our view of that demurrer is different. It is only a confession of all facts *well pleaded*, but in this bill none were so; the power of the court to give relief, and of the complainants to bring a suit, either at law or in equity, for the original debt which they had proved in bankruptcy, having been mistaken.

The dismission of the bill by the court below is affirmed.

Mr. Justice NELSON concurs in the result of the opinion of the court in this case.

JAMES B. TELLER AND THOMAS W. SWINNEY, PLAINTIFFS IN ERROR, *v.* JONATHAN T. PATTEN AND JOHN J. LANE.

Where the question before the jury was, whether or not one of the defendants was a partner in a commercial firm, it was proper for the court to exclude the declarations made by the defendant in the absence of the plaintiffs.

It was also proper not to confine the attention of the jury to declarations made at one particular time in the presence of one of the plaintiffs, but to allow all similar declarations to be given in evidence, so that the jury could judge of the entire question of the existence of the partnership.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Indiana.

It was an action of assumpsit, brought by Patten and Lane, merchants of New York, against the plaintiffs in error, merchants of Fort Wayne, Indiana. The only question in the court below was, whether or not Swinney was a partner of Teller, the declaration counting upon four promissory notes signed by Thomas B. Teller & Co. Under the instructions of the court, a verdict was found for the plaintiffs. The substance of the bills of exception is stated in the opinion of the court.

The case was submitted on a printed argument by *Mr. Crawford* for the plaintiffs in error, and argued by *Mr. O. H. Smith* for the defendants.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought here by a writ of error from the Circuit Court for the district of Indiana.

It is an action of assumpsit on four promissory notes signed by Thomas B. Teller & Co. A verdict was rendered, and a judgment entered, for $2,719.40.

Certain rulings of the court on questions of evidence which were made during the trial, and to which exceptions were taken, present the points for consideration.

Evidence was given to prove the partnership of Swinney with Teller, which was denied, and which was the only controverted fact in the case. Thomas P. Anderson, a witness, stated that in April, 1852, he introduced Swinney to divers merchants in the city of New York, including the plaintiffs, as a person wishing to buy goods for Fort Wayne, as the father-in-law of Teller, and the capitalist of the concern, which was not denied by Swinney. Several other witnesses gave evidence conducing to prove that Swinney was a partner of Teller, and had by his declarations and conduct at Fort Wayne on divers occasions, in 1852 and 1853, held himself out to the world as a partner of Teller, who was then doing business as a merchant, and that Swinney had suffered Teller to hold him out as such.

It was further proved, by the book-keeper of the plaintiffs, that Swinney was in New York in June, 1854, a period prior to the extension of the notes sued on, and in conversation with

Patten and Lane, the plaintiffs, he admitted that he was a partner of Teller & Co., in the house at Fort Wayne. About the same time, two of the daughters of Swinney testified that their father stated, at the Astor House, in New York, to Patten, one of the plaintiffs, that he was not a partner of Teller.

The defendants then offered several depositions, conducing to prove that Swinney, on his way to New York, with Solomon D. Bayless, to purchase goods, &c., and to whom he said that he was not to be a partner with Teller, who was his son-in-law, that he intended to purchase a small stock to start him in business, but that he had no further interest or connection in the matter. The same statement was made by Swinney to several persons in New York. Witness introduced him to a number of merchants in that city, and to those persons he did not represent him as the partner of Teller. This was before Thomas P. Anderson arrived at the city. At none of these conversations does it appear that plaintiffs were present, or either of them. Other depositions were offered to prove that on the trial of one Michael Dougherty for larceny, at Fort Wayne, in January, 1853, Swinney and Teller were both witnesses, in the absence of the plaintiffs, and both swore that Swinney was not a partner of Teller's. But the court, on objection being made, overruled the depositions, which showed the declarations of Swinney made to different individuals at different times, in the absence of the plaintiffs, and also the oaths made by Swinney and Teller in the criminal case stated, as incompetent, but the evidence of the two daughters of Swinney was not overruled.

After the evidence was given, and the argument of counsel closed, the defendant's counsel requested the court to charge the jury, if they believed from the evidence that in June, 1854, Swinney told Patten, in New York, that he was not, and never had been, a partner of Teller, the plaintiffs could not afterwards deal with him so as to bind Swinney, unless proof were made of a new authority given to him. But the court refused to give the instruction prayed for, and said, if the jury were satisfied, from the evidence, that Swinney was actually a partner with Teller in the establishment at Fort Wayne, his declarations to the contrary to Patten, in New York, could not relieve him from liability in this action.

An exception was taken to the instruction refused and to that which was given.

The instruction given on the evidence before the jury was proper. It was the province of the jury to determine the weight of evidence before them. The instruction asked by the defendant would have restricted this right, as it would have

thrown out of the case the evidence of the plaintiffs. The jury might believe that the remarks were made to Patten by Swinney, in the presence of his daughters, "that he was not, and never had been, a partner of Teller, at Fort Wayne," and yet, from the plaintiff's evidence, find them to be untrue. This statement is represented to have been made in 1854, some two years after the merchandise had been purchased. It is said this was prior to the extension of the notes; but that is immaterial, as the partnership debt had been long before incurred. No one can manufacture evidence for himself in such a case. The judge treated the evidence fairly by submitting it, with the other facts, to the consideration of the jury.

The depositions which related to the declarations of Swinney, at different times and occasions, that he was not a partner of Teller's, were properly suppressed; they were not made in the presence of the plaintiffs, or their agent, and of which the plaintiffs could have had notice. The oaths said to have been made on a certain occasion, by Teller and Swinney, belong to the same category.

The existence of the partnership at Fort Wayne seems to have been proved to the satisfaction of the jury. The firm was known by the name of Teller & Co. This was the admission of a partnership in their course of dealing; and if Swinney was not the partner, it would have been easy to prove who was.

The ruling of the court in the admission of the evidence to the jury, and the exclusion of that which was offered, was correct.

The judgment of the Circuit Court is affirmed, with costs.

J. M. MATTINGLY AND SARAH ANN HIS WIFE, APPELLANTS, *v.* JOHN H. BOYD, ADMINISTRATOR OF DAVID H. BOYD, DECEASED.

By the laws of Virginia, where an absent defendant is sued, and a garnishee is found within the State having funds of the absent debtor in his hands, the court may either suffer the fund to remain in the hands of the garnishee, or be paid over to the attaching creditor, security being given in either case to refund the money upon a final decree.

Whilst the suit is pending, therefore, the money must be considered as in the custody of the court, and not liable to be sued for by the absent debtor against his garnishee.

Consequently, the statute of limitations does not run whilst the suit is pending; and if an action is brought against the executor of the garnishee after the termination of the principal suit in sufficient time to clear the statute, a recovery must be had.

The garnishee having used the money, his executor must pay interest from the time when the attachment process was served, up to the time of the death of the garnishee—it being so claimed in the bill.

The garnishee was entitled to a reasonable sum for the trouble which he had taken.

THIS was an appeal from the Circuit Court of the United States for the district of West Tennessee.

The bill was filed by Sarah Ann Thorp, but in the course of proceedings her marriage with J. M. Mattingly was suggested, and the suit thereafter conducted in the names of Mattingly and wife.

The case is stated in the opinion of the court.

It was argued by *Mr. Robinson*, no counsel appearing for the appellee.

Mr. Robinson made the following points:

I. That if, when this suit was brought, Bylen had been alive and a citizen of Tennessee, and a party defendant, the plaintiff would not have been barred from proceeding against him by the statute of 21, Jac. 1, ch. 16, sec. 3, or by the Tennessee statute of 1715 taken from it, or by any other statute of that State. 1. Because, by the appointment of Bylen as guardian, an express trust was created, and the statute of limitations is no bar in the case of such express trust. (Pinkerton, &c., *v.* Walker and wife, 3 Hay., 221–'2; Bryant *v.* Pucket, ib., 252–'3; Parson, &c., *v.* Ivey, 1 Yer., 297; Armstrong *v.* Campbell, 3 Yer., 201; McDonald *v.* McDonald, 8 ib., 148; Smart and wife *v.* Waterhouse, 10 ib., 104; Porter *v.* Porter, 3 Humph., 586.) 2. Because the statute of 1715 does not bar actions of debt generally, but those only which are brought for arrearages for rent; (Kirkman *v.* Hamilton, &c., 6 Pet., 23; Tisdale *v.* Munroe, 3 Yer., 222;) and even if the plaintiff came within the 5th section, she comes within the disabilities provided for by the 9th section. 3. Because no statute of limitations in force in Tennessee bars an action on a specialty; neither such as Bylen gave when he qualified as guardian, nor such as was taken under the decrees of the Court of Chancery at Richmond. (Lawrence *v.* Bridleman, 7 Yer., 107; Hay *v.* Lea, 8 ib., 89; Rice *v.* Alley, 1 Sneed, 52;) and even if there were any statute of Tennessee prescribing a certain term of years within which an action must be commenced on such a bond as that, (pp. 36–'7,) the defendant does not show that such term of years has elapsed since the plaintiff married or attained the age of twenty-one years.

II. That supposing the plaintiff has a right to maintain a suit against Bylen or his representative for the money mentioned in said bond and the interest thereof, the right of action of Bylen against David H. Boyd, for the money received by the latter as agent, would not be barred by the time which has elapsed since Boyd received the money. For whether the attachment was right or wrong, Boyd claimed to hold and was allowed to hold the money pending the attachment, and is bound to answer for it when the attachment was terminated.

III. That seeing, if the plaintiff was to have a decree against Bylen, the latter would be entitled to a decree against Boyd, the proper course of equity is to decree immediately for the plaintiffs, against the administrator of Boyd—the party ultimately responsible. (Garnett, &c., *v.* Macon, &c., 6 Call, 349, and other cases cited in 2 Rob. Pract., 395–'8, old ed.)

IV. That the decree should be for $1,112.82, with interest from the 26th of October, 1826, (p. 32,) and the costs of this suit.

Mr. Justice CATRON delivered the opinion of the court.

Spencer Roane devised to his grand-daughter, Sarah Ann Roane, one thousand dollars. She was a minor, residing in Kentucky; and Joseph N. Bylen, her stepfather, was her guardian. Bylen sued Roane's executors for the money, and recovered it as guardian. David H. Boyd acted as the agent of Bylen, and received the money in Virginia, and held it as agent. Fayette Roane, the father of Sarah Ann, owed William H. Roane, of Richmond, Virginia, a thousand dollars. Bylen was Fayette Roane's executor; and William H. sued out a subpœna and filed an attaching creditor's bill in the Superior Court of Chancery at Lynchburg, against Bylen and others, to which David H. Boyd was a party defendant. The main purpose of the bill was, to restrain the money held by Boyd for Bylen as guardian, in Boyd's hands, until Roane could obtain a decree against Bylen, and enforce payment from Boyd as the debtor of Bylen.

Roane's restraining order was sued out and executed on Boyd the 10th day of October, 1827.

May 4, 1829, Boyd answered the bill, and admitted that he had received $1,112 as agent of Bylen, guardian of Sarah Ann Roane, on a power of attorney, "which money he intended to pay over to Bylen as guardian, until inhibited by the process of the court."

The suit lingered on the rules at Lynchburg till July 4, 1853, the restraining order being in full force from 1827 to 1853. In the mean time, Boyd had removed to Tennessee, and died there on the 25th of August, 1851; and about two months thereafter, John H. Boyd, the defendant to this suit, administered on David H. Boyd's estate; and on the 5th of September, 1853, this suit was brought. The main defence set up is, the acts of limitation barring actions in Tennessee. The suit was brought within two years after John H. Boyd administered, and therefore the act barring suits against administrators does not apply; and the only question is, whether the suit is barred by the general law barring actions founded on simple contracts, if not sued for within three years next after the cause of action accrued.

The settled law of Tennessee is, that where an agent obtains money of his principal, and converts it to his use, and is not sued until three years elapse, the remedy by assumpsit is barred. (McGinnis *v.* Jack and Cocke, Martin and Yer. R., 361; Hawkins *v.* Walker, 4 Yer. R.)

It is also settled in Tennessee, that where the statute commences to run, it runs on, unless there is a new promise within three years next before suit is brought; and an acknowledgment by the defendant of an actual subsisting debt due to the plaintiff within the three years is deemed equivalent to new promise, as the law raises a promise to pay on the acknowledgment. (Russell, adm'r, *v.* Gass, Martin and Yerger's R., 270.) This acknowledgment was made by Boyd, in 1829, by his answer, filed in the Superior Chancery Court at Lynchburg. Had Bylen sued him at law, and the act of limitations been pleaded, the statement in Boyd's answer would have been a good replication.

The question then comes to this—whether Bylen, as guardian, or Sarah Ann Roane, after she became of age, had cause of action against Boyd whilst the suit at Lynchburg was pending? The act of 1819 (Virginia Revised Code, 474) in substance provides, that where a suit in chancery is prosecuted against a defendant who is out of the State, and against a defendant within the State, who has in his hands effects of or is indebted to the absent defendant, the court may make an order, and require surety, if it shall appear necessary, to restrain the defendant within the State from paying the debt by him owing to the absent defendant; or the court may order such debt to be paid to the attaching creditor, upon his giving sufficient security for the return of the money to such person, and in such manner as the court shall afterwards direct.

The act also provides how the absent defendant shall be notified by publication; and if he does not appear, the court may hear the plaintiff's proofs of the justice of his demand, and may proceed to take the bill for confessed, and to decree thereon as to the court may seem proper, and enforce due execution of the decree.

The court did not require security from Boyd to have the money forthcoming according to a decree, that might be subsequently made; but set the cause down for hearing against him, leaving the money in his hands.

Bylen never answered, but urged Boyd by letters to employ counsel and defend the suit, and to send him the money if the bill was dismissed; and thus the matter stood until 1853, when the suit abated by William H. Roane's death.

As, by the Virginia attachment law, the court might require

surety of the garnishee, to restrain him from paying the money in his hands to his creditor, pending the attachment suit, or order it to be paid the attaching creditor, on his giving surety to refund if the suit was decided against him, it follows that the fund was in custody of the law, and that the garnishee could not be sued a second time; so that, in this case, if Bylen, or Miss Roane, had sued Boyd pending the attachment suit, he or she could have pleaded in abatement the former suit pending, to the same effect as if he had been twice sued by Bylen. This is plainly inferrible from the face of the statute; and the position is supported by adjudged cases both in England and in this country. (Brooke *v.* Smith, 1 Salk., 280; Embree and Collins *v.* Hanna, 5 John. R., 101; Irvine *v.* The Lumberman's Bank, 2 Watts and Sargent, 208.) The same rule was recognised by this court in the case of Wallace *v.* McConnell, 13 Peters, 151. Mr. Drake, in his well-considered treatise on attachment, (section 720,) has stated the practice in different States, to which book we refer.

We are opinion that Boyd's holding was not adverse until the suit in Virginia was ended; and, secondly, that neither Bylen, as guardian, nor Sarah Ann Roane, after she became of age, had *cause of action* against Boyd for retaining the money, whilst the suit was pending, and therefore the act of limitations is no defence.

The next question is, whether Boyd is bound to pay interest on the fund? As a general rule, a garnishee is not bound to pay interest, because he is liable to be called on to pay at all times. (11 Sargent and Rawle, 188; Drake Pr., 725; 1 Washington Va. R., 149.)

But here the bill alleges that he used the money as his own; and the proof is, that in the latter part of November, 1826, he received the money as agent of Bylen, and immediately loaned it to George Boyd, his father, who was in failing circumstances, and shortly thereafter became insolvent. As this was an appropriation of the money, and a manifest breach of trust, David H. Boyd was bound to account with interest.

The bill only claims interest from the time the attachment process was served, up to the time of David H. Boyd's death; we therefore order that interest be calculated from the 23d of October, 1827, to the 25th of August, 1851, these being the dates from and to which interest is claimed.

In June, 1826, David H. Boyd forwarded an account to Bylen for the money he had expended for the latter, in prosecuting the suit, at Richmond, against Spencer Roane's executors, including one hundred dollars for his trouble in attending to the business.

The amount claimed is $216.39. We think this charge is reasonable, and order it to be deducted from the principal sum sued for, which is $1,112.33, and leaves $896.44 due of principal, on which interest after the rate of six per cent. per annum will be calculated, from 23d day of October, 1827, up to the 25th day of August, 1851, to be levied of the goods and chattels of the estate of David H. Boyd in the hands of his administrator, John H. Boyd, the respondent, to be administered.

It is further ordered, that the decree of the Circuit Court for the district of West Tennessee, dismissing the bill, be reversed, and that the cause be remanded to said court, for further proceedings to be had therein.

CHARLES MCMICKEN, APPELLANT, *v.* FRANKLIN PERIN.

Where this court affirmed a decree of a Circuit Court, which was, that a conveyance of property should be executed upon the payment of a sum of money; and the Circuit Court proceeded to carry out its decree by issuing an attachment against the party who refused to execute such conveyance, an appeal will not lie to this court from the order directing the attachment.

The appeal must be dismissed, with costs, on motion.

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

It was before this court at a preceding term, and is reported in 18th Howard, 508.

When the mandate of this court went down, the money therein mentioned was tendered to McMicken, who refused to accept it; whereupon, an order was obtained to attach him for contempt, in refusing to make the conveyance required by the decree. Whilst in custody of the marshal, he executed the conveyance, and at the same time took an appeal from the order to attach.

Mr. Taylor moved to dismiss the appeal, which motion was opposed by *Mr. Gillet.*

Mr. Taylor referred to the cases of Watson *v.* Thomas, Littell's Select Cases, (6 Lit.,) 248; Carr *v.* Hoxie, 13 Pet., 462; and Lovelace *v.* Taylor, 6 Rob. R., 93.

Mr. Justice MCLEAN delivered the opinion of the court.

This is an appeal from the Circuit Court for the eastern district of Louisiana.

The defendant, Perin, in the year 1848, being desirous of purchasing the interests the Fletchers had in a plantation, with

the improvements thereon, situated in the parish of East Baton Rouge, in the State of Louisiana, applied to Charles McMicken, a relation of his, living in Cincinnati, Ohio, to loan him five thousand dollars for the purchase, which he agreed to do; and, in order to secure McMicken, it was agreed that he should take the title in his own name in trust, on condition that Perin should pay him the money advanced. And it appears that, under various pretences, McMicken sought to hold the plantation as his property.

A bill was filed by Perin for a specific execution of the contract, by a conveyance to him on the payment of the five thousand dollars borrowed.

And after various proceedings were had and testimony examined, the court decreed that Perin, within six months, shall pay McMicken the sum of $7,266.30, with interest thereon at the rate of eight per cent., from the date until paid; and, on the payment thereof, that McMicken shall convey to Perin the undivided three-fourths part of the plantation aforesaid, in the parish of East Baton Rouge. Subsequently, the time for the payment of the money was extended three months. But this order was afterwards annulled, and an appeal to the Supreme Court from the decree was granted.

And afterwards, at the January term, 1857, on filing the mandate of the Supreme Court of the United States affirming the decree of the Circuit Court, and upon showing that a tender had been made of the sum of money specified in said decree, and the interest thereon, by said Perin to said McMicken, according to the terms of the decree, to wit, the sum of eight thousand seven hundred and fifty-five dollars, which sum has been deposited in this court in satisfaction of said decree by Perin, and upon filing the affidavit of Perin that McMicken refuses to convey the premises directed by said decree, the deed being herewith filed, it is therefore ordered that said defendant, Charles McMicken, do show cause, on Saturday, the 17th instant, at 10 o'clock A. M., why an attachment should not issue to enforce compliance with said decree.

On the same day the mandate was entered, and prior to its entry it was proved, by the affidavit of Perin, that a tender of the above sum was made to McMicken, which he refused.

In answer to the rule to show cause why an attachment should not issue against him, various reasons were assigned, all of which were overruled by the court, and an attachment was ordered to issue to compel the defendant to execute a conveyance, as directed by the decree; and, further, that the defendant should pay the costs of the rule. From this decision the defendant prayed an appeal to the Supreme Court, which

was allowed, and on which bond was given. This is the appeal now before us, and which a motion is made to dismiss.

By the appeal from the former decree, the time within which the money was required to be paid was necessarily suspended. But that decree having been affirmed by the Supreme Court, and remanded to the Circuit Court to be carried into effect, nothing further was required to be done. The tender and deposit of the money in court was all that Perin was required to do, to authorize the court to attach McMicken for a contempt, in refusing to make the conveyance. This involved no new question or decision, but was the ordinary means of enforcing the original decree. In no sense was this a final decree on which an appeal could be sustained. It is, in effect, the same as ordering an execution on a judgment at law, which had been affirmed on error, and remanded for execution to the Circuit Court. It has been held that an order of sale in execution of an original decree is not a final decree, on which an appeal will lie. (Keene *v.* Warren, 13 Peters, 439.)

There are cases in which a second appeal may be taken, but it must be founded on a procedure subsequent to the original decree, and in a matter not concluded by it.

This appeal is dismissed, at the costs of appellant.

ANN C. SMITH, USE OF CALEB CUSHING, PLAINTIFF IN ERROR, *v.* THE CORPORATION OF WASHINGTON.

The power granted by Congress to the corporation of the city of Washington, "to open and keep in repair streets, avenues, lanes, alleys, &c., agreeably to the plan of the city," includes the power to alter the grade or change the level of the land on which the streets by the plan of the city are laid out.

If, in the exercise of this power, an individual proprietor suffers inconvenience or is put to expense, the corporation are not liable in damages.

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

It was an action on the case brought in the Circuit Court by Ann C. Smith, against the corporation of Washington, to recover damages alleged to have been suffered by the plaintiff by reason of the alteration of the grade of K street, in the city of Washington, upon which street the plaintiff's dwelling-house and messuage were situated.

Upon the trial in the court below, after much evidence had been given, the defendants' counsel asked the court to give the following instruction, which was given by the court, and plaintiff's counsel excepted.

If, from the whole evidence aforesaid, the jury shall find that the defendants, *bona fide*, and to promote the public convenience, and to complete and extend the grading of the streets of said city, caused the north side of K street to be cut down, graded, and completed, and thereby caused the damage in said declaration complained of; and that, in the execution of said work, the said corporation made their said excavation in the street, and at a distance of six or seven feet from the front line of the plaintiff's said premises, then the damages so as aforesaid alleged by the plaintiff, if the jury shall believe the same was occasioned by the acts aforesaid of the defendants, and not otherwise, is *damnum absque injuria*, and the plaintiff is not entitled to recover in this action, which instruction the court gave as prayed; whereupon, the plaintiff, by her counsel, excepts to said ruling of the court, and prays the court to sign and seal this, his bill of exceptions, and to cause the same to be enrolled, which is done, this 22d day of May, 1856.

And on the trial of said cause, and before the same was submitted to the jury, the counsel for the said plaintiff requested the said court to give the jury the following instructions, to wit:

1. That if they find, from evidence, that the grade of K street north, in front of said plaintiff's premises mentioned in said declaration, was established and made, and said street gravelled, at or about the year 1832, and the said sidewalk graded and flagged at or about the same time, by the direction and authority of said corporation at the time of opening said street, and in pursuance of the acts of October 23, 1830, August 11, 1831, and 18th of May, 1832—that then the said corporation had no power or authority to regrade said street in a manner to occasion expense to the plaintiff, or injure the use or value of her property, without making compensation therefor, and that the defendants are liable for the damages which the said regrading occasioned plaintiff. [Refused.]

2. That if they believe that the plaintiff or her grantors was induced to build said house in consequence of the said act of October 23, 1830, and the grading of said street in front thereof under it, that then in that case the changing of said grade to her injury, without making compensation, was an act of bad faith towards her, for which the defendants are liable. [Refused.]

That if they find that the said street in front of plaintiff's house was graded under and in pursuance of the act of March 3, 1851, by said defendants, that then the regrading under the act of September 12, 1851, was unauthorized, if the plaintiff sustained injury thereby, for which no compensation was made; and that then, and in that case, the defendants are liable to her for the injury which she sustained thereby. [Refused.]

That if they find that the said defendants caused the pavement in front of said plaintiff's house to be taken up, and said sidewalk to be regraded and the pavement relaid, that then the taking up the same, and regrading and relaying the same, under the acts of August 21, 1851, and 12th of September, 1851, without making compensation for the damages the said plaintiff might sustain thereby, was unauthorized and unlawful, and that said defendants are liable to the plaintiff for the damages sustained thereby. [Refused.]

That under the act of Congress authorizing said defendants to open streets, when they have once graded and opened the same, that they have no lawful authority, without the consent of the property holders injured thereby, and without making compensation for the damages sustained, to regrade so as to injure the value or the use of real estate when the said regrading is made; and that if they find said defendants have so regraded, they are liable to said plaintiff for all damages she has sustained by such regrading. [Refused.]

That if the jury find that the said street had been previously graded by the said corporation, that no changes by the action of the elements thereon, or by natural causes resulting from said grade, can authorize such regrading; and that if the said defendants regraded said streets on account of such changes, they are liable to said plaintiff for all damages which she sustained thereby. [Refused.]

That if the jury find that said street was graded and gravelled, in August, 1851, by said corporation, that without a change of circumstances, and the occurrence of a new and further necessity for a change in said grade, that then the regrade under the act of 12th of September, 1851, was unauthorized and unlawful, and the defendants are liable for such damages as the plaintiff may have sustained by said last-mentioned regrading. [Refused.]

That if the jury find that the defects in the street were such as were occasioned solely by a neglect in not preserving it in the condition in which it was left when first graded under the laws of 1830, 1831, and 1832, that then the defendants were not authorized to regrade said street under either of said acts of 1851, and that their doing so was illegal, and renders them liable for all damage growing out of such regrading resulting therefrom. [Refused by a divided court.]

That if the jury find that said street could have been restored to its condition, as established under the grading originally made, without cutting down said street and regrading it, that said defendants were bound so to restore it without regrading, and that such regrading was unauthorized and illegal, and ren-

ders the defendants liable for all damages sustained by the plaintiff resulting therefrom. [Refused.]

That if the jury believe that said defendants, in regrading said street in 1851, cut down said street lower than was necessary to restore the former grade, and render the said street equally passable, that such excess of cutting down was unauthorized and illegal, and the said defendants are liable to said plaintiff for all injury sustained by such excess of cutting down. [Refused.]

That if the jury find that in said regrading in 1851, the defendants cut down said K street in front of said plaintiff's premises so much as to render it necessary to regrade and cut down Twelfth street, and thereby render that portion of it north of said K street steeper and more difficult of passage than it formerly was; that such fact raises a presumption that said regrading, to the extent it took place, was unnecessary and improper, and unless such presumption is repelled by proof, that the said regrading was unauthorized, and renders the defendants liable to the plaintiff to the extent of the damages which she has sustained thereby. [Refused.]

That if the jury find that the fall between the north and south sides of K street in front of plaintiff's premises, by the first grading or first regrading, was not greater than that in one or more of the grades in the city of Washington made or suffered by the defendants in opening and grading said streets, that such fact will raise the presumption that said regrading was not a work of necessity, and was therefore illegal and unauthorized, and renders them liable to all such damages as the plaintiff sustained by such regrading. [Refused.]

That if the jury find that the north side of said K street in front of plaintiff's house was cut down so low as to turn the water from Thirteenth street from its natural course from north to south, from the high grounds at the north of said K street to the low grounds on I street, at the south, and make it run east to Twelfth street, that such fact is presumptive evidence that said street was cut down more on said north side than was necessary or proper, and that, unless disproved, it is conclusive against the defendants that they cut down there more than was necessary, and that they are liable to the plaintiff for all damage she has sustained thereby. [Refused.]

That if the jury believe that said K street, or any part thereof, where it crosses Twefth street, was left higher than said K street, and impassable for teams, or materially obstructed from the regrading in 1851 to the fall of 1854, or to other time, that such fact is presumptive evidence that said regrading was not necessary for the purposes, passing, and travel, on said K

street, but that it was lowered below said Twelfth street at that point for some other purpose; and that, unless disproved, it renders said defendants liable to said plaintiff for all damage she may have sustained by so regrading. [Refused.]

That if the jury find that the lowering the north side of K street in front of said plaintiff's house, and the making a gutter there from Twelfth to Thirteenth street would have obviated the objection of the flow of the water across the street, and gullying the same, without regrading to the extent which said street was regraded, that then said defendants are liable to said plaintiff for all damages sustained by lowering the north side of said street more than was necessary to protect against said flow and injury. [Refused.]

That the statute of Congress authorizing said corporation to open and grade streets in said city, is not a continuing power, but, when once opened and graded, that such corporation is not authorized to regrade the same in a manner whereby private property is injured; and that if they do so, they are liable to those injured for all damages sustained thereby. [Refused.]

The court having refused to give said instructions, the plaintiff's counsel excepted.

The defendants' counsel thereupon asked the said court to give the following instructions:

And thereupon the said plaintiff's counsel, insisting before the jury that the said change of grade was not made by defendants *bona fide*, the defendants now pray the court further to instruct the jury that the defendants cannot be made responsible in damages in this action, unless from the evidence the jury shall find that the said change was made wantonly, wilfully, and maliciously; which instruction the court gave as prayed.

Whereupon the plaintiff, by her counsel, excepted, and prays the court to sign and seal this her bill of exceptions, this 23d day of May, 1856.

And the said court thereupon gave said instructions, and the counsel for the plaintiff excepted.

And thereupon the said jury, under the said ruling of the court, found a verdict for the defendants.

Upon these various rulings and refusals, the case came up to this court.

It was argued by *Mr. Gillet* and *Mr. Cushing* for the plaintiff in error, and *Mr. Carlisle* for the defendants.

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

FIRST.—*The plaintiff had a right to give evidence tending to question the bona fides of the defendants in making the regrades.*

One of the tests of good faith in making the said regrades was to compare their acts in question with other acts upon a like subject. If the defendants acted in good faith, they would deal with the people in Franklin Row as they did with those in other parts of the city. The defendants had offered proof that the first grade of K street, in front of plaintiff's house, was steep. Thereupon, the plaintiff offered to prove that it was not as steep as other grades which the corporation had fixed in other parts of the city. This evidence was objected to by the defendants, and rejected by the court, and the plaintiff excepted.

This evidence clearly tended to show, if it was not conclusive, that the defendants applied a different rule in other parts of the city from that which they enforced upon the plaintiff. The evidence offered raised a presumption against the defendants, and it rested with them to repel it by other evidence, if they could. It prejudiced the plaintiff to reject it altogether, and therefore the exception ought to be sustained.

SECOND.—*That the first establishment of a grade raises a presumption that such grade was the proper one; and to justify a change, the defendants were bound to show a change of circumstances, and the occurrence of a new and further necessity, to justify a regrading.*

After the grading in 1831 or 1832, which was proved to be a proper grade, by the acts of the defendants as well as by witnesses, it was incumbent upon the defendants to show some reason for a regrade, other than their neglect in letting the street get out of repair. They offered none of a material character. They ordered the regrade by the act of August 11th, 1851, without any substantial or plausible reason. It was the exercise of power without any reasonable cause.

The regrading under the act of the 12th of September, 1851, is wholly without a pretence of excuse. They had fixed the grade and gravelled the street; neither the elements nor any other cause had changed it, or proved it unsuitable. There was no change of circumstances, and no occurrence of any new or further necessity for a change of what they had made as good and sufficient. It was a wanton exercise of power, without any assignable good motive. It laid the foundation for the assumption that the defendants did not act in good faith. It raised that presumption, and it rested with them to repel it, which they did not attempt.

THIRD.—*The payment of damages to a portion of those injured residing in Franklin Row, authorized the presumption that the defendants did not act in good faith.*

The defendants, as a corporation, derive their powers under the seventh and eighth sections of the act of 1820. (3 U. S. S., 586, 587.) There is no power conferred upon them to make gratuities; to do so would be a wanton violation of duty. They cannot assume that they thus acted in paying Ratcliffe $425 towards his loss. This was an acknowledgment that they had acted wrongfully in the cutting down, and were liable for the injury. It was an admission that they acted without lawful cause, and had no legal justification, and raised a clear presumption against them, which they did not attempt to repel.

FOURTH.—*The condition in which the defendants left the street for a long time, raised the presumption against the good faith of their acts.*

Mr. Ratcliffe testified, that "after the defendants cut down the street, we were left in the mud a year or so." The fact of cutting down the street, and leaving it in the condition described, raises a presumption that it was not done to improve the street and make it more passable. It was incumbent upon the defendants to repel this presumption by proof.

FIFTH.—*The court erred in instructing the jury that the plaintiff could not recover without proving that the change in the street was made "wantonly, wilfully, and maliciously."*

In the first instruction prayed by the defendants, the court told the jury, as a matter of law, that if the defendants acted in good faith in the regrading, the plaintiff could not recover. The plaintiff had given evidence tending to show, unexplained, a want of good faith, and especially the order for the second regrading, within about a month after the first regrading, and her counsel commenced to sum up the facts before the jury, to show that the defendants did not act *bona fide*. Thereupon the defendants' counsel interrupted, and prayed a further instruction, as follows:

"And thereupon, the plaintiff's counsel insisting before the jury that the said grade was not made by the said defendants *bona fide*, the defendants now pray the court further to instruct the jury, that the defendants cannot be responsible in damages in this action, unless from the evidence the jury shall find that the said change was made wantonly, wilfully, and maliciously; which instruction the said court gave as prayed."

To this there was an exception. The jury of course found, under this instruction, for the defendants.

a. Here was a change of ground by defendants during the trial, and one assumed under which the plaintiff could not be expected to prevail. It presented, in effect, a new issue, not raised by the plea of the "general issue."

b. It avoided the question of the power of the defendants to regrade, as they had done, as well as that of *bona fides*, and threw upon the plaintiff the burden of proving matters essentially different. These matters relate not to the right to recover, but simply to the extent of the recovery. The decision, in substance, was, that the question of power was not to be looked at, but that the plaintiff must make proof that the act was done "wantonly, wilfully, and maliciously." Under this decision, if the defendants had no power whatever, but had been in fact forbidden by law to do the act complained of, they might not have acted wantonly, wilfully, or maliciously. They might have mistaken the law, or never have seen or heard of it, or acted upon the supposition that they might do whatever they chose; and in either of these cases they would have escaped all responsibility, thus making the plaintiff sustain all the loss, because of their blunders or want of knowledge. Such a rule would work mischief without end. It would be a justification of nearly or quite all the acts of public functionaries, if not of private individuals, of which so much complaint has been made. It would justify courts and officers acting without jurisdiction, if they did not act maliciously. It would, in effect, make the right to recover, in all cases of tort, depend upon the motive which led to its commission, and throw upon the plaintiff the burden of proving that such motive had its origin in malice. A more mischievous rule of action was never maintained and urged before a judicial tribunal.

c. Under the instruction, the issue framed by the pleadings was changed. The declaration charged that the defendants had injured her property without authority of law, and the plea denied the allegation. The parties went to trial upon that issue. The court, on the trial, made a different one, and directed the jury that they must find three other charges against the defendants before the plaintiff could recover:

1st. That the defendants had acted wantonly—that is, wholly without regard to restraints or consequences.

2d. That they acted wilfully—that is, obstinately and stubbornly wrong, not yielding to reason; but by design, and with the purpose of doing injury.

3d. That they acted maliciously—that is, with extreme enmity of heart—with malevolence, and with a disposition to injure the plaintiff without cause—with unprovoked malignity or spite. A malicious injury has been defined to be: "An injury committed out of spite or ill-will against another; an injury committed wantonly, wilfully, and without cause." (2 Burrell L. Dic., 698; 1 Chit. Gen. Pr., 136.) Wantonness is defined by Bouvier (2 v. L. Dic., 640) as "A licentious act by

one man towards the person of another, without regard to his rights."

In changing the issue by the charge of the court, the plaintiff sustained an injury; and the judgment ought to be set aside, and a new trial ordered.

SIXTH.—*The defendants had no lawful authority to cut down the street in front of the plaintiff's house, so as to injure her property, without her consent, without making her compensation.*

It is a fundamental rule of law, that artificial bodies, like corporations, can exercise no power except such as is expressly conferred upon them. (Head *v.* Providence Ins. Co., 2 Cr., 121; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat., 326.)

The only power conferred upon the corporation of Washington on this subject is found in the 7th section of the act of May 15th, 1820, (3 U. S. L., 5687,) and is in these words:

"The said corporation shall have full power and authority to * * * erect and repair bridges; to open and keep in repair streets, avenues, lanes, alleys, drains, and sewers, agreeably to the plan of the city, to supply the city with water," &c.

This provision recognises the known historical fact, that at an early day there was prepared and adopted a plan of the city of Washington, wherein the streets, alleys, lanes, &c., were drawn, and the grade of the streets and avenues above tide water accurately laid down. The elevations of the original grades are shown in the diagram in this case, admitted in the stipulation, and is proved by Cluskey's testimony.

The grades having been previously established, the power conferred in relation to streets and avenues was "to open and keep in repair," and not to grade. The intention of Congress was to authorize the city government to carry into effect the plan of the engineers who laid out the city, and of General Washington, who approved of it. It was not the intention to authorize that elaborate work to be broken up and defeated, in conformity to the caprices which might at any time spring into existence in the city government. Hence the limitation of the power conferred. It neither authorizes the opening a street, nor fixing its grade, but permits opening "agreeably to the plan of the city," which contained the grade of every street, avenue, &c. The city cannot lay out a new street, nor fix the grade of an old one. Its power does not extend to either.

But the charter does authorize the city "to cause new alleys to be opened through the squares, and to extend those already laid out, upon the application of the owners of more than one-half of the property in such squares." (Sec. 8, p. 587.)

But this can only be done by paying those injured the losses they sustain, which is to be collected of those whose property shall be benefited, as equity and justice require. This provision in relation to lanes shows that Congress did not intend to arm the city with the power of injuring the property of individuals, without requiring it to make just compensation.

This law is entirely different from the Georgetown act, construed in Gosler *v.* The Corporation of Georgetown, 6 Wheat., 593. The Legislature conferred upon the corporation of Georgetown "full power and authority to make such by-laws and ordinances, for the graduation and levelling of the streets, lanes, and alleys, within the jurisdiction of the same town, as they may judge necessary for the benefit thereof."

Under this provision, a by-law was passed to grade the streets, in which it was declared that forever thereafter the grade thus established should be regarded in making improvements in the streets. Subsequently, the corporation passed a new law, changing the grade. The plaintiff claimed to be injured by the change, and brought suit upon the ground that the corporation had, by the first law, contracted not to disturb the first grade. The court held that it was not a compact, and that the power to make by-laws and ordinances was a continuing power. Marshall, C. J., said:

"The power is not 'to graduate and level the streets,' or 'to make a by-law for the graduation and levelling of the streets;' but 'to make such by-laws and ordinances for the graduation and levelling of the streets,' &c., within the jurisdiction of the same town, as they may judge necessary for the benefit thereof."

He placed the decision upon the ground, that the corporation was clothed with power to act, when they judged it to be necessary for the benefit of the town.

The power in that case was necessarily a continuing power, to be exercised when the corporation thought necessary. There was no limitation as in this case. It is clear that the Chief Justice was of opinion, that if the power had been to "grade and level," or to make a by-law for doing so, it would not have been a continuing power.

In the present case, there being no express power to grade streets, it is claimed that the authority to open streets not only confers that power, but that it continues, and may be exercised without limit, except upon proof of malice. But the power to open is not a continuing power, because when once opened a street cannot be opened again. The power to repair does not include that of establishing a new grade. That term means simply to restore what has been injured to its original condi-

tion. Bouvier (2 v. L. Dic., 447) says, that "repairs" means "that work which is done to an estate to keep it in good order."

It is clear, that when a street is once opened it cannot be regraded under the power to open, and that under the authority to repair nothing can be done but to restore it to its original condition.

But if the power to open authorized the grading, when it was once exercised the power would be exhausted, and could not be exercised a second time.

The counsel for the plaintiff in error referred also to the following authorities:

1. On the power of the President to fix the grades of the streets. (1 vol. Opin. of Atty's Gen., 368, 416; Burch's Dig. of Atty's Gen., 331; Act of Congress of 1851, 9 Stat. at L., 614; Act of 1852, 10 Stat. at L., 92.)

2. Cases on the right of action on the ground of responsibility. (Rolles Rep., 43; 1 Cramp. and Jar., 20; 9 Barn. and Cres., 705; 16 East, 215; 2 Barn. and Cres., 703; 5 Barn. and Ad., 837; 6 Taun., 23; 3 Burgh. N. C., 468; Selw. N. P., 241; 3 Barn. and Ad., 875.)

Mr. Carlisle, for defendant in error, maintained that the action of the court below, in granting or refusing instructions, depended on the following propositions:

I. The corporation of Washington had power, under its charter, to regrade this street. Its power in this respect is a continuing power, to be exercised, *toties quoties*, as the public convenience may require. (Gorzler *v.* The Corporation of Georgetown, 6 Wheat., 593; Act of Assembly of Md., 1797, ch. 56, sec. 6; Van Ness and ux. *v.* The U. S. and Corporation of Washington, 4 Pet., 280; Char. of 1820, 3 Stat. at L., 587.)

II. The corporation had no power, even by an express ordinance, or contract in any form, to bind itself not to change or alter the grade of the street, even if such grade should be, by the same ordinance or contract, or in any other manner, established. And it follows, of course, that there can be no implied contract, such as is imputed to the corporation, in the premises. The plaintiff could not have acquired any right, by convention, grant, prescription, or contract, express or implied, to have the old grade of the street maintained.

This follows from the preceding point, and is sustained by the same reason and authorities.

III. The case made by the plaintiff in error is one of mere *damnum absque injuria*. It shows no invasion of any right, but simply a damage resulting from the *bona fide* and careful exercise of a lawful authority for the public good. The supposed

right of the plaintiff, of the invasion of which she complains, is a right *ex jure naturæ* to build a house on the top of a hill in the midst of a city, and to require the city to conform perpetually to her convenience, at the expense of the convenience of everybody else; a right to keep a nuisance; to insist on an impracticable grade of a public street; to destroy the value of all the surrounding lots of ground, in order that she may have more convenient access to the house so built. But if, in any case, such right, *ex jure naturæ*, could be maintained, certainly it does not exist in the city of Washington, where all titles to city lots are held from a common source, and subject to common conditions and liabilities; the original proprietors having conveyed their lands to trustees "to be laid out for a federal city, with such streets, &c., as the President of the United States for the time being shall approve." (Burch's Digest, 331; 4 Peters, 283.) The plaintiff was simply the owner of a city lot, as such.

That no action lies in such case, results from the fact that no injury, no violation of her right, has occurred. (4 D. and E., 794, Governor, &c., *v.* Meredith; 8 Cow., 146, Lansing *v.* Smith; 1 Denio, 595, Wilson *v.* The Mayor, &c.; 1 Am. Law Reg., 550, Woodfolk *v.* Nashville Co., by the Sup. Court of Tenn.; 12 Mo. Rep., 418, St. Louis *v.* Gurno; 9 Watts, 382, Green *v.* Borough of Reading; 18 Penn., 187, O'Connor *v.* Pittsburg; 29 Miss., 37, Withers *v.* Commissioners, &c.

Mr. Justice GRIER delivered the opinion of the court.

The declaration in this case alleges, in substance, that the plaintiff is owner of a lot in the city of Washington, fronting on K street; that this street was opened in front of her lot in the year 1831, and became a travelled street; that a wall had been erected in front of the lot, to protect it; that shade trees had been planted in front it; that a sidewalk had been laid; "that defendants unlawfully, wrongfully, and injuriously," cut down the shade trees, took down the wall, removed the pavement, and dug down the street in front of the premises, thereby obstructing and injuring the ingress and egress to plaintiff's lot and the buildings thereon—injuring their value, depriving her of the shade and ornament of the trees, and compelling her to pay large sums of money to enable her to use and occupy her house.

It must be observed that the gravamen of this case is not a trespass on the property of the plaintiff, or the taking down a wall or removing shade trees thereon; nor the erection of a nuisance on the public highway; nor a wilful, malicious, or oppressive abuse of authority, in order to injure the plaintiff.

But the declaration charges that these acts of defendants, in reducing the level of the street, removing trees, pavement, &c., were done "unlawfully, wrongfully, and injuriously."

On the pleadings and evidence in the case, the only questions of law that did or could arise on it, were—

1st. Whether the corporation, defendant, had power to change the grade of the street, or acted "unlawfully and wrongfully" in so doing; and,

2d. If the act was lawful, were the defendants bound to compensate the plaintiff for the injurious consequences to her property?

1. First, then, as to the authority of the corporation.

It is unnecessary, in the consideration of this point, to recur to the early history of the foundation of the city of Washington; suffice to say, the land was originally conveyed to trustees, "to be laid out as a federal city, with such streets, &c., as the President shall approve." It has been so laid out, and the streets dedicated to the public. As in all other cities and towns, the legal title to the public streets is vested in the sovereign, as trustee for the public; and consequently in this District they can be regulated only by Congress, directly, or by such individuals or corporations as are authorized by Congress.

The act to incorporate the city of Washington, passed May 15th, 1820, among other specific powers and duties enumerated in the seventh section, has the following: "*To open and keep in repair* streets, avenues, lanes, alleys, &c., &c., agreeably to the plan of the city."

It has been contended that this power, "to open and keep in repair," does not include the power to alter the grade or change the level of the land on which the streets, by the plan of the city, are laid out.

But we think such a construction of this clause of the charter is entirely too narrow, and cannot be supported as consonant either with the letter or spirit of the statute. It is the evident intention and policy of this statute to commit to this corporation, as a municipal organ of government, whose members are chosen by the citizens, the care, supervision, and general regulation of the streets, as in other cities and boroughs.

Where sums of money have been specially voted by Congress for the improvement of the city, it is usual to order it to be expended under the supervision of the President. But no inference can be drawn from such legislation, that Congress intended to retain the whole police and regulation of the streets to itself, so as to require a special act to alter the grade of a street, or that the President, in addition to his other duties, has imposed on him that of street commissioner of Washing-

ton. The city corporation has the trust confided to them, and the duty imposed upon them, not only of opening the streets of Washington, but of "keeping them in repair."

Streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the road must be "*graded*" or "reduced to a certain degree of ascent or descent;" which is the proper definition of the verb "to grade." If the duty imposed on the corporation requires this to be done, the power must be coextensive with the duty. If charged with neglect of their duty, as public officers bound to keep the streets in repair, it would not be a sufficient excuse to allege that the fences and obstructions are removed, and therefore the street is "opened," or that it has been kept in as good "repair" as it was found.

A Court of Quarter Sessions would probably not receive a defence founded on such astute philological criticism of the terms of the statute. Nor could the allegation be admitted, that having once fixed a grade, which is now found improper and insufficient, the corporation has exhausted its power, and has no authority to change the level or grade, in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it.

2. Having performed this trust, confided to them by the law, according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purposes of a highway, they have not acted "unlawfully or wrongfully," as charged in the declaration. They have not trespassed on the plaintiff's property, nor erected a nuisance injurious to it, and are, consequently, not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not "unlawful or wrongful," they are not bound to make any recompense. It is what the law styles "*damnum absque injuria.*" Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public.

The law on this subject is well settled, both in England and this country. The cases are too numerous for quotation; a reference to one or two more immediately applicable to the questions arising in this case will be sufficient.

In Callender *v.* Marsh, (1 Pick., 417,) the defendant, as surveyor of the highways, was charged with digging down a street in Boston, so as to lay bare the foundations of plaintiff's house, and endanger its falling. The authority under which he acted was given by a statute which required "that all highways, townways, &c., should be *kept in repair and amended* from time to time, that the same may be safe and convenient for travellers." "This very general and exclusive authority," say the court, "would seem to include everything which may be needed towards making the ways perfect and complete, either by levelling them where they are uneven and difficult of ascent, or raising them where they should be sunken and miry." It was held, also, that the law does not give a right to compensation for an indirect or consequential damage or expense, resulting from a right use of property belonging to the public.

In Green *v.* The Borough of Reading, (9 Watts, 282.)

The defendants, by virtue of their authority to "*improve and repair*," graded the street in front of plaintiff's house five feet higher than it had been before, and it was held that the corporation was not liable to an action for any consequential injury to plaintiff's property, by reason of such improvement or change of grade in the public street.

In the case of O'Connor *v.* Pittsburg, (18 Penn. Rep., 187,) a church had been built according to the direction of the city regulator, and by a grade established in 1829. Afterwards, in pursuance of an ordinance, the grade of the street was reduced seventeen feet; the church had to be taken down and rebuilt on a lower foundation, at a damage of $4,000. The authority given to the city was "*to improve, repair, and keep in order the streets*," &c.

The court say, "We had this case reargued, in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in Pennsylvania, but by every decision in the sister States, except one."

We are of opinion, therefore, that the instructions given by the court below on these points were correct, and affirm their judgment.

JOSEPH H. LYON, PLAINTIFF IN ERROR, *v.* JOHN BERTRAM, ALEXANDER H. TWOMBLY, AND EDWIN LAMSON.

Where there was a contract for the purchase of a cargo of flour, and a portion of it was delivered, paid for, and used by the purchaser, he cannot repudiate the contract, upon the ground that the brand upon the flour was not that for which he contracted.

The cases upon this point examined.

Where the statute of limitations imposes a bar upon certain species of contracts after three years, and upon others after two years, and the plea did not show that the contract in question was of the latter class, the plea was bad.

The laws of California require that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action may be joined. So that this statute is complied with, it is not a fatal objection that the respective interests of parties *jointly* concerned are not accurately set forth.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of California.

The facts are particularly stated in the opinion of the court.

It was argued by *Mr. Brent* and *Mr. Poe* for the plaintiff in error, and *Mr. Fessenden* for the defendants.

The counsel for the plaintiff in error, after stating their objections to the pleadings in the case, and also those which were founded on the statute of limitations in California, contended that this was not an entire contract for the purchase of the whole cargo, but only for so much of it as was branded Haxall; that the description of the quality was material; that Lyon, if had chosen, could have declined to receive any part of the cargo; that the acceptance of a part, under the circumstances, did not affect his right to repudiate the residue.

Mr. Fessenden contended that the contract was entire; that it was an executed contract; that the term Haxall was descriptive merely, and not material; that if it was material, then it was an express warranty upon which the purchaser must rely, without rescinding the contract; and that the acceptance of a part was an acceptance of the whole.

Mr. Justice CAMPBELL delivered the opinion of the court.

This suit was commenced by the defendants in error, to recover the price for a cargo of flour, bargained and sold to the plaintiff in error, in the city of San Francisco. The judgment of the Circuit Court was rendered upon a special verdict in favor of the plaintiffs in that court. The verdict finds that on the 13th January, 1853, the plaintiffs, and Flint, Peabody, & Co., were, jointly, the owners of a cargo of flour, consisting of two thousand barrels, branded, and which were in fact Gallego, then being on the barque Ork, lying at a public wharf in San Francisco, and composing its entire cargo of flour, which inspected 1,771 barrels superfine, and 229 bad.

The firm of Flint, Peabody, & Co., as agents and part owners, on the day aforesaid, concluded the following agreement with the defendant:

SAN FRANCISCO, *January* 13, 1853.

Sold this day to Joseph H. Lyon, Esq., a cargo of Haxall flour, now on board the barque Ork, lying in this harbor, being about two thousand barrels, on the following terms and conditions, viz: Joseph H. Lyon, Esq., agrees to pay Messrs. Flint, Peabody, & Co., thirty dollars per barrel for such as shall inspect superfine, and twenty-seven dollars per barrel for such as shall inspect bad; payment to be made as it may be delivered, and to be received and paid for on or before the expiration of three weeks from date.

If Messrs. Flint, Peabody, & Co., elect, they can land and store the flour at the expiration of one week, or so much as may remain on board at that time, Mr. Lyon paying storage and drayage expenses. J. H. LYON.

FLINT, PEABODY, & Co.

On the 25th January, 1853, the defendant applied to Flint, Peabody, & Co., for fifty barrels of flour, so purchased by him, by a written order, as follows:

SAN FRANCISCO, *January* 25, 1853.

Messrs. Flint, Peabody, & Co., will please deliver Mr. William R. Gorham, or bearer, fifty barrels of flour, out of the lot purchased from the ship Ork, and oblige J. H. LYON.

Paying them therefor the contract price, amounting to the sum of $1,500, and received from Flint, Peabody, & Co., the following order:

SAN FRANCISCO, *January* 25, 1853.

Captain of Barque Ork: Please deliver the bearer fifty barrels superfine flour, and oblige FLINT, PEABODY, & Co.

Fifty barrels of Gallego flour, inspecting superfine, being part of said cargo of flour on board the barque Ork, was delivered from the barque to William R. Gorham, a baker, to whom the defendant had sold and transferred the delivery order and the said flour. When the order was made for William R. Gorham, the defendant represented that the flour was Haxall. On the 29th January, 1853, the defendant sold to Dunne & Co. fifty barrels of flour, which he represented to be Haxall, and gave the following order, bearing date on that day:

Messrs. Grey & Doane will please deliver Messrs. Dunne & Co. fifty barrels of Haxall flour from Ork. J. H. LYON.

The said Dunne & Co., on discovering that the flour was not

Haxall, but Gallego, refused to take it, and so notified the defendant. On the 31st of January, 1853, the defendant made further application for one hundred barrels of flour, being part of the flour so purchased as aforesaid, and gave his check on his bankers for the price, and received the following delivery order from Flint, Peabody, & Co., bearing that date:

Capt. Hutchings, Barque Oak: Please deliver to J. H. Lyon, or to the order of Grey & Doane, one hundred barrels superfine flour, and oblige, &c.

The check was not paid on presentation. Upon the refusal of Dunne & Co. to take the flour, the defendant, on learning the fact, notified the plaintiffs that he would not take the flour, and countermanded the payment of the check he had given for the one hundred barrels last mentioned.

On the 3d of February, 1853, the plaintiffs informed the defendant that they were prepared to deliver the remainder of the cargo, and requested the defendant to receive it. And subsequently, on the same day, they addressed him a note, in which they advised him they would sell the flour on the 5th February, at public auction, for his account, and would hold him responsible for the difference there might be in the net proceeds of the proposed sale and the contract price, and for charges and expenses, he (Lyon) having declined to take the flour under the contract. All the flour on the barque was of the brand known as Gallego, and the barrels were branded Gallego in printed characters from two to two and one-half inches in length, on both heads. In the opinion of some experts, there existed no difference in the quality or price of the flour of either brand, (Haxall and Gallego,) each inspecting superfine; but, in the opinion of other experts, there was a difference, some preferring the one brand and some the other.

Subsequently to the sale, and up to and including the 28th January, 1853, Gallego and Haxall flour had advanced to $35 per barrel in San Francisco; and between that and the 5th of February the price of both declined to $18 per barrel. On the 5th of February the plaintiffs caused the remainder of the cargo to be sold at public auction, according to their notice to the defendant, for his account, and at a great reduction of price. The verdict does not find any fact to impugn the fairness of this sale. Before this suit was commenced, Flint, Peabody, & Co., assigned their interest in this suit to the plaintiffs, of which the defendant had notice.

The verdict is silent in reference to the negotiations that preceded the contract, and does not inform us whether the

cargo was at any time visible to the defendant; nor does it discriminate with exactness the qualities of Haxall and Gallego flour, or affirm that there is any specific difference between them.

It is evident, from the verdict, that the error in the description of the cargo did not bear on the substance, or on any substantial quality of the subject of the sale. The subject of the sale was a cargo of flour of about two thousand barrels, on board of a vessel lying at a wharf in the city; of a quality to be ascertained by an inspection; and from that inspection, and not from the brand, the price was to be ascertained. The brands Haxall and Gallego are understood to refer to different mills in Richmond, Virginia, at which flour is manufactured. The verdict sufficiently determines that the difference between them in the market of San Francisco is inappreciable, at least by the mass of purchasers and consumers. The case clearly does not belong to that class in which the subject-matter of the contract was of a nature wholly different from that concerning which the parties to the contract made their engagements. The brand on the exterior of the barrels of flour was certainly not of the substance of the contract. (Young *v.* Cole, 3 Bing. N. C., 724; Gompertz *v.* Bartlett, 2 Ell. and B., 19 Verm. R., 202.)

The defendant does not resist the fulfilment of his agreement for any fraud; nor does the verdict impute any *mala fides* to the plaintiffs.

The case rests upon these facts. There was a sale of a cargo of flour, at a price dependent upon the fact whether the component parts inspected superfine or bad, which was described as of one brand, but which proved to be of another. There was no material difference in the credit of the brands, and the market price of the flour was but little affected by the question whether the brand was of the one or the other mill.

A portion of the flour has been delivered to, and paid for, and consumed by, the defendant. He made no offer to return this flour. The flour remained in the Ork from the 13th of January till the 31st of January, subject to the exigencies of the contract. During that period, there was no complaint on the part of the defendant. From the 28th of January till the 5th of February, when the refusal to accept the remainder of the flour and the sale of it on account took place, the price of flour was steadily declining.

It may be admitted that the description of the flour as Haxall imported a warranty that it was manufactured at mills which used that brand; and that the purchaser would have been entitled to recover the amount of difference in the value of that and an inferior brand. (Powell *v.* Horton, 2 Bing. N. C., 668; Henshaw *v.* Robbins, 9 Met., 83.)

But it cannot be admitted that the purchaser was entitled to abandon this contract.

In the note to Cutter *v.* Powell, in Smith's Leading Cases, the annotator says: "It is settled, by Street *v.* Blay, and Poulton *v.* Lattimore, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all. 2. He may receive it, and bring a cross action for the breach of the warranty. 3. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price." The annotator proceeds to say, "that it was once thought, and, indeed, laid down by Lord Eldon, in Curtis *v.* Hanney, 3 Esp., 83, that he might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to Weston *v.* Downes, Doug., 23, is overruled by Street *v.* Blay, 2 B. and Adol., and Gompertz *v.* Denton, 1 C. and Mee., 205; and it is clear that, though the non-compliance with the warranty will justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price."

The second and third propositions of this learned author are indisputable, and have received the sanction of this court. Thornton *v.* Wynn, 12 Wheat., 183, as modified by Withers *v.* Greene, 9 How. S. C. R., 213. The first proposition, concerning the right of the purchaser to reject the article because it varies from the warranty, is an open question. In Dawson *v.* Collins, 10 C. B. R,, 527, (70 E. C. L. R.,) the judges dissent from it. The Chief Justice expressed his favor for the conclusion, "that the buyer has no right to repudiate the article," because it did not correspond to the warranty; and Cresswell, Justice, said, "Where the rule is of an individual and specific thing, the vendee can only defend himself, altogether, against an action for not accepting it, if the thing be utterly worthless, as in Poulton and Lattimore; or, in part, by giving the breach of warranty in evidence in reduction of damages." And this corresponds with the conclusions of this court in the case of Thornton *v.* Wynn, 12 Wheat., 183, where very similar language is used.

But while the first proposition of the note in the Leading Cases is a matter of dispute, there is none in respect to the conclusion that the purchaser who has received and used the article, and derived a benefit from it, cannot then rescind the contract. This principle is stated in Hunt *v.* Silk, 5 East., 449, in which Lord Ellenborough says: "Where a contract is to

be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*." And, "if the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of. The parties cannot be put *in statu quo*." In Perley *v.* Balch, 23 Pick., the same principle is applied to contracts of sale of chattels. The court say: "The purchaser cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. The purchasers cannot derive any benefit from the purchase, and yet rescind the contract. It must be nullified *in toto* or not at all. It cannot be rescinded in part and enforced in part." In Burnett *v.* Stanton, 2 Ala. R., 183, the court say: "A contract cannot be rescinded without mutual consent, when circumstances have been so altered by a part execution that the parties cannot be put *in statu quo;* for if it be rescinded at all, it must be rescinded *in toto*." To the same effect is Christy *v.* Cummins, 3 McLean R., 386; 2 Hill N. Y. R., 288, per C. J. Nelson; Kase *v.* John, 10 Watts, 107. In Thornton *v.* Wynn, 12 Wheat., 183, this court say: "That if the sale of a chattel be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return in a reasonable time."

If the verdict had found that the defendant had sustained any damage from the difference in the brands on the flour, the price would have been diminished accordingly; and so the defendant might have been indemnified upon an action commenced by himself, alleging a breach of the contract. But, without considering whether he could refuse to accept any portion of the flour for the variance from the letter of his contract, we decide that he lost this power when he applied to have, paid for, and sold the parcels, on the 25th and 31st of January, 1853.

The defendant pleaded that the several causes of action in the complaint mentioned did not accrue within two years before the commencement of the suit. The code of California provides, that "an action upon any contract, obligation, or liability, founded upon an instrument of writing, except those mentioned in a preceding section, shall be brought within three years, and within two years if founded upon a contract, obligation, or liability, not in writing, except in actions on an open

account, for goods, wares, and merchandises, and for any article charged in a store account. The plea of the defendant does not allege that the cause of action is founded upon a contract, obligation, or liability, not in writing, nor show that it falls within the limitation of two years, as pleaded. The complaint is framed so as to admit evidence of a contract in writing quite as well as an oral contract, and the evidence shows this action is founded on a written contract. The plea should have contained an averment that the cause of action was not in writing, with such other averments as to show that the bar of the statute pleaded was applicable.

A plea cannot be sustained, which rests for its validity upon a supposed state of facts which may not exist. The plea must be an answer to any case which may be legally established under the declaration. Winston *v.* The Trustees' University, &c., &c., 1 Ala. R., 124.

It was objected that the proof shows that the assignment by Flint, Peabody, & Co., was made to the plaintiffs in the suit, and that the declaration alleges that they assigned their interest in the claim to John Bertram, one of the plaintiffs. The code of California requires that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. The plaintiffs are shown to be the parties jointly interested in the subject of the action, and in the claim for relief. It is quite immaterial in what proportions they may be concerned. Their case is substantially established, when their joint interest is shown, and the error in respect to the degree of the interest of the several parties is not such a variance as will be considered.

Judgment affirmed.

WILLIAM S. HUNGERFORD, APPELLANT, *v.* JOHN SIGERSON.

Where a bill in chancery was filed for the purpose of enjoining a judgment at law, obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, and did not contain any charges of fraud; neither did it aver that it was owing to the contrivance or unfairness of the defendant that an adequate remedy could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed.

THIS was an appeal from the District Court of the United States for the district of Wisconsin.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Bradley* for the appellant, and by *Mr. Cushing* and *Mr. Gillett* for the appellee.

Mr. Bradley admitted that the bill was very inartificially drawn, but contended that there were three grounds upon which the jurisdiction of the court could be sustained.

First. Complicated accounts between the parties.

Second. The breach of the trust with which the said note was clothed.

Third. The want of remedy in the common-law court.

If the bill shows a state of facts well pleaded, which would entitle the complainant either to a discovery or relief, the demurrer must be overruled. (Livingston *v.* Story, 9 Pet., 658.)

And they are well pleaded if they are material, and stated in terms which may be deemed reasonably certain in their import. (Sto. Eq. Pl., sec. 452, note 1.)

There had been no settlement of accounts between the parties, and the balance owed was uncertain. This note was for twice as much as was claimed by the defendant, and the complainant was not to be sued upon it. Yet he sued and recovered judgment for the whole amount. Equity has jurisdiction to relieve. (Gainsborough *v.* Gifford, 2 P. Will., 424.)

The defendant thus gained an undue advantage. It is against conscience that he should use that advantage thus improperly gained, and that gives jurisdiction to restrain the proceedings at law. (Eden on Inj., ch. 2, p. 3.)

He could not have availed himself of the defences, because the court of law could neither give adequate relief by account, nor compel a discovery of the facts of that mutual understanding, under which the note was given, as these facts were from their nature private, and therefore known only to the parties. (Bateman *v.* Willoe; 1 Sch. and Lefr., 204; Marine Ins. Co. *v.* Hodgson, 7 Cr., 332.)

The counsel for the appellee said that in the bill there is no allegation that a fraud was committed to induce the complainant to give the note;

Nor any that the defendant transferred it contrary to promise;

Nor any that the defendant misled him so as to prevent his defending the suit;

Nor any that he could not have defended the suit successfully;

Nor any that he could not have made proof of all the facts necessary for a successful defence on that trial of the cause;

Nor any that he has no relief except in equity, nor that he has no remedy at law;

Nor any that the complainant has offered to settle with the defendant, and to pay him what was justly and equitably his due;

Nor any that he stated the whole case to counsel, when he

was advised that he had no defence on said note which he could make in that suit;

Nor any that the advice of counsel referred to was before the judgment upon said note;

Nor any that his failure to defend was occasioned by such advice.

FIRST.—*A court of equity has no jurisdiction where the party has had a full remedy at law.*

Except under some special statute, no court of equity can entertain jurisdiction without the complainant averring that he has no remedy at law. In this case, the bill was filed in the District Court of the United States, under the powers conferred by the judiciary act. The sixteenth section of this act provides, "that suits in equity shall not be sustained in either of the courts of the United States, in cases where plain, adequate, and complete remedy may be had at law." (See Gordon *v.* Hobart, 2 Sumner, 401; Baker *v.* Biddle, 1 Baldwin, 405.)

The omission of the party to avail himself of his defence at law cannot confer jurisdiction. If the party has once had an opportunity to defend himself, it is the same to both parties, as if he had actually done so. It ends the matter.

SECOND.—*Where a party failed to defend a suit at law, equity will not relieve, except when the defence was not available at law, or where he was prevented by fraud, accident, or wrongful act of the other party, without any negligence or fault on his part.*

This propositon is in the very words of the Court of Appeals in New York, in Vilas *v.* Jones, 1 Coms., 274, pp. 281, 282.

It is supported by a long current of decisions.

In More *v.* Bayley, 1 Breese, 60, the court said, that if "a defendant neglects to make his defence at law, a court of equity will not relieve him."

In Cowan *v.* Price, 1 Bibb, 173, the same rule is laid down.

In Williams *v.* Lee, 3 Atk., 224, Lord Hardwicke held in the same way.

In Winthrop's case (3 Desausure, 310, p. 324) this point was ruled in the same way.

In Bateman *v.* Willoe, 1 Schoales and Lefroy, 201, p. 204, after laying down the same rule, Lord Redesdale says, "it is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere."

In Lansing *v.* Eddy, 1 John. Ch. R., 49, Chancellor Kent said, that an injunction will not be granted on a charge of usury, and the party seeks a discovery, "for the usury would have been a good defence at law; and no reason was given why the defendant did not seek the discovery while the suit at law

was pending." "Chancery will not relieve against a judgment at law, unless the defendant was ignorant of the fact in question pending the suit, or it could not be received as a defence."

In Simpson *v.* Hart, ib., 91, p. 98, this doctrine was reiterated.

In Barker *v.* Elkins, ib., 465, it is repeated; and the court say, "if the defendant has not used due diligence in applying for a discovery, if necessary to aid him, he cannot be relieved."

In Norton *v.* Wood, 5 Paige, 249, Chancellor Walworth expressly laid down the same rule. It is recognised by him in Post *v.* Boardman, 10 Paige, 580.

In Perrine *v.* Striker, 7 Paige, 598, he repeats the rule, and says, "if there are circumstances in the case which rendered it impossible to obtain relief in the suit at law, they should be stated in the bill."

In Thompson *v.* Berry & Van Buren, 3 John. Ch. R., 395, it was held, that where a party suffered judgment to pass against him without making his defence or applying for a discovery, equity could not relieve him. This case was affirmed on appeal in the Court of Errors, in the 17th of John. R., 436, by the unanimous opinion of the court.

In Penney *v.* Martin, 4 John. Ch. R., 566, Kent, Chancellor, held that "where there was neither accident nor mistake, misrepresentation nor fraud," the Court of Chancery had no jurisdiction to afford relief, although he had lost his remedy at law through ignorance of a fact which he might have learned with due diligence and inquiry, or by bill of discovery."

In McVickar *v.* Walcott, 4 John. R., 510, the same rule was declared in the Court of Errors.

In Green *v.* Dodge, 6 Ham. Ohio R., 80, the Supreme Court proceed upon the same ground.

In Bartholomew *v.* Yaw, 9 Paige, 165, Chancellor Walworth goes over the whole ground, and reasserts the principles above laid down.

In Minturn *v.* The Farmers' Loan and Trust Company, 3 Coms., 498, the Court of Appeals say: "Where an action at law was commenced to recover upon a contract alleged to be usurious, and the defendant in the action filed a bill in chancery, praying for an injunction to restrain the proceedings, but alleged no defect in the means of establishing his defence at law, the bill could not be sustained."

These cases abundantly settle the point above laid down. If the note in question was given for ten thousand dollars, when

only four or five thousand were really due, it cannot be questioned that there was a good defence at law to so much as was not equitably due.

1. If there was a defence, it was a legal one, and would have been available at law; and this is not denied in the bill.

2. The bill does not aver that complainant was unable to prove his defence in the action of law. But if he could not *prove* it without a discovery, he was bound to file a bill for such discovery, so as to use the answer upon the trial.

3. There is no allegation in the bill that a misrepresentation was made, or fraud practiced upon complainant, by Sigerson, which prevented his making his defence.

4. No excuse whatever is offered for not making his defence in the suit at law, except that his counsel told him he had no defence to the note. He does not state that this advice was given pending the suit at law, and the expression used clearly indicates that it was not. But, however that may be, it is clear that his defence was a legal one, and available at law if it existed. If he was wrongfully advised, that is a question between him and his counsel. If the latter misled him, Sigerson is not responsible for it, nor can it give a court of equity jurisdiction. If, through wrong advice, inattention, or otherwise, he failed to avail himself of his defence, he must abide the consequences. A court of equity cannot relieve him.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the District Court for the district of Wisconsin.

In his bill, the complainant states that prior to the 1st of December, 1851, he had numerous business transactions with the defendant, who had made advances of money to him on divers occasions, and payments had been made to him by the complainant. In a conversation in relation to their accounts, the defendant admitted the complainant was indebted to him only in about the sum of four thousand two hundred dollars; and on that day the defendant proposed to the complainant that he should execute to the defendant a promissory note for the sum of ten thousand dollars, payable one day after date, which he wished to use as a collateral security on which to raise money; and he agreed not to sell or dispose of the same, or urge the complainant for the payment of the note, but would indulge him until he could make collections. And having unlimited confidence in the defendant, and feeling under many obligations to him for his various acts of kindness, the complainant made and delivered to the defendant, on the 1st of

December, 1851, a note of hand for $10,000, payable one day after date, to the order of John Sigerson, for value received, without defalcation or discount, negotiable and payable at the Bank of the State of Missouri. And the complainant avers that the note was given under the circumstances and for the consideration stated, and on no other or different account; that since the date first above stated, he and the defendant have had no dealings whatever.

And the complainant alleges that on the 10th of August, 1852, the defendant caused a suit to be brought against him on the above note, and on the 11th of January, 1854, a judgment was recovered for $11,258.33 and costs. And the complainant says the judgment is unjust, in so far as it exceeds in amount the sum of four thousand two hundred and seventy-five dollars and interest.

And the complainant prays the defendant may be enjoined from collecting such part of the judgment as exceeds the sum he owes to the defendant, and this sum he offers to pay. Numerous interrogatories to the defendant are stated in the bill, designed to show the money transactions between them, and the amount due by the complainant to the defendant.

A demurrer was filed to the bill, which, on argument, was sustained, and the bill dismissed at the costs of the complainant, on which an appeal was allowed.

The subject-matter of this controversy arises out of mutual dealings between the parties, and the consideration on which the note stated in the pleadings was given. There is no allegation in the bill that adequate relief could not be had at law. There is no charge of fraud, or that the note had been assigned contrary to the agreement; nor that, by the contrivance or unfairness of the defendant, a remedy was not had at law; nor is there anything in the bill from which the court can infer a discovery is necessary to reach the justice of the case.

Where a party has failed to make a proper defence at law through negligence, equity will not aid him. If by accident or fraud such a defence has been prevented, a court of equity may grant relief.

When the decree below was pronounced on the demurrer, the complainant, by application to the court, might have asked leave to amend his bill, which the court, as a matter of course, would have allowed. But he prayed an appeal to this court, resting his whole case on the bill. And as it contains no averments authorizing relief in equity, none can be given.

The decree of the District Court is affirmed.

WILLIAM B. GRANT, WILLIAM BRADSTREET, WILLIAM L. FLITNER, PETER GRANT, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THOMAS GRANT, DECEASED, ELIZABETH F. GRANT, ADMINISTRATRIX, WILLIAM S. GRANT AND GEORGE BACON, ADMINISTRATORS OF THE ESTATE OF SAMUEL C. GRANT, DECEASED, OWNERS OF THE AMERICAN SHIP CONSTELLATION, LIBELLANTS AND APPELLANTS, *v.* CORNELIUS POILLON, RICHARD POILLON, JAMES L. VARICK, IMPLEADED WITH H. JOHNSON, HICKS, BAILEY, WILLIAM Y. CLARK, DEAN W. W. HINCHEN, C. H. CLARK, AND D. D. MILLER, RESPONDENTS AND APPELLEES.

Where the master of a vessel was also part owner, and made a contract of affreightment with a lumber company, of which he was also a member, and the cargo was consigned to the master, the case is not within admiralty jurisdiction, but appropriate to that of a court of chancery.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

It will be perceived, by the caption, that Flitner was one of the libellants, and, as he was also a member of the Constellation Lumber Company, he was on both sides of the case.

The circumstances under which the libel was filed are stated in the opinion of the court. The District Court dismissed the libel; and upon an appeal, this decree was affirmed by the Circuit Court. The libellants then appealed to this court.

The case was argued by *Mr. Goodrich* for the appellants, and submitted on a printed argument by *Mr. Donohue.*

Mr. Goodrich made the following points, viz:

I. The contract which is set forth in the bill of lading, and the services performed under it, appertain to the admiralty and maritime jurisdiction, and the libellants are entitled, *prima facie*, to its assistance.

II. The libellants, as owners of the ship, have not made any agreement with the owners of the cargo, by which the rights or remedies of the libellants, derived from the contract set forth in the bill of lading, have been diminished.

III. The agreement which Flitner made with the respondents does not purport to bind the owners of the ship; Flitner, as master, or as part owner, had no implied authority to bind the ship, or its owners, to such an agreement, and no express authority to that effect is shown.

IV. Assume that some portion of the freight-money would be due to Flitner, upon a statement of an account between the

owners of the ship; and that Flitner, by agreement with the respondents, (to which the ship and its owners were no party,) is bound to contribute to the payment of the freight-money, and thereupon, to the extent of such contributory share, the respondents have an equity against Flitner to *retain* his share of the freight-money; such equity does not change the character of the contract set forth in the bill of lading, or the rights of the libellants under it, or take away the admiralty and maritime jurisdiction which attached, as an incident to the contract, if I may so say, the moment it was entered into, and continued, when the libel was filed.

a. The contract into which the owners of the ship entered is entirely within the admiralty and maritime jurisdiction. If they had made a contract principally appertaining, in its subject-matter, to some other jurisdiction, and only incidentally embracing matters of a maritime character, they might have been obliged to resort to a court of common law, or to a court of equity; but not having entered into any such contract, they are not excluded from the admiralty by any equities which the respondents may have against Flitner, by reason of a contract with which neither the ship nor its owners are in privity, and which has no connection with the contract evidenced by the bill of lading. (The Pacific, 1 Blatchford, 569; Le Gaux *v.* Eden, Douglas, 606.)

V. There is no averment, in the answer of the respondents, that Flitner has not contributed to them all which he was bound to contribute; it contains no averment that any sum, upon a statement of an account between the owners of the ship, would be due to Flitner from the other part owners. There is no foundation for any subsisting equity in favor of the respondents.

VI. Flitner, as master, in making the contract set forth in the bill of lading, undertook to bind the owners of the ship, including himself, as the party on the one side contracting, to and with the owners of the cargo, excluding himself, as the contracting party, on the other.

a. The libellants, from the facts in proof, have a right to say that the respondents, knowing their relation to Flitner, meant to bind themselves in the manner suggested. (Brown on Actions at Law, 133, 134; Robson *v.* Drummond, 2 B. and Ad., 303; Sims et al. *v.* Bond, 5 B. and Ad., 389.)

c. The respondents having received the consideration and benefit of the contract, set forth in the bill of lading, which they entered into with Flitner, the agent of the libellants, cannot in any manner, or for any purpose, set up a private agreement made by themselves with Flitner, so as to defeat or impair the

rights or remedies of the libellants, under their bill of lading. (Catts *v.* Phalen, 2 How., 381; Bradford et al. *v.* Williams, 4 How., 588; Van Rensselaer *v.* Kearney, 11 How., 326; Curran *v.* Arkansas, 15 How., 309; Philadelphia, Wilmington, and Baltimore Railroad *v.* Howard, 13 How., 326; Comer *v.* Jackson, 4 Pet., 83 to 87; Comth. *v.* Heirs of Andre, 3 Pick. Rep., 324; The Repulse, 2 Wm. Robinson Rep., 399; Pitt *v.* Chappelow, 2 M. and W., 6, 15, 19, 20; The Frederick, 1 Dodson Adm. Rep., 266; Bacon *v.* Robertson, 18 How., 480.)

d. The libellants could not have been compelled to make delivery of the cargo without payment of freight; and upon refusal by the respondents to pay, might have had a sale under the admiralty; the respondents, upon an offer to pay freight, and a refusal of the libellants to deliver the cargo, might have proceeded against the libellants in the admiralty, and the libellants could not have resisted by pleading the private agreement of Flitner with the respondents.

VII. The non joinder of Flitner, as party respondent, cannot avail as ground of exception or defence.

a. It should have been set up by way of exceptive allegation, and not in the answer. (Reed *v.* Hussey, Blatch. and Howl., 525; 2 Conkling Adm. Juris., 583, 584, 585; Pratt *v.* Thomas, Ware Rep., 427; Certain Logs of Mahogany, 2 Sum. Rep., 589; Sheppard *v.* Graves, 11 How., 509; Conard *v.* The Atlantic Ins. Co., 1 Peters, 386, 450; De Wolf *v.* Rabaud, 1 Peters, 476, 498; Sims *v.* Handley, 6 How., 1; Smith *v.* Kernochen, 7 How., 198; Evans *v.* Gee, 11 Peters, 80.)

b. If it may be set up in the answer, it must be regarded as an exceptive allegation; and as such it is insufficient, because it does not show who are the owners or members of the Constellation Lumber Company, or that they are unknown and cannot be described.

c. Flitner, as master and part owner of the ship, is a proper party libellant; the respondents are estopped, by their contract with him, as the agent of the libellants, to set up an adverse private interest created by themselves.

Mr. Goodrich cited, also, the following authorities: Waring *v.* Clark, 5 How., 541; Parsons *v.* Bulford, 3 Peters, 447; The Catherine, 6 Notes of Cas. Ecc. and Mar. Supp., 43, 49; Mereton *v.* Gibbens, 3 D. and E., 267; The Repulse, 5 Notes of Cas. Ecc. and Mar., 348, 350, 351; Abbott on Shipping, 7 Lon. edi., 105, sec. 4; The Lady Campbell, 2 Hag. Adm., 14, note; Willard *v.* Dorr, 3 Mason, 161, 171; The England, 5 Notes Cas. Ecc. and Mar., 173, 174; Collyer on Partnership, 4 Am. edi., sec. 719; Greenleaf *v.* Queen, 1 Peters, 149.

Mr. Donohue made the following points:

First. Flitner was a proper party respondent in the court below; and until he is made a party, no further proceedings should have been had in the court below; and this was no ground for exception. The only ground for exception to the libel for the causes is rule XXXVI, of the Supreme Court. The persons composing the so-called Constellation Lumber Company, of which he was one, being partners, are all liable *in solido;* and the objection being taken by answer, they cannot proceed until he is made a party defendant.

Second. Ships being made "to plough the seas, and not lie by the walls," and as all the owners owning from a sixty-fourth to a half cannot act at once, one owner must. (See Story on Partnership, sec. 418.) And his contracts are the contracts of all in the employment of the vessel (Story on Agency Part., sec. 419) or her repairs. Flitner was not only master, but part owner, acting for all.

Third. Supposing Flitner to have only been master, the facts show a ratification of his act, and full authority.

1. The vessel in New York, without cargo, with all the owners within one day (by mail or travel) of the vessel, they of course knew what was going on.

2. A contract, made 22d September, to go *perhaps* to Callao at one freight, *perhaps* to the Sandwich Islands at another, *perhaps* to California at a different one—under this, goods were shipped, 12th of November, nearly two months after. Is it to be supposed that a vessel of this size should be about starting on such a voyage, without the other owners knowing and approving of the act? Is this a fair conclusion of law or fact?

3. Their entire approval and even ratification of his act is apparent from all the circumstances.

Fourth. The libellants, including Flitner, were all partners in the sailing of the vessel. (Abbott on Shipping, p. 111; Story on Partnership, secs. 441, 444, 408.) And notice to one is notice to all. (See Story on Partnership, secs. 107, 108.) They were therefore chargeable with notice of this contract when it was made, and have never disapproved of it, if they had the right. They had notice from 22d of September to 12th November, before the ship sailed, with one partner acting, and did not attempt to disaffirm.

Fifth. The libellant, Flitner, is liable individually for the whole debt claimed to be due from the respondents to the libellants, as one of the partners in the Constellation Lumber Company, and he could be compelled to pay, and be left to his action for a settlement with his copartners. A payment to him, as one of the owners of the whole debt, would discharge the

indebtedness of the company to the owners of the ship, and leave them to their account for a settlement against him in equity. (Story on Part., sec. 419.)

Sixth. If Flitner is, in fact, the creditor of his co-owners, exclusive of this claim, then, in law, such debt due from them to him operates to extinguish the debt to the whole jointly; for with one the other is paid. It nowhere appears that Flitner is, in fact, their debtor, and most likely is their creditor; and he now seeks in this way to collect out of his partner, money not of right payable to him or them. (See Abbott on Shipping, pp. 130, 131, sec. 5; see, as to such rights, Story on Part., sec. 406.)

Seventh. The whole of the facts of this case show it to be one of purely equitable cognizance.

1. A captain and partner, owner in a ship wanting freight, entering on her behalf into a bargain to get a cargo, simply to employ that vessel.

2. The purchase, by a company, of which such owner is one, of the cargo, for the purpose of shipment, and a loss of all the outlay, and $2,300 besides.

3. That the ship realizes $11,000, and over, on the shipment.

4. Large claims on the part of the copartners for the detention of the cargo, and other acts of the captain.

Under these circumstances, equity would certainly give the partners owning that capital some show in the distribution of the remnants, as well as the ship her freight; but this is an attempt, by bringing the case into a court not competent to fully dispose of the matters, and clogged with restraints, to avoid the just responsibility the parties have assumed, and to make the Poillons pay the whole, (besides losing their investment,) of which they should only pay one-half.

Eighth. But suppose, as has been and is contended by the libellants, that the bill of lading is entirely independent and distinct of the original contract, and has no necessary connection with it, then this case assumes a phase which would prevent a recovery in any form of action, or in any forum, because—

1. By the terms of the bill of lading, the cargo is consigned to one of the libellants, and a part owner of the ship.

2. The case shows that he accepted the consignment, and actually sold and disposed of the property consigned.

3. By law, having accepted the consignment, he became liable for the payment of the freight; and, by the terms of the bill of lading, he actually covenants to pay the freight reserved in it "unto William L. Flitner, or his assigns, he or they paying freight." (*Vide* bill of lading.)

4. This case would present the anomaly of a party suing on an instrument whereby not only by law he is himself liable for the payment of the sum demanded, and which, by the terms of the instrument upon which the suit is instituted, he expressly covenants to pay.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in admiralty from the Circuit Court for the southern district of New York.

The libellants, Grant and others, are the sole owners of the ship Constellation, and they bring an action of affreightment, civil and maritime, against the respondents, and allege that William L. Flitner was master of the ship; that the respondents were copartners, under the name of the "Constellation Lumber Company;" and that, on or about the 12th November, 1849, they agreed to ship on board the Constellation, then lying in the port of New York, 230,655 feet of lumber and 29,700 cypress shingles, to be delivered at the port of Valparaiso, Sandwich Islands, or San Francisco, unto the above-named Flitner, or his assigns, he paying the freight upon the same. The ship proceeded on her voyage, and delivered the lumber and shingles unto the said William L. Flitner, at San Francisco, on or about the —— day of ——, in the year 1850. That there was due for the freight of the lumber, with primage, the sum of $13,944.02, of which sum Flitner paid $11,494.93, which were the net proceeds of the lumber, leaving a balance of $2,449.09 due and unpaid; and it is averred that Flitner, acting as consignee, and in making sale of the lumber, was the agent of the respondents, and a decree for the payment of this balance by the respondents is prayed.

The respondents deny that they compose the company, and that Flitner acted as their agent, &c.; and they say that the lumber was shipped on account of the said vessel and of said company, the said vessel being interested in said company, and that the transaction was a partnership one, and not a subject of jurisdiction in this court; that Flitner, named as a libellant, was and is interested, and one of the parties in the "Constellation Lumber Company," and is a proper party respondent herein; that the subject-matter of the suit is not within the admiralty or maritime jurisdiction of this court, and of which it has no cognizance.

It was agreed that ten persons named—about the 22d of September, 1849—of whom William L. Flitner was one, constituted the lumber company, each individual taking one share, not to exceed in value five hundred dollars, with the exception of Flitner, who took two shares, and Hicks and Bailey also

took two. That Flitner was the agent of the company and the consignee, a commission of five per cent. to be paid to him; that the ship Constellation belonged to the libellants, and that Flitner was master and part owner; that the lumber company purchased the cargo, and it was shipped the 12th November, 1849, and a bill of lading was signed by Flitner.

The proof shows that the lumber was sold at San Francisco for the prices stated, and that the proceeds of the sale, after deducting commissions, fell short of paying the freight, the sum named.

The principal question is, whether the case made is within the admiralty jurisdiction. That it would not be within the admiralty jurisdiction in England is clear. In general, contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on the land, are not cognizable by the English admiralty. There are some exceptions to this rule in that country; but none, it is believed, which affect the question now before us. There are conflicting decisions as to the admiralty jurisdiction in England, and also in this country. It may be difficult, if not impracticable, to state with precision the line of this jurisdiction, but we may approximate it by consulting the decisions of our own courts.

In the case of Willard *v.* Dorr, 3 Mason, 91, it was held, "no suit for services performed by the master, as a factor, or in any other character than that of master, is cognizable in the admiralty." And again, in Plummer *v.* Will, 4 Mason C. R., 380, it was said, "a contract of a special nature is not cognizable in the admiralty, merely because the consideration of the contract is maritime. The whole contract must, in its essence, be maritime, or for compensation for maritime service." In 11 Peters, the Steamboat Orleans *v.* Phœbus, it was said the admiralty has no jurisdiction in matters of account between part owners. And, further, "the jurisdiction of courts of admiralty, in case of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale upon any dispute between them as to the trade and navigation of the ship engaged in maritime voyages, properly so called." (Ib.)

The jurisdiction of courts of admiralty is limited, in matters of contract, to those, and to those only, which are maritime. (Ib.)

An agreement by the master of a vessel to pay wages, may be sued upon in the admiralty; but a stipulation in the same contract to pay a sum of money in case the voyage should be altered or discontinued, can be enforced only at common law. (L. Arira *v.* Manwaring, Bee's Rep., 199.) The admiralty jurisdiction of the District Courts of the United States, being ex-

clusive, cannot be extended to cases of law or equity, cognizable by the Circuit and State courts, under the 11th section of the judiciary act. (1 Baldwin, 554.)

A contract between two persons, one of whom had chartered a vessel, whereby he was to act as master, and the other as mate of the vessel, and the two were to share equally in the profits of the contemplated voyages, was held not to be within the admiralty jurisdiction. (The Crusader, Ware's Rep., 437.) A distribution cannot be claimed in the admiralty, except by those who have a lien. (1 Pet. Ad., 223.)

The lumber company was formed to engage in an enterprise of shipping lumber to San Francisco. Twelve shares were taken by the company, consisting of ten persons, each having one share of the value of five hundred dollars, and two of them had two shares each, one of them being the master of the vessel. He was also a part owner of the vessel, the consignee of the cargo, and had a right of primage. As part owner of the vessel, he was entitled to his share of freight; and as being a member of the lumber company, having two shares in it, he was proportionately liable for the freight. In his capacity of master he was entitled to primage, and as consignee he was also entitled to compensation. Now, this individual, in interest, is both plaintiff and respondent, and has claims in his capacities of master, consignee, and agent. The proceeds of the sale of the cargo, after paying commissions, left a balance due for freight of $2,449.09.

Here is a complicated account to adjust, apportioning the loss between the members of the lumber company, exacting from them what may be necessary, not only to pay the balance of freight due, but whatever may be required to discharge what may be due to the master as part owner of the ship, as master, consignee, or agent, at the same time holding him liable, as having two shares in the lumber company. And in an enterprise in which the whole of the capital has been sunk, leaving a large sum due for freight, it would seem that some inquiry might reasonably be made into the conduct of the master in the various capacities in which he acted. And it is probable that, to settle the controversy, a procedure against the members of the lumber company may become necessary, to compel them to contribute respectively and equally what may be necessary to meet the exigency. It is clear that the exercise of the powers indicated do not belong to a court of admiralty, but are appropriate to a court of chancery.

The decree of the Circuit Court is affirmed, with costs.

JOHN E. HYDE AND JOSEPH H. OGLESBY, TRADING UNDER THE NAME AND STYLE OF HYDE & OGLESBY, PLAINTIFFS IN ERROR, *v.* HENRY L. STONE.

Where a suit was brought upon a bill of exchange in one of the State courts of Louisiana, and by that court was transferred to another State court for the purpose of being connected with certain proceedings in insolvency, and this transfer was pleaded in bar in the Circuit Court of the United States to the prosecution of the suit in that court upon the bill, the plea was not good.

The jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power.

The insertion of the bill amongst the debts of the insolvent upon his schedule, is evidence of the fact of notice; and the sufficiency of the evidence was a question for the jury, and is not subject to review in this court.

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

On the 2d of January, 1850, Stone, being then in New Orleans, purchased from Hyde & Oglesby a bill of exchange, of which the following is a copy, with the notarial protest thereof.

$1,500. NEW ORLEANS, *January 2d*, 1850.

Sixty days after sight of this second of exchange, first unpaid, pay to the order of ourselves fifteen hundred dollars, value received, which place to account W. Barton, as advised.

HYDE & OGLESBY.

To P. Frothingham, Esq., Boston.

Endorsed: Pay H. L. STONE.
HYDE & OGLESBY.
H. L. STONE,
By H. W. HERBERT, *Att'y.*
[Acceptance on face:] January 15, 1850.
PETER FROTHINGHAM.

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, City of Boston, ss:

On this nineteenth day of March, in the year of our Lord one thousand eight hundred and fifty, I, Henry Clark, notary public, by legal authority admitted and sworn, and dwelling in the city of Boston, at the request of J. J. Loving, Esq., cashier North Bank of Boston, went with the original bill of exchange, of which the foregoing is a true copy, to the counting-room, in this city, of Peter Frothingham, the acceptor, and presenting said bill to him, demanded payment thereof,

the time therein limited and grace having elapsed, to which he answered, that said bill would not be paid.

I sent notice of the non-payment thereof to the drawers and first endorsers, requiring payment of them, by mail, to New Orleans.

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, against the drawers of said bill, and endorsers, acceptor, and all others concerned therein, for exchange, re-exchange, and all costs, charges, damages, and interest, suffered and sustained, or to be suffered and sustained, by reason or in consequence of the non-payment of said bill.

Thus done and protested, in Boston aforesaid, and my notarial seal affixed, the day and year last written.

(Signed) HENRY CLARK, [seal.]
Notary Public.

Stone brought suit upon this bill in the fifth District Court of New Orleans, in March, 1853; whereupon, the defendants filed an exception to the jurisdiction of the court, upon the ground that they had previously made a surrender of their property to their creditors in the third District Court of New Orleans, and that all proceedings were stayed against them. The exception further stated that the plaintiff was put upon their schedule as a creditor; wherefore they prayed that the suit of plaintiff be transferred and cumulated with the insolvency proceedings in the third District Court of New Orleans.

On the 31st of May, 1853, the fifth District Court sustained the exception, and ordered the costs to be paid out of the mass of property surrendered.

On the 1st of May, 1854, Stone brought his action in the Circuit Court of the United States.

The defendants pleaded in abatement, that Stone was a citizen of Louisiana, and therefore incompetent to sue in the Federal court, and in bar that the question had become *res judicata* by the maintenance of the exception in the fifth District Court. The case went to trial upon an agreed statement of facts, whereof those recited above are the most material; and at November term, 1855, the court gave judgment for the plaintiff. The defendants brought the case to this court by a writ of error.

It was argued by *Mr. Benjamin* for the plaintiffs in error, and *Mr. Taylor* for the defendant.

The argument of *Mr. Benjamin* upon the effect of the proceed-

ings in insolvency is omitted, because the court did not think that question was raised by the record in the case. His point with regard to the notice of the dishonor of the bill was thus stated:

I. The defendants are discharged from responsibility as drawers and endorsers of the bill, by reason of the laches of the holder, in failing to give notice of non-payment.

The law of Louisiana on this subject has reference exclusively to protests made by notaries of that State. (Acts of 1855, p. 48.)

By the law merchant, it is clear, without citation or authorities, that the protest of a foreign bill of exchange is not legal evidence of any other fact than that of presentment and refusal to pay. A statement volunteered by the notary, that he put into the post office a notice of protest to the drawer, is not legal evidence of the fact.

Even if the law of Louisiana were applicable to the case under consideration, the evidence is insufficient. The protest, as annexed to the petition, and made part of it, shows that it is not such a protest as is alone permitted by that law to be received as proof of notice. It is not signed by two witnesses. (McAfee *v.* Doremus, 5 How., 53.)

II. In the absence of proof of notice, an attempt is made to fasten responsibility on defendants by proof of waiver of notice.

The waiver is said to result from the acknowledgment of the debt set forth in the eighth article of the statement of facts.

To this presumption of waiver there are two fatal objections:

The first is, that it is nowhere stated at what *date* the acknowledgment was made. If the schedule of insolvency was filed *before* the maturity of the bill, (and there is no proof of the contrary,) it was still the duty of insolvents to place the bill on their schedule as a debt due by them, and to put the name of the holder, if known, in the list of creditors. (Bainbridge *v.* Clay, 3 Martin's U. S., 262; Deslix *v.* Schmidt, 18 Louisiana Rep., 466.)

The second is, that an acknowledgment of the indebtedness, if it ever can be considered to amount to a waiver of laches, is confined to cases where the party making the acknowledgment knew of the laches. The proof of his knowledge of the laches must be clear, or no waiver will be presumed. (Story on Notes, secs. 362, 363, and notes; Story on Bills, sec. 320; Chitty on Bills, p. 500, Am. edi., 1842; Thornton *v.* Wynn, 12 Wheat., 183.)

In Louisiana, the doctrine is extremely rigid. (See the cases and principles collected in Hennen's Digest, Verbo, Bills and Notes, XI.)

Mr. Taylor, for the defendant in error, made the following points:

I. The judgment on the exceptions filed in the case in the third District Court of New Orleans, in the State of Louisiana, was not a final judgment, and is no bar to any other proceedings on the cause of action set up in the case.

II. The fact that H. L. Stone, the plaintiff in the court below, was a citizen of Massachusetts, proved on the trial, and that the bill of exchange sued on was bought by him individually, and with his personal funds, as shown by the statement of facts agreed to and signed by the parties, gave the Circuit Court of the United States jurisdiction. (Constitution U. S.)

III. The defendant in error, H. L. Stone, performed no act to make himself a party to the proceedings in insolvency in the third District Court of New Orleans.

IV. The plaintiffs in error are legally bound to pay H. L. Stone the amount of the bill of exchange sued on, because, first, legal notice of its protest for non-payment was given them; and, second, they acknowledged it to be due and owing by them in their schedule filed in the proceedings in their insolvency. (Shed *v.* Brott, 1 Pick., 401.)

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendant in error instituted his suit in the Circuit Court, as the endorsee of a bill of exchange, payable in Boston, of which the plaintiffs in error were drawers, payees, and endorsers, and which bears date at New Orleans.

The defendants answered the petition, and averred that the plaintiff was a citizen of Louisiana, and the said bill of exchange a Louisiana contract, and governed by the law of that State. That the plaintiff resided in Louisiana when the defendants surrendered their property in insolvency in the third District Court of New Orleans, and to the proceedings therein the plaintiff became a party. That, subsequently thereto, the said plaintiff instituted a suit on the said bill of exchange in the fifth District Court of that city, and, on an exception filed by the defendants, informing that court of those facts, the same was sustained, and the said suit was transferred to the third District Court of New Orleans, and made part of the aforesaid insolvent proceedings therein; by which the right of plaintiff to have and maintain this action in the Circuit Court is barred, and the question has become *res judicata.*

With this exception to the jurisdiction of the court, the defendants filed a general denial of their indebtedness to the plaintiff. The cause was submitted to the Circuit Court upon

an agreed statement, and judgment was rendered for the plaintiff without the intervention of a jury.

From that statement it appears that the bill was duly protested for non-payment; and the notary in Boston certifies, "I sent notice of the non-payment to the drawers and first endorsers, requiring payment of them, by mail, to New Orleans, on the day of the protest." That the plaintiff has always been a citizen of Massachusetts; that his family resided there, and he had a commercial establishment there; that he is a partner in a commercial establishment at New Orleans, and generally spent a portion of the winter months in that city, and then returned to Massachusetts; and that this bill was purchased in the city of New Orleans, on his own account. It further appears that the plaintiff, before the commencement of this suit, sued the defendant in the fifth District Court of New Orleans, on this bill; that the defendant appeared and answered that the fifth District Court had no jurisdiction, because the defendant had made a surrender of his property to his creditors in the third District Court of New Orleans, which surrender had been accepted, and all proceedings stayed against him; and that the plaintiff was put upon his schedule as a creditor; and he prayed that the suit of the plaintiff be transferred and cumulated with the insolvency proceedings in the third District Court in New Orleans; that thereupon the fifth District Court, before the commencement of the present suit, decreed that the exception herein filed be maintained, and the costs paid out of the mass of the property surrendered. It further appears that the plaintiff performed no act to make himself a party to the proceedings in insolvency in the third District Court, and that no notice of those proceedings had ever been served on him; but that the bill of exchange described in his petition was enumerated among his debts, and the firm of H. L. Stone & Co., of New Orleans, which was supposed to be the holder of the bill, was placed on the schedule among the other creditors of the insolvents.

The question whether a foreign bill of exchange, sold by a merchant in New Orleans to a person who has a commercial house there, but whose domicil is at the place where the bill is payable, and where he resided when the proceedings in insolvency were instituted, is affected by them when he does not make himself a party to those proceedings, is not involved in this case. The defendant did not plead the pendency of those proceedings, or the decree of the third District Court, as a bar to the present suit, or afford any proper description of them to raise that question. The exception of the defendant is, that certain proceedings pending in the third District Court were

successfully pleaded in the fifth District Court of New Orleans, as a cause for the removal of a suit commenced by the plaintiffs against the defendants in that court to the other, and that the decision of the fifth District Court upon that plea ought to preclude the plaintiff from maintaining this suit in the Circuit Court of the United States. But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, State laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. (Suydam *v.* Broadnax, 14 Pet., 67; Union Bank *v.* Jolly, Adm'r, 18 How., 503.)

It follows, therefore, that the decision of the fifth District Court of New Orleans, transferring the suit, commenced by the plaintiff on his bill against the defendants, in that court, and directing it to be cumulated with the proceedings in bankruptcy which were pending in another court of the State, did not disable the plaintiff from commencing a suit in the Circuit Court, nor can it form a proper declinatory exception to its jurisdiction.

The plaintiffs in error object, that the evidence before the Circuit Court did not authorize the court to infer that they had notice of the dishonor of their bill. The notary states that he sent a notice to them, at New Orleans, on the day that the protest was made. In addition to this evidence, it is shown that the bill, after its maturity, was enumerated among the debts of the plaintiff in error, on the schedule that was returned to the third District Court; and that they successfully pleaded their return to the prosecution of a suit by the defendant in error in another court. A plaintiff may prove, by admissions of a defendant, that all the steps necessary to charge him as an endorser or drawer of a bill of exchange have been taken. Proof of a direct or conditional promise to pay after a bill becomes due, or of a partial payment, or of an offer of a composition, or of an acknowledgment of his liability to pay the bill, has been held to be competent evidence to go to a jury, of a regular notice of the dishonor of a bill, and to warrant a jury in presuming that a regular notice had been given.

(Thornton *v.* Wynn, 12 Wheat., 183; Rogers *v.* Stevens, 2 T. R., 713; Patterson *v.* Beecher, 6 J. B. Moore, 319; Campbell *v.* Webster, 2 M. G. Sc., 253; Union Bank *v.* Grimshaw, 15 La., 321; 3 Mort. N. S., 318.) The effect of such evidence in the particular case must be determined by the jury, and their decision cannot be reviewed by an appellate court. In the present case, the matter of fact was submitted to the Circuit Court, and its determination on this subject cannot form the ground of an exception here.

Judgment affirmed.

EUGENE LEITENSDORFER AND JOAB HOUGHTON, PLAINTIFFS IN ERROR, *v.* JAMES J. WEBB.

When New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relation to each other, and their rights of property, remained undisturbed.

The executive authority of the United States properly established a provisional Government, which ordained laws and instituted a judicial system; all of which continued in force after the termination of the war, and until modified by the direct legislation of Congress, or by the Territorial Government established by its authority.

A suit brought in a court established by the provisional Government was properly transferred to a court created by the act of Congress establishing the Territory of New Mexico, the jurisdiction of which was fixed by a Territorial statute.

The laws of the provisional Government authorized an attachment against the property of a debtor, in cases in which a party claiming to be a creditor, upon a petition and affidavit, charged that his debtor had fraudulently disposed of his property, so as to hinder, delay, or defraud, his creditors. By the same law, an issue was directed to be tried upon the petition and affidavit of the plaintiff; upon which issue, if the finding sustained the petition and affidavit, the plaintiff was authorized to proceed to the proof of his debt; if the finding was against the charge in the petition, the attachment was to be dismissed. These proceedings with reference to the attachment are in their nature proceedings in abatement, and are not final as to the rights of the parties, and therefore cannot be reviewed upon writ of error in this court.

THIS case was brought up, by writ of error, from the Supreme Court of the Territory of New Mexico.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Cushing* and *Mr. Gillet* for the plaintiffs in error, and by *Mr. Polk* for the defendant.

The counsel upon both sides argued the case upon its merits; but as it went off upon a question of pleading, these arguments are omitted.

Mr. Justice DANIEL delivered the opinion of the court.

This case is brought before this court upon a writ of error to the Supreme Court of the Territory of New Mexico.

Upon the acquisition, in the year 1846, by the arms of the United States, of the Territory of New Mexico, the civil Government of this Territory having been overthrown, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary Government for the acquired country. By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to the change of sovereignty, would be the appointment or control of the agents by whom and the modes in which the Government of the occupant should be administered—this result being indispensable, in order to secure those objects for which such a Government is usually established.

This is the principle of the law of nations, as expounded by the highest authorities. In the case of The Fama, in the 5th of Robinson's Rep., p. 106, Sir William Scott declares it to be "the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed." So, too, it is laid down by Vattel, book 3d, cap. 13, sec. 200, that "the conqueror lays his hands on the possessions of the State, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters." In the case of the United States *v.* Perchiman, 7 Peters, pp. 86, 87, this court have said: "It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other,

and their rights of property, remain undisturbed." (*Vide* also the case of Mitchel *v.* The United States, 9th ib., 711, and Kent's Com., vol. 1, p. 177.)

Accordingly we find that there was ordained by the provisional Government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned. By the same authority, the jurisdiction of the Circuit Courts to be held in the several counties was declared to embrace, 1st, all criminal cases that shall not be otherwise provided by law; and, 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. (*Vide* Laws of New Mexico, Kearney's Code, p. 48.) Of the validity of these ordinances of the provisional Government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended, that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and re-established. The fallacy of this pretension is exposed by the fact, that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the ordinances and institutions of the provisional Government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the Territorial Government in the exercise of powers delegated by Congress. That no power whatever, incompatible with the Constitution or laws of the United States, or with the authority of the provisional Government, was retained by the Mexican Government, or was revived under that Government, from the period at which the possession passed to the authorities of the United States.

Among the laws ordained by the provisional Government of New Mexico is one conferring upon creditors the right of pro-

ceeding by attachment in certain cases against their debtors, and prescribing the instances in which, and the modes by which, this remedy may be prosecuted.

This law is contained in what is called the Kearney Code, at p. 39, and is found under the title Attachments. Upon its provisions, the case under consideration was instituted; and those provisions, so far as they are pertinent to the questions before us, will now be examined.

By section 1st, it is declared that creditors, whose demands amount to fifty dollars or more, may sue their debtors in the Circuit Court by attachment in the following cases, to wit:

"1st. When the debtor is not a resident of this Territory.

"2d. When the debtor has concealed himself or absconded, or absented himself from his usual place of abode in this Territory, so that the ordinary process of law cannot be passed upon him.

"3d. When the debtor is about to remove his property or effects out of this Territory, *or has fraudulently concealed or disposed of his property or effects*, so as to *hinder*, *delay*, or *defraud* his creditors."

It is under the third clause only of this first section of the attachment law, that this case has been or could have been instituted; since, by a recurrence to the affidavit made by the plaintiff in the attachment, it will be found to state, that Leitensdorfer & Co. *have* fraudulently disposed of their property and effects. By the second section of this law it is declared, that a creditor, wishing to sue his debtor by attachment, shall file in the clerk's office of the Circuit Court a petition or other lawful statement, with an affidavit of his cause of action, and a bond, with a condition to the latter to prosecute his action with effect, and without delay, and to refund all sums of money that may be adjudged to the defendant, and to pay all damages that may accrue to any defendant or garnishee, by reason of the attachment, or any process or judgment thereon.

The third section of this same statute provides, that the affidavit made by the plaintiff shall state that the defendant is justly indebted to the plaintiff, after allowing all just discounts, in a sum to be stated in the affidavit, and on what account; and shall also state that the affiant has good reason to believe, and does believe, the existence of one or more of the causes which, according to the provision of the first section, will entitle the plaintiff to sue by attachment. (See collection of the Laws of New Mexico, comprising the Kearney Code, p. 39.)

With the requisites of the aforegoing provisions of the statute, it appears, by the record, that the plaintiff below, the defendant in error here, formally and regularly complied.

The sixteenth section of the statute enacts, that "in all cases when property or effects shall be attached, the defendant may, at the court to which the writ is returnable, put in his answer without oath, denying the truth of any material fact contained in the affidavit; to which the plaintiff may reply. A trial of the truth of the affidavit shall be had at the same term; and on such trial, the plaintiff shall be held to prove the existence of the facts set forth in the affidavit, as the ground of the attachment; and if the issue shall be found for him, the cause shall proceed; but if it be found for the defendant, the cause shall be dismissed at the costs of the plaintiff."

At the October term, 1849, of the Circuit Court of the Territory, established by the Kearney Code, the defendants in the attachment appeared and filed a demurrer to the petition, and at this point terminated the proceedings had in this cause in the court last mentioned. By subsequently tendering and joining in an issue in the District Court of the Territory, in bar of the plaintiff's right of recovery, the defendants must be considered as having waived the demurrer interposed by them in the Circuit Court of the provisional Government, and there appears not to have been a joinder in the demurrer, nor any order whatever taken with respect to it.

On the 9th day of September, 1850, was approved the act of Congress establishing the Territorial Government for the Territory of New Mexico. (*Vide* Stat. at Large, vol. 9, p. 446.) By this act, commonly distinguished as the Organic Law, the legislative and judicial powers of the Territorial Government are provided and defined, to have effect from the passage of that act. The former, (the legislative power,) *vide* sec. 7, it is declared, shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States and the act of Congress above mentioned. The latter, (the judicial power,) *vide* sec. 10, shall be vested in a Supreme Court, in District Courts, and in justices of the peace. That the Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall form a quorum; that the said Territory shall be divided into three judicial districts, and a District Court shall be held in each of said districts by one of the justices of the Supreme Court, at such time and place as shall be prescribed by law. And it is further declared, that the jurisdiction of the several courts, as therein provided for, both appellate and original, and that of the justices of the peace, shall be as limited by law.

On the 19th day of September, 1851, the District Court of the United States for the first judicial district, created by the act of Congress, being then in session, the plaintiff in the attach-

ment moved the court for leave to file therein the papers and proceedings in that case, and that the same might be made a part of the records of the District Court; and it was thereupon ordered by the court, that the case be entered upon its docket. Objection was made by the defendants to the transfer of this case from the Circuit Court of the provisional Government, (*vide* Kearney Code,) to the District Court created by Congress, upon the ground that the Legislative Assembly had no power to authorize such a transfer. This objection was overruled by the District Court, and exception was taken to its decision.

Afterwards, viz: on the 25th of March, 1852, the defendants in the attachment so far submitted themselves to the jurisdiction of the District Court, as to plead to the averments in the petition and affidavit, and to pray judgment of the action, because they say that at the time of the institution of the suit, viz: on the 30th day of July, 1849, the defendants had not fraudulently disposed of their property, so as to hinder, delay, and defraud their creditors. And again, at the same term of the said District Court, the defendants, upon affidavits made by them of the insufficiency of the sureties in the bond filed by the plaintiff in the attachment, applied for and obtained from that court an order for further security, which security was, upon the said application and order, given by the plaintiff.

On the 1st day of October, 1852, this cause was, upon the petition and affidavit, the plea of the defendants, and the evidence produced by the parties, submitted to a jury, who found that the affidavit of the plaintiff was true; whereupon it was considered and ordered by the court that the cause should proceed, and that the defendants should plead to the merits of the plaintiff's demand; and the defendants having pleaded that they did not promise and undertake as the plaintiff had charged them, and upon this last issue the cause having been committed to a jury, they found for the plaintiff, and assessed his damages at ten thousand three hundred and thirty dollars and twenty-five cents. After the finding of the juries upon both the issues in this case, motions were made, first for a new trial, and secondly for an arrest of judgment, both of which motions were overruled. As these were motions submitted to the discretion of the court, and determined by it upon facts and circumstances not fully disclosed upon this record, it would be improper in this court, and in conflict with its settled rule of action, to overrule or even to canvass the decision of the court which overruled these motions.

In the objection which was taken to the power of the Legislative Assembly to transfer the cognizance of causes previously pending under the laws of the provisional Government to the

courts created by the act of Congress establishing the Territory of New Mexico, we can perceive no force. It was, undoubtedly, within the competency of Congress either to define directly, by their own act, the jurisdiction of the courts created by them, or to delegate the authority requisite for that purpose to the Territorial Government; and by either proceeding, to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional Government, to the tribunals of the Government they were about to substitute for the Territory, in lieu of the temporary or provisional Government. This power we consider was, in fact, delegated by Congress to the Territorial Government by the seventh section of the act of 1850, which declares, that "the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and with this act;" and by the tenth section of the act, which, after ordaining a Supreme Court, District and Probate Courts, and justices of the peace, and after dividing the Territory into three judicial districts, and directing a District Court to be held in each district, by one of the judges of the Supreme Court, goes on to declare, that "the jurisdiction of the several courts therein provided for, both appellate and original, and that of the Probate Courts, and of justices of the peace, shall be as limited by law."

The inquiry regularly suggested by these provisions of the act of Congress, is not whether they invested the Legislative Assembly with authority to prescribe the subjects for the cognizance of the courts created by that act—of this there can be no doubt—but whether the authority delegated to that Assembly has been *in fact*, and *to what extent*, exerted with reference to controversies previously in litigation in the courts of the provisional Government, and to subjects of controversy subsequently arising.

Under the provisions of the act of Congress above quoted, the Legislative Assembly have, in several instances, prescribed the powers and duties of the Territorial courts, and, among others, by the fourth section of the act of that Assembly, passed on the 12th of July, 1851; by which section it is declared, that the *District* Courts shall have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not specially delegated to some other court; and by the second section of the act of the Assembly, approved on the 14th of July, 1851, expressly providing, "that all bonds, writs, and processes, which have remained in force, shall be carried to a final decision in the courts established by the Legislative Assembly, *to the same effect* as they would have been in the courts previously existing."

As the Legislative Assembly possessed no power to organize or create courts differing from those created by the act of Congress, which act had divided the Territory into districts, and had designated the courts which should be vested either with appellate or original jurisdiction, it would seem to follow that, by an act of the Legislative Assembly, designed to preserve, and to prevent the discontinuance of rights in litigation subsisting in the courts of the provisional Government, the distribution of the cognizance of those rights was intended to be made to courts corresponding in their jurisdiction with the tribunals of the provisional Government.

Such appears to have been the interpretation, by the judges of the Supreme Court of the Territory, of the acts of the Legislative Assembly, and by which interpretation they have recognised the transfer of causes pending in the Circuit Courts of the provisional Government, for final decision, to the *District* Courts under the Territorial Government; and although there is some obscurity in the language of the Territorial statutes on this subject, yet the reasonableness of their interpretation by the Supreme Court and the District Courts of the Territory commends it to our approval, and its adoption conforms to the rule of this court, by which it has followed the construction of local statutes established by the highest judicial authority of the community for whose government they are enacted.

At the trial of the issue joined upon the verity and effect of the affidavit, the plaintiff in the attachment, to maintain that issue, on his part, produced in evidence and proved the execution of an assignment, by which Leitensdorfer had conveyed all his goods, wares, and merchandise, and all his property and effects, of the late firm of Leitensdorfer & Co. Also, an instrument executed at the same time, by Joab Houghton, the other member of the firm, whereby he authorized the assignees of Leitensdorfer & Co. to use and sign his name in any way that it might be necessary for them to use it in settling the business of the late firm of Leitensdorfer & Co. By the deed from Leitensdorfer, certain creditors to the amount of between twenty and thirty thousand dollars were preferred, besides all sums of money due by Leitensdorfer & Co. for simple deposits or money loaned without interest; after which, the general creditors were to be paid *pro rata*, from whatever might be collected, until the assets should be exhausted. There was no inventory of assets, nor any schedule of debts due by said Leitensdorfer, attached to or accompanying the deed of assignment. The deed provided that a fair and correct list of the liabilities of Leitensdorfer & Co., and also a fair list, so far as could be made, of all the assets, was to be made within ten

days after signing the deed; within this period, an inventory of assets was made out, but no list of liabilities. Some persons, whose names were not in the assignment, who had deposited with or loaned money without interest to the firm, were paid by the assignees, and the deed was not pursued in other respects. Upon the closing of the testimony on the trial in the District Court, the defendants, the now plaintiffs in error, moved the court for the following instructions to the jury, all of which were refused:

1. That as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and the verdict must be for the defendants.

2. That the deed of assignment was not fraudulent in law; and unless the jury find, from the evidence, that in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, and defraud their creditors, they must find for the defendants.

3. That as the plaintiff had shown no title to the note sued on in himself, he had no authority to sue, and the jury must find for the defendants.

The court then instructed the jury that the deed was fraudulent in law, because of the want of a schedule thereunto annexed of the property and effects conveyed to the assignees, and because of the want of a schedule of the preferred creditors, and because of a preference of some creditors; and also, if the jury found that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, at the time of the commencement of this suit, they must find for the plaintiff. That the execution of the deed by Leitensdorfer, unaccompanied by the proper schedules, was a fraudulent disposition in law, as aforesaid; and that the commission of a fraud *in law* by the defendants, or either of them, without fraud in *fact*, or without an intent to defraud, was a sufficient cause for the attachment as the commission of a fraud in fact, or with intent to defraud. And also, that upon the trial of this issue it was not necessary for the plaintiff to show himself a creditor of the defendants, farther than is shown in the affidavit, to entitle him to a verdict in his favor upon the issue of the truth of the affidavit; but that the sole issue was, whether the defendants, or either of them, at the time of the commencement of the suit, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors.

Upon the refusal by the court of the first, second, and third

prayers presented by the defendants, and to the granting of the instructions prayed for by the plaintiff below, the defendants excepted.

Upon the trial of the issue joined on the plea in bar to the action, no question of law was raised, no exception taken to any of the proceedings under that issue.

On an appeal from the judgment of the District Court to the Supreme Court of the Territory of New Mexico, the judgment of the District Court was, on the 28th of February, 1853, affirmed.

It is obvious, that in the proceedings in the District Court, neither the justice nor the amount of the plaintiff's demand was put in controversy. These were not embraced within the issue raised upon the petition and affidavit. That issue related only to the right of the plaintiff to sue in a particular form of action, a right dependent upon his ability to show the alleged character of the defendants' acts, with respect to their creditors generally, and not with respect to the plaintiff particularly or exclusively. The verity and the amount of the plaintiff's demand were matters for distinct and ulterior investigation. The proceeding, then, upon the petition and affidavit, was in reality a proceeding in abatement, and not in bar of the plaintiff's debt or right of recovery. This appears to be a regular conclusion from the language of the law of the Territory, and it is in accordance with the construction by the courts of a neighboring State of a law identical in its provisions with the law of the Kearney Code, and from which law it is not improbable that the latter was adopted. (*Vide* Missouri Reports, vol. 5, p. 544; ib., 13, p. 118; ib., 14, p. 600; ib., 15, p. 499.)

It is true, that by the practice of the State courts the preliminary proceedings upon the petition and affidavit, and any questions of law ruled by the courts in those proceedings, are carried for review to the tribunals of last resort. But this is a practice authorized by the States under their peculiar jurisprudence. The States possess an undoubted power to permit or to require of their courts the re-examination and control of proceedings in their own tribunals, entirely interlocutory in their nature. The appellate or revisory power of this court, as defined by the Constitution and laws of the United States, is more restricted in its extent than that with which some of the States have invested their courts. By the twenty-second section of the act of Congress to establish the judicial courts of the United States, it is declared that *final* judgments and decrees in civil actions and suits in equity in a Circuit Court, brought there by original process, or removed there from the courts of the several States, or from a District Court, where the matter in

dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be examined, and reversed or affirmed, in the Supreme Court. But there shall be no reversal for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer.

From this provision in the act of Congress it follows, that the preliminary proceeding in the District Court of the Territory, being in its nature interlocutory, and designed to abate the particular remedy by attachment only, and having no application to the plaintiff's right to a recovery of his demand, or to the jurisdiction of the Territorial court, either as to the parties or the subject-matter of the controversy, that proceeding comes not within the appellate or revisory power of this court.

Upon the trial in chief, or upon the merits, there appears to have been no question made, nor any point reserved upon the law or the evidence; the record of this trial presents simply the finding of the jury, and the judgment of the District Court upon that finding. The decision of the Supreme Court of the Territory in sustaining the judgment of the District Court must therefore be affirmed.

ISAAC M. FISHER, APPELLANT, *v.* JOHN HALDEMAN, JACOB S. HALDEMAN, RICHARD J. HALDEMAN, AND ROBERT J. ROSS, EXECUTORS OF JACOB HALDEMAN, DECEASED, AND THOMAS CHAMBERS, ADMINISTRATOR DE BONIS NON OF THOMAS DUNCAN, DECEASED.

By the laws of Pennsylvania before the Revolution, a pre-emption right to islands in the Susquehanna river could not be obtained by settlement.
The courts of that State have so decided, and this court adopts their decision.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Pennsylvania.

The bill was filed by Fisher, a citizen of the State of Delaware, against the appellees, claiming to be the equitable owner of an island in the Susquehanna river, and alleging that the appellees had become possessed of the legal title by a series of frauds. The bill was quite voluminous, occupying upwards of seventy pages of the printed record, and then there was an amended bill of thirteen pages more. The substance of it, as well as the other branches of the case, are stated in the opinion of the court. In September, 1856, the Circuit Court dismissed the bill, and the complainant appealed to this court.

It was argued by *Mr. Fisher* for the appellant, and by *Mr. John M. Read* for the appellee.

The arguments of the respective counsel upon the point on which the decision of the court turned were as follows:

Mr. Fisher, in noticing the point that the islands in the Delaware and Susquehanna were reserved as the private property of the Penns, said, to meet the allegation of defendant, that the islands in the rivers were the private property of the Penns, without any warrant of appropriation.

Windmill Island, in front of Philadelphia, is noticed. This island was never surveyed for the Penns, nor for the Commonwealth.

It was applied for, July 1, 1849, by one Tatham, under the act of 1806, and Tatham now holds it. (See Jones *v.* Tatham, 8 Har., 398—410.)

The island in the Allegheny river, claimed by the parties, in the case of Hunter *v.* Howard, 10 S. and R., 243, in which his honor Judge Duncan gave the opinion of the court, was claimed and is now held under the same act of 1806.

There are more than a hundred islands in the various rivers of Pennsylvania which were never surveyed and returned for the proprietaries, under their general warrant of October 13, 1760; and all islands not so surveyed and returned before the 4th of July, 1776, were confiscated to the Commonwealth, as part of the general mass of the proprietary estate, under the fifth section of the divesting act of 1779.

Islands were treated by the proprietary Government as open to settlement and improvement long after 1760.

In the year 1770, William Dunn settled on the Great Island in the West Branch; and the island, one of the very best in the river, is held under his settlement right to this day.

The record of his title from the land office will be submitted at the hearing, under the agreement of counsel that all papers from the land office shall be read on the appeal.

Previous to the year 1760, the proprietaries had granted many islands in the Susquehanna river on common warrants and common terms. Copies of these grants and the surveys on them are in the record.

Settlement Right.—A first settler holds his allowance of land, 300 acres, against the proprietaries, the Commonwealth, and all subsequent settlers and warrantees. (Gilday *v.* Watson, 2 S. and R., 410.)

The actual settler has always been a favorite with the courts and Legislature of Pennsylvania. (Emory *v.* Spencer, 11 Harris, 271.)

Before the Revolution, a settler was entitled to take and hold 300 acres against proprietaries, warrantees, and other settlers. It was an actual, personal resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy. (Bonnet *v.* Devebaugh, 3 Binney, 184.)

The usage of the land office bound the proprietaries to grant the land to actual settlers on the usual and common terms; and should the proprietaries refuse to make the grant, chancery would enforce it. (Ibid.)

The consent of the proprietaries, in whatever way shown, was sufficient to vest an equitable title in a settler, which the courts would protect. (Sergeant's Land Law of Pennsylvania, 37.)

Mr. Read for the appellees:

The civil law which has pervaded continental Europe, and which took its rise in a country were there was a tideless sea, recognised all rivers as navigable which were really so; and this liberal view was adopted by the founder of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth. This gave to the proprietary the ownership of all the larger streams of the Commonwealth, the riparian owner coming but to the low-water mark. The river includes what is in the river, whether above the water or under it. (Carson *v.* Blazer, 2 Binn., 473; Fisher *v.* Carter, 1 Wallace, jr., 70.)

This policy was early developed in the instructions given by William Penn, before he left England, to three commissioners for the settling of the colony, in which he said: "Let no islands be disposed of to anybody, but let things remain as they were, in that respect, till I come." (Hazard's An., 530.) And in after-times the proprietaries appropriated them to their own use by special warrants. Thus, from the first settlement of the country, these islands were withdrawn from appropriation. (1 Wallace, jr., 70.)

In Carson *v.* Blazer, 2 Binn, 477, decided on 2d June, 1810, Chief Justice Tilghman said: "But the common-law principle concerning rivers, even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small.

"But there is another objection to the adoption of this principle. The common law gives to each proprietor one-half of the river adjoining his shore; and if this doctrine is applied to the Susquehanna, every owner of the bank must own all the islands nearest to that bank—*a right never contended for.*

"The common-law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now, the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert, that by navigable rivers are meant rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our larger rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches."

William Penn, the proprietary and Governor of Pennsylvania in 1683, in speaking of the new city of Philadelphia, uses this emphatic language:

"The situation is a neck of land, and lieth between two navigable rivers, Delaware and Schuylkill, whereby it hath two fronts on the water—each a mile—and two from river to river. Delaware is a glorious river; but Schuylkill being a hundred miles boatable above the falls, and its course northeast towards the fountain of Susquehanna, that tends to the heart of the province, and both sides our own, it is like to be a great part of the settlement of this age." (Lowber's Ordinances of the City of Philadelphia, p. 289.)

In Hunter *v.* Howard, 10 Sergeant and Rawle, 245, decided on 26th September, 1823, the opinion of the court, consisting of Judges Gibson and Duncan, was delivered by Judge Duncan, who had argued the case of Carson *v.* Blazer. The court say, "Islands in the great rivers of Pennsylvania, under the provincial Government, *were never the subjects of appropriation, either by office right or settlement.* The proprietaries appropriated them to their own use by special warrants. This, from the consideration of the supposed superior nature, either from the quality of the soil, or the benefit of fisheries. *The State has pursued the same policy.* When the land office was opened, on the 8th April, 1785, for the sale of the residue of the waste lands, shortly before purchased from the natives by the State, it is provided, 'That all islands within the bed of the river Susquehanna, and of the east and west branches thereof, and of the rivers Ohio and Allegheny (and Delaware,') are excepted and reserved. And the said islands may be sold by special order of the President or Vice President, in council, *concerning*

each of them, by public sale or otherwise, *for the best prices that can be gotten for the same* (islands,) and *all occupancy, and every survey, claim, or pretence, for holding the same islands by any other title, shall be utterly void.*" (See 13th sec. act 8th April, 1785; 2 Smith's Laws of Pennsylvania, p. 322.)

"Thus," say the court, "from the first settlement of the country, we see these islands were withdrawn from appropriation at the general prices of other land, but each was to be sold as an individual would sell his own land, for the best prices. This act may be called the *Magna Charta*, the foundation of all titles to lands in that purchase."

"It has been modified with respect to islands; but still the Legislature kept in view the sale of the islands at a full and fair price, by the act of 6th March, 1793, (3 Smith's Laws, p. 93,) directing the sale of certain islands in the river Susquehanna. This act gave a pre-emption right to improvers for three years, directed the board of property to ascertain the just value, provided that the lowest price to be fixed by them shall not be less than eight dollars per acre. Then came the act of 27th January, 1806, (4 Smith's Laws, p. 206,) which gives rise to the present controversy, directing the sale of islands in the rivers Delaware, Ohio, and Allegheny. This act gives the improver the right of pre-emption for three years, and makes special provision how the value shall be ascertained: the officers of the land office shall appoint, on an application made for an island, three disinterested men, who shall value the same on their oaths, and shall certify the value to the secretary of the land office, who shall thereupon issue a warrant to such applicant, &c. The act declares that the pre-emption right shall be vested in the actual settler or improver for the term of three years; and that, after the expiration of that time, it shall be lawful for the Commonwealth to *grant such improved island* to the first who shall apply for the same, *subject to the regulations and provisions contained in the act.*"

In Shrunk *v.* Schuylkill Navigation Company, 14 Sergeant and Rawle, p. 71, decided on April 10th, 1826, after argument by the ablest counsel of the day, Chief Justice Tilghman said, (p. 79,) after enumerating the principal rivers of the State, "Now, with us, it has never been supposed, from the earliest times to the present moment, that the owners of land on the bank had the right of property in the soil to the middle of the river in front of their land; because if they had, they would have a right to the islands also, contrary to universal opinion and practice. *These islands have never been open to applicants under the common terms of office, either under the proprietary or State Government, but have always been sold on special contract, and*

for higher prices than common; whereas, the lands on the banks of rivers have always been open to the public, on the usual terms, and at the usual prices. For a particular account of the manner in which islands have been granted, I refer to the case of Hunter *v.* Howard, 10 Sergeant and Rawle, 243.

"As for the soil over which our great rivers flow, it has never been granted to any one, either by William Penn or his successors, or the State Government."

In this very case, on the common-law side of the Circuit Court, reported in 1 Wallace, jr., Rep., p. 69, under the name of Fisher *v.* Carter, the late Judge Baldwin, one of the very ablest land lawyers in the State, held, on the 8th November, 1843, that at no time in the history of Pennsylvania, neither before October 13th, 1760, nor since, have islands in her great rivers been open to settlement on the same terms with fast land generally. They could be settled only on *agreed* terms.

The case is worthy of attentive perusal, as all the evidence contained in the present record, with the exception of some immaterial matters, was before the court, passed upon by them, and would have been settled by the jury definitively, except that the plaintiff suffered a nonsuit. Judge Baldwin's tribute to Chief Justice Tilghman is peculiarly just and appropriate. (Page 83.)

Mr. Read then referred to and commented upon the following cases—Johns *v.* Davidson, 4 Harris, 512, decided in 1851; Jones *v.* Tatham, 8 Harris, 398, decided in April, 1853; Sergeant's Land Laws of Pennsylvania, 193, 194; Rundle *v.* Delaware and Raritan Canal Company, 14 How., 80; 1 Wallace, jr., 274—and then traced the title of the appellees from 1760 down to the present time.

Mr. Justice GRIER delivered the opinion of the court.

The appellant filed his bill in the Circuit Court of the United States for the eastern district of Pennsylvania, claiming to be the equitable owner of an island in the Susquehanna river, containing about seven hundred acres, and praying that the respondents may be decreed to surrender to him the possession of the same, to deliver up their deeds and muniments of title, and account for the rents, issues, and profits.

In order to ascertain the questions involved in the case, it will not be necessary to give an abstract of the bill or specify the allegations of the answer. A brief statement of some of the admitted facts and charges of the bill will suffice.

It commences the history of the case with the first charter to and immigration of William Penn, the proprietor of Pennsylvania. But we do not think it necessary to go farther back

than the year 1760. In that year, the proprietors, claiming that the islands in the Susquehanna and other navigable streams were their private property, had them surveyed and returned as such.

About the year 1798, the persons under whom complainant claims were found by the agent of the proprietors in possession of the island, and claiming a right, from their long occupancy, to a pre-emption right as settlers. They had occupied parts of the island as far back as 1749 or 1750, some ten years before the proprietors had surveyed it; and though not in possession at that time, had afterwards returned. They were told by the agent for the Penns, that they had no title, and if they wanted a legal title they must purchase from the Penns, and that islands never had been subject to be taken up by settlement, as the other proprietary lands. These occupants refused or neglected or were unable to purchase; and about the year 1800, Thomas Duncan purchased from the agents of the Penns. Finding these occupants on the land, he told them they had no title; that islands had never been open to pre-emption by settlement, and that he was the purchaser from the Penns of the legal title. He demanded the possession of them, offering to pay them the value of their improvements, and for a release of their claim. They accordingly released their claim, gave up their possession, and received a consideration in money from Mr. Duncan, of about twenty shillings an acre. Mr. Duncan then took possession, and he and those claiming under him have had possession from that day to this, over fifty years.

In Pennsylvania, occupants or settlers on land are never considered as holding adversely to the proprietors, or to the State, their successor. Where the land was subject to pre-emption in favor of settlers, those who had obtained an equity by virtue of such a settlement or improvement, had a good title as against subsequent purchasers. But until they paid the purchase-money, and obtained their patent or deed from the proprietor, no length of possession authorized a presumption of the payment thereof, or of a grant as against the proprietors or State.

In order, therefore, to evade the effect of the release by the occupants, and the surrender of their possession to Mr. Duncan, who held the admitted legal bill, the bill charges:

1. That Edmund Physic and John R. Coats, the agents of the Penns, combined and conspired with Thomas Duncan to defraud the settlers of their title to this island.

2. That this fraud consisted in the assertion that "islands had never been subject to be appropriated as other proprietary

lands, by settlement or location, but were treated as the private property of the Penns, and, as such, sold by special contract only."

3. That the persons in possession, believing such to be the law, surrendered their possession and released their claim, whatever it might be, to Thomas Duncan, for the consideration of twenty shillings an acre, which was much less than the full value of the land.

4. That this representation, with regard to the custom or traditionary law of the province of Pennsylvania, was not true, and that Mr. Duncan must have known it to be so, and therefore made a false representation of the law to the settlers.

5. That the falsehood of this representation was not discovered till 1822.

6. That suits were then instituted, in which the judgments were against the title of plaintiff, in consequence of erroneous or unjust decisions of the courts.

Without noticing the objections to this bill on account of staleness, and the defence that Haldeman is a purchaser for valuable consideration without notice, it is plain that the whole foundation and superstructure of the case rests on this assumption, to wit: "That in 1749, by the law of the land, a preemption right to islands in the Susquehanna river could be obtained by settlement." If this be not so, the plaintiff's case falls to the ground, and the numerous other objections to this bill need not be noticed.

Now, this is a question of fact, depending on the history and traditions of the province of Pennsylvania, of which the decisions of her own courts are the best evidence, and conclusive on this court. The order of survey of 1760, by which the islands of the Susquehanna, and this among others, were appropriated to the private use of the proprietors, together with the manors reserved, is itself *prima facie* evidence that the proprietors never considered these islands as open to settlement as other lands. And this inference is fully confirmed by the instructions given by William Penn, before he left England, to the three commissioners for the settling of the colony, in which he said: "Let no islands be disposed of to anybody, but let things remain as they were, in that respect, till I come." (Hazard's An., 530.)

The State of Pennsylvania, by what was called the "divesting act," assumed, for a certain consideration, all the proprietary rights of the Penns over the colony, as distinguished from their private rights of property, and pursued the same policy which had been adopted by them as to islands in navigable rivers. The act of 18th April, 1785, orders islands in the new purchase

to be sold for the best prices that can be gotten for the same, and declares, "all occupancy and every survey, claim, or pretence for holding the same islands by any other title, shall be utterly void."

The statute thus recognised and continued the rule as it was found to have existed under the proprietary Government.

By the common law, fresh-water rivers do not come within the category of navigable rivers, and the riparian owners had a right to all the islands in the river, "*ad medium filum aquæ.*" But such has never been the law in Pennsylvania. In the case of Carson *v.* Blazer, (2 Binney, 473,) this peculiarity of the traditionary law of Pennsylvania, differing from the common law of England, was first recognised by judicial authority. The late Chief Justice Tilghman, speaking of the proprietary, says: "No doubt he retained the entire right to the river, and *of everything in the river*, in order that he might make such use of it as would be most conducive to the public benefit." And again, in Shrunk *v.* The Schuylkill Nav. Co., (14 S. and R., 79,) he remarks: "These islands have never been open to applicants under the common terms of office, either under the proprietary or State Government," and refers with approbation to the case of Hunter *v.* Howard, (10 S. and R., 243,) which decides that, "from the first settlement of the country, islands in the great rivers of Pennsylvania, under the provisional Government, were never subjects of appropriation, either by office-right or settlement." This doctrine has continued to be recognised as settled law in Pennsylvania for half a century. See Fisher *v.* Carter, (1 Wallace, p. 69;) Johns *v.* Davidson, (4 Harris, 516.) It is treated as such in the learned work of Judge Sergeant on the Land Laws of Pennsylvania, p. 193. Nor can any case be found in the reports or traditions of the bar, which varies or contradicts this uniform course of decision. It is through these sources alone that this court must seek for a solution of the question; and finding the law so established by the tribunals of the State, we are bound to acquiesce in and follow their decisions.

The decree of the Circuit Court is therefore affirmed, with costs.

GILBERT L. THOMPSON, PLAINTIFF IN ERROR, *v.* WILLIAM SELDEN, JOHN WITHERS, ROBERT W. LATHAM, AND LAWRENCE P. BAYNE, DOING BUSINESS UNDER THE FIRM OF SELDEN, WITHERS, & COMPANY.

The fifteenth section of the judiciary act of 1789 authorizes the Circuit Court, upon motion and the notice thereof, to require a party to produce books or writings, &c.; and if a plaintiff shall fail to comply with such order, it shall be lawful for

the court, on motion, to give the like judgment for the defendant as in cases of nonsuit.

It is not enough for a defendant to give notice, and then move for a judgment of nonsuit. There must be a motion for an order to produce the books and papers.

This court again decides that it rests in the sound discretion of the court below to grant or refuse a motion to continue a case; and a writ of error from such a judgment will not lie.

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 of the case are stated in the opinion of the court.

It was argued by *Mr. John S. Tyson* for the plaintiff in error, and by *Mr. Magruder* for the defendants. On that side, also, was a brief by *Messrs. Davidge*, *Ingle*, and *Chilton*.

Mr. Tyson, for the plaintiff in error, made the following points:

The act of Congress, September 24, 1789, empowers the Circuit Courts of the United States, in the trial of actions at law, on motion and due notice thereof being given, to require the plaintiffs to produce books or writings, in their possession or power, which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.

The record, page 9, (affidavit No. 1,) shows that said books were pertinent to the issue, and (affidavit No. 2) that due notice was given to plaintiffs below to produce said books and papers.

The court's refusal to grant the order, which was an order *nisi* only, was error.

The order *nisi* issues, as a matter of course—*ex debito justitiæ*. (2 Dall., 333, Geyger *v.* Geyger; 11 Johns. R., 245; Lawrence *v.* The Ocean Ins. Co.; 3 Wash. C. C., R., 381, Joseph Bas et al. *v.* Steele.)

It is not necessary that the party applying for the order *nisi* should first produce proof of the pertinency of the evidence—a simple suggestion to that effect is sufficient. (Hylton *v.* Brown, 1 Wash. C. C. R., 298.)

If that suggestion was not sufficient in affidavit No. 1, p. 9, it was rendered completely so by affidavit No. 3, p. 10.

The court, therefore, certainly erred in refusing the order *nisi* moved after the filing of the affidavit No. 3.

Competency and pertinency of the evidence sought fully shown by that affidavit.

Entries on partnership books may be given in evidence, if

made before dissolution. (2 Wash. C. C. R., Assignees of Simonton *v.* Boucher et al.; ib., 482, Jordan *v.* Wilkins.)

A fortiori, entries on the books of a banking establishment.

This proceeding, under the act of 1789, is in the nature of a bill of discovery, and proceedings under it. (Wendall's Rep., vol. 9, 458, 6 Cowen, 62, Bank of Utica *v.* Hilliard; 1 Johns. R., 395, Kenny *v.* Vanhorne and Clarkson; Cowen and Hill's Notes to Ph., 191; Notes to Phill., 197.)

The right to a bill of discovery, although said to be a right of the plaintiff, is also a right of the defendant, because by cross bill he can always make himself plaintiff. (Wigram on Discovery, 24, 25.)

To a bill of discovery a party *must* answer. (Ib., 207.)

By an act of the General Assembly of Maryland, chap. 72, sec. 21, passed in 1785, the defendant in equity has the same power to interrogate the plaintiff that he has to interrogate the defendant. (Gresley's Treatise of the Law of Evidence in Courts of Equity, 43 to 46.)

So upon an order *nisi*, if the party refuses to show cause, the order becomes absolute. (Hylton *v.* Brown, 1 Wash. C. C. R., 298.)

The court further erred in refusing the necessary order, *after* the jury was sworn.

The plaintiff below could not resort to the alternative of giving evidence of the contents of the books and papers called for, because impossible. He was in that state of necessity which the law always respects and relieves. The court, in this necessity, refused even to continue the cause. In general, the refusal to continue a cause is not error, but it is presumed that this rule is not without exceptions, and that in a case like this, where by the action of the court the defendant is placed at the mercy of the plaintiff, the least the court could do would be to continue the cause. (Act Assem. Maryland, 1787, chap. 9, sec. 8.)

Upon the whole, the whole action of the court was the withholding from the jury of competent evidence offered by the defendant below, and that is error. (12 Pet., 154, Martha Bradstreet *v.* Anson Thomas; 17 How., p. 13, Cowen and Hill's Notes, vol. 4, p. 775, 776; 1 Duer, Sup. C. R., 431, 434.)

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

I. That the notice to produce books and papers, served by the defendant on the plaintiffs' counsel below, in the record referred to, was insufficient in point of time, and too general in its terms and extent. (1 vol. Stat. at Large, p. 82; 2 Cranch C. C. R., 427; ib., 336; 3 Cranch C. C. R., 646.)

II. That the said notice and affidavits filed therewith are defective, because they do not show or aver that the evidence sought was "pertinent to the issue," and such as the plaintiffs "might be compelled to produce by the ordinary rules of proceeding in chancery." (3 Johns. C. R., 45; 16 Johns. R., 591, 598.)

III. That the exercise of the power invoked by the defendant's motion to produce books, &c., is matter of sound discretion with the court, and not imperative and unconditional, and that the record does not show that this discretion has been abused by the court below.

IV. That the refusal of the court to continue the cause is not error—such a motion being always addressed to the sound discretion of the court. (6 Cranch, 206, 218.)

V. That the record does not show any proper ground on which the writ of error can be sustained; and that if this result be attributable to the meagreness or omissions of the transcript, such defects must operate to defeat the plaintiffs in error, since the rule of the court, and all the intendments of the law, are in favor of the correct ruling of the court below.

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

This is a writ of error to the Circuit Court for the District of Columbia, upon a judgment rendered in that court in favor of the defendants in error, in a suit brought by them upon certain promissory notes set forth in the pleadings.

Some time before the trial, a notice was served on Selden, Withers, & Co., the defendants in error, to produce certain books and papers mentioned in the notice; and that, unless they were produced at the trial, the plaintiff in error would move the court for a nonsuit, or for a like judgment as in cases of nonsuit; and an affidavit was made by the plaintiff in error, that the books and papers specified were necessary for his defence. Those applications and motions were afterwards repeated before the trial and at the trial, upon further affidavits and notices to the same effect, which it is not necessary here to set forth.

They were opposed by Selden, Withers, & Co., who were the plaintiffs in that court, and the motions were all overruled by the court. The exception does not state on what ground they were opposed, nor upon what ground they were overruled; and as far as the case is disclosed in the record, we see nothing in the rulings of the court to impeach its judgment.

The fifteenth section of the judiciary act of 1789, under which these proceedings were had, authorizes the court, upon motion and due notice thereof, to require a party to produce books or writings in his possession or power, which contain evidence

pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, it shall be lawful for the court, on motion, to give the like judgment for the defendant as in cases of nonsuit.

The transcript does not show that any motion was made for an order upon the plaintiff to produce the books and papers mentioned in the notice. It shows that a motion was made to render a judgment of nonsuit for not complying with the notice, and also a motion for a continuance of the case. But the court is not authorized by the act of Congress to enter a judgment of nonsuit upon the failure of the party to comply with the notice. The notice is merely a preliminary proceeding, to enable the party to bring before the court the motion for the order to produce; and when that motion is made, the party called on has a right to be heard, and he is not bound to produce the books and papers called for, until the court shall order him to produce them, and is in no default unless he refuses or neglects to obey the order. The court were therefore right in refusing to enter the judgment, when no order had been moved for or granted.

And as regards the motion to continue the case, it has often been decided by this court, that the refusal of an inferior court to continue a case to another term cannot be assigned for error here. Justice requires that the granting or refusal of a continuance should be left to the sound judicial discretion of the court where the motion is made, and where all of the circumstances connected with it, and proper to be considered, can readily be brought before the court.

We think, therefore, that neither of the objections taken here can be sustained, and that the judgment of the Circuit Court must be affirmed.

WILLIAM B. DEAN, APPELLANT, *v.* NATHAN MASON ET AL.

In suits for the infringement of a patent right, the rule of damages is the amount which the infringer actually realized in profits, not what he might have made by reasonable diligence.

After a bill is taken *pro confesso* in the Circuit Court, a motion to allow an answer to be filed is addressed to the discretion of the court; and from a refusal so to do, an appeal does not lie to this court.

A motion to dismiss the complainant's bill, upon the ground that he had parted with his interest, was properly overruled, because such assignment was not made until after the time when the computation of profits ended.

THIS was an appeal from the Circuit Court of the United States for the district of Rhode Island.

The bill was filed by Nathan Mason, of the city of Providence, in said district, planer of boards; Charles D. Gould, of Albany, in the State of New York; William W. Woodworth, of Hyde Park, in the northern district of New York, as he is administrator of William Woodworth, late of the city of New York, gentleman, deceased; and as he is grantee of certain exclusive privileges under and pursuant to an act of Congress, as is hereinafter fully set forth; James G. Wilson, formerly of the city of Philadelphia, and now of Hastings, in the State of New York, gentleman; and Richard Borden, and Jefferson Borden, both of the town of Fall River, and district of Massachusetts, against Dean, of the city of Providence.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Jenckes* for the appellant, and by *Mr. Payne* for the appellees, upon which side there was also a brief filed by *Mr. B. R. Curtis* and *Mr. Payne.*

Mr. Jenckes made the following points:

1st. The rule laid down by the court in both decretal orders, for the computation of profits, is erroneous. It is not in accordance with the prayer of the bill, or with the rule of law in such cases, as established by this court. The rule should have been to take an account of the actual gains and profits of the appellant, during the time his machines were in operation. This point has received an express adjudication in this court.

"In a suit in equity for an injunction and account of profits of a patented machine, the defendant is accountable only for what profits he *actually made*, not for what by diligence and skill he might have received." (Livingston et al. *v.* Woodworth et al., 15 How., 546.)

2d. The court below was in error in refusing leave to the defendant to answer on the motion to set aside the decree *pro confesso*, and allow the defendant to answer.

3d. The court below should have dismissed the complainants' bill, upon the proof that they had parted with all their interest in the subject-matter of the suit.

4th. The court below was in error in refusing leave for the filing of a supplemental bill in favor of Baker & Smith.

They had clearly succeeded to the complainants' title, and their proposed bill contains averments, verified by their oaths, which entitled them to the relief prayed for. The defendant below had started his machines, and was using them to the injury of the owners of the patent. No process of contempt could be moved for by the complainant Mason, for he had parted with his interest. The proposed parties complainant,

Baker & Smith, were entitled to the benefit of what had been done, on the title which they had acquired. (Story Eq. Pl., secs. 339, 349, 351; Calvert on Parties to Suits in Eq., pp. 99, 100.)

The fact that an interlocutory decree had been entered upon Mason's title did not bar his grantees who had purchased that title. A supplemental bill may be filed as well after as before a decree. (Story Eq. Pl., sec. 338.) In this case it was proposed to be filed "in aid of the decree, that it might be carried fully into execution."

If the supplemental bill had been filed, the defendant below would have been entitled to answer both the original and supplemental bills, and his full defence to this suit would thus have been made to appear. The hearing upon the decree prayed for would have necessarily led to an inquiry into the propriety of the decree sought to be enforced; and the court below could then have followed the decision of this court in Bloomer *v.* McQuewan, and dismissed the bill, as the Circuit Court in the case of Perkins *v.* Fourniquet reversed its interlocutory decree after the adverse decision of this court in a similar case. (See 1 Barbour's Ch. R., 363, *et seq.*)

5th. These questions are all proper to be discussed on appeal. This point has received the direct adjudication of this court.

"An appeal in equity brings up all the questions decided in the court below to the prejudice of the appellant." (Buckingham *v.* McLean, 13 How., 150.)

The counsel for the appellees made the following points:

1st. With respect to the motion to strike out the decree *pro confesso*, and allow the defendant to answer.

The decision of the motion to open the decree and allow an answer to be filed, even when made at the proper term, rests in the sound discretion of the Circuit Court, and is not subject to re-examination here. Wylie *v.* Coxe, 14 How. R., 1, is directly in point. If further authorities are needful, The Marine Insurance Company *v.* Hodgson, 6 Cranch, 206, where the refusal of the Circuit Court to allow a plea to be filed, United States *v.* Evans, 5 Cranch, 280, and Welch *v.* Mandeville, 7 Cranch, 192, where its refusal to reinstate the plaintiff, were in question, show that this court cannot review such decisions of the Circuit Court.

A reference to the nineteenth rule for the practice of the Circuit Courts in equity will show how entirely the allowance or refusal of this motion, if made in time, rests in the discretion of the Circuit Court.

2d. As to the motion to dismiss the bill.

Such a motion, based upon facts dehors the record, was wholly irregular, and could not be allowed.

And it may be added that, even if regular, and the facts upon which it was alleged to rest had been shown, they constituted no objection to a final decree.

A transfer of the title by each of the plaintiffs, *pendente lite*, cannot affect the rights of the defendant. (Eades *v.* Harris, 1 Young and Col. N. R., 230.) Certainly it could not do so in this case; for the allegation is, that Mason parted with his title in April, 1852, (see page 122,) and the account of the profits comes down only to the 29th of August, 1851. (See pages 56, first paragraph; 101, fourth paragraph.)

3d. As to the interlocutory decree, by which the cause was referred to the master to take an account.

We submit that the appellant cannot now take an objection to that decree.

The nineteenth rule expressly provides, that a decree founded upon an order taking a bill for confessed, shall be absolute at the close of the term at which the decree is entered. If this defendant (who admits that he was actually cognizant of all the proceedings, and that he intentionally allowed them to take place) intended to object to a direction given to the master, he should have appeared and objected then, before the proceedings were had in the master's office. At all events, he might, and should, when the master's report came on for confirmation, have taken his objection. Having suffered all these opportunities to pass, he cannot now, for the first time, take the objection in the appellate court.

But if this court should think otherwise, we submit that whatever error existed in the directions given to the master, it was cured by the proceedings which actually took place.

The appellant rendered an account to the master of his receipts, and of the allowances he claimed. His account of his actual receipts was not questioned, and was taken by the master as the basis of his report. The dispute arose upon the allowances, the principal items of which were rents, fuel, labor, carting, oil, and repairs. If the appellant had carried on the business of planing only, these items would have been capable of being distinctly vouched and liquidated. But in point of fact, his planing business was carried on upon the same premises, and by the same power and labor, which were used for much other machinery. The expenses of the planing business were therefore not liquidated and distinct items.

They were necessarily to be arrived at only by estimates, based on a view of the whole business, and of the proportionate cost of this part of it. The master, therefore, went into an

examination of the entire cost of the several items of expense, and of the just proportion of it which belonged to the planing business.

It is difficult, without a perusal of both his reports, and of the exceptions taken to them, and of the decrees of the court thereon, to obtain a correct view of his action; but we submit that such a perusal will show that no speculative rule of profits was applied by him; that estimates were not resorted to, save in reference to the expenses where they were absolutely necessary; and that the results of the proceedings before him were these—that the appellant was charged only with what he admitted he actually received, and was allowed all, which, upon a fair view of the evidence, it appeared he had actually expended in this part of his business. By reference to the items stated by the master at the foot of page 55, and an examination of the preceding part of the report, in which he shows how he arrived at each of those items, and also by reference to his subsequent report, p. 98, as to some of them which he had been required to re-examine, we submit it appears that the balance which he reported was a balance of actual profits; and that therefore it became wholly immaterial that he might have found possible profits. So the appellant seems to have considered; for at no time, nor in any form, did he object that possible profits had been charged.

In McMicken *v.* Perin, 18 How., 507, where a bill was taken *pro confesso*, and at the same term a decree of reference was made, it was objected that the master had not allowed to the appellant the amount *admitted by the bill to be due to him.* But as no exception had been taken to the master's report, this court refused to reverse the decree. Certainly, it is not more apparent on this record than it was on that, that the master's report is erroneous; and if an exception was indispensable then, why not here?

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the Circuit Court for the district of Rhode Island.

A bill was filed in this case by Mason et al., claiming to be owners of a territorial right to the exclusive use of the Woodworth patent for planing boards, charging the defendant with using three of the machines in the city of Providence, in violation of the complainant's right. The suit was commenced the first year of the extension of that patent by Congress, and the three machines which were sought to be enjoined were those used during the first extended term of the patent, under a license from its owners. A preliminary injunction was granted.

At the June term, 1851, of the Circuit Court, a decree *pro confesso* was entered against the defendant, and he was perpetually enjoined. The case was referred to a master, to take an account of the profits or income derived by the defendant, or which by reasonable diligence might have been realized by him, from the use made of the three machines.

Exceptions were taken to the first report of the master, and it was referred to him again under the same instructions.

Before the second report of the master, a motion was submitted to the court by the defendant to set aside the decree *pro confesso*, and for leave to answer the bill, on the ground that the Supreme Court in the case of Bloomer *v.* McQueen et al., 14 Howard, 539, had held, in a case similar to this, that the licensee's privilege continued under the extension of the patent by Congress, the same as under prior extensions; but the court refused the motion; consequently, the appeal does not bring before us any question under the last extension of the patent.

At the November term, 1854, the master made his second and final report, in which he stated the sum of $2,566.46 as the amount of profits which the defendant, by reasonable diligence, might have derived from the use made by him of such patented machines, and the sales of the products thereof, during the period covered by the suit.

The decree was entered, on the report of the master, for the estimated amount of profits which the defendant, with reasonable diligence, might have realized; not what, in fact, he did realize. This instruction was erroneous. The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general, is the damage done to the owner of the patent. It takes away the motive of the infringer of patented rights, by requiring him to pay the profits of his labor to the owner of the patent. Generally, this is sufficient to protect the rights of the owner; but where the wrong has been done, under aggravated circumstances, the court has the power, under the statute, to punish it adequately, by an increase of the damages.

The injury done is measured by the supply of planed boards thrown upon the market, which lessens so much the demand. But, if the liability of an infringer is to be increased by an estimate of the work he might do, with great diligence, he will be more likely to exceed the estimate than fall below it. This policy would increase the evil of the wrong-doer, without benefit to any one. In Livingston et al. *v.* Woodworth et al., 15 How., 546, the true rule of damages in such cases is laid down.

It is contended the court erred in refusing leave to the defendant to answer, on the motion made at June term, 1853.

A motion to amend, or file an answer after default, is generally addressed to the discretion of the court. Under some circumstances, the court, for the purposes of justice, will go great lengths in opening a default and allowing a plea to be filed. But this is done or refused by the court, in the exercise of its discretion, which is not subject to the revision of this court.

In the case before us, the motion to file an answer was not made until after the decree *pro confesso* had been entered, and a reference made to a master for an account. This was more than three years after the bill was filed. Whether the Circuit Court refused the motion on the ground of delay, or a want of merits in the cause assigned, does not appear; but it is sufficient to say, that on such grounds the decree cannot be reversed.

The motion to dismiss the complainant's bill, upon proof that they had parted with all their interest in the subject-matter of the suit, was properly overruled. The allegation is, that Mason parted with his title in April, 1852, and the account of the profits is brought down only to the 29th August, 1851. The right asserted in this action was not affected by the conveyance of Mason to Baker & Smith.

The refusal of the Circuit Court to permit a supplemental bill to be filed by Baker & Smith, was, under the circumstances, a matter of discretion in the court; and it affords no ground for the reversal of the decree. It is not perceived what interest these assignees could have in a suit for an infringement of the patent, before their right accrued; and any attempt to make them parties, with the view to benefit the defendants in the pending suit, was unsustainable.

For the reasons assigned, the decree for damages must be reversed, at the costs of the defendants in error, as founded on an erroneous estimate; and the cause is remanded to the Circuit Court, with instructions to enter a decree for the amount of the profits realized by the defendant from the wrongful use of the patent.

JANE CARROLL, MARIA C. FITZHUGH, ET AL., DEVISEES OF DANIEL CARROLL OF DUDDINGTON, PLAINTIFFS IN ERROR, *v.* NICHOLAS DORSEY, NOAH DORSEY, ACHSAH DORSEY, TRISTAM S. DORSEY, HEIRS AT LAW OF ALFRED R. DOWSON, DECEASED.

Although an irregularity in the citation may be cured by an appearance in court, yet a defect in the writ of error, (such as not naming a return day for the writ,) or an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal, are fatal errors, and the case must be dismissed for want of jurisdiction.

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.

A motion was made to dismiss it, by *Mr. Bradley* and *Mr. Charles Lee Jones*, for the following reasons, viz:

That it is manifest, by the record filed in this court in the said cause, that the judgment therein was rendered in the Circuit Court of the District of Columbia, at the October term of said court, in the year 1851.

That the appeal bond filed therein bears date the 27th day of May, 1853; that the recital of the said bond sets out a writ of error, returnable to the term of this court to be holden on the first Monday of December then next ensuing; that the said bond was approved on the 17th day of December, 1853, being after the return day of said writ, as set out in the said bond; that the citation and writ of error were both issued on the 17th day of December, 1853, and the said writ of error was returnable to this court, without designating to what term the same should be returned; that the transcript of the record of the said cause was not returned to or filed in this court until the December term, 1856.

And therefore they say, for the said irregularities in the said proceedings, patent on the face of the record of the said cause, the said cause ought to be dismissed.

The motion was opposed by *Mr. Coxe*, who, after explaining the cause of the delay, contended that inasmuch as a general appearance was entered at December term, 1856, the motion to dismiss now came too late.

As a general rule, defects in *mesne* process are cured by appearance. (1 Bos. and Pul., 105, 250, 644.)

In 3 Cranch, 496, process had irregularly issued, in contravention of the express language of a statute prescribing to whom it should be directed. This irregularity was specially pleaded and demurred to. The court unanimously held that the appearance by attorney cured all irregularity of process.

In Harrison *v.* Rowan, 1 Peters C. C. R., 489, the true distinction is taken. It is said the eleventh section of the judiciary act, which relates to the service of process, is not a denial of jurisdiction, but the grant of a privilege to the defendant not to be sued out of the State where he resides, which he may waive by a voluntary appearance. (14 Peters, 174, 299.)

In 3 Dallas, 87, one error alleged was, that a monition should have issued; but this court held, that if this was a defect inquirable into by it, it was cured by appearance. (8 Wheat., 699.)

In 4 Cranch, 180, it was held, that where the writ of error is returned, although not at the first term, the appearance of defendant in error waives all objection to the irregularity.

In 3 Howard, 693, McDonogh *v.* Millaudon, the party by appearance and delay was held to waive all objection; and in 13 Howard, Buckingham *v.* McLean, a motion at a subsequent term after appearance was held to be too late.

As to any irregularity in the form of the writ, that at most is a mere clerical error, and cannot prejudice the parties in the case.

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

A motion has been made to dismiss this case, for want of jurisdiction.

It appears that an action of ejectment was brought by the plaintiffs in error against the defendants, in the Circuit Court of the District of Columbia, and upon the trial the verdict and judgment was for the defendants.

The particular day on which the judgment was rendered is not given; but it is stated as a judgment on the third Monday in October, in the year 1851, which it appears was the first day of the term. But it also appears that two exceptions were taken at the trial by the plaintiffs, one dated the 20th and the other the 22d of November; so that the judgment would seem to have been rendered a few days before the December term, 1851, of this court.

No steps were taken to bring it here for revision, until the 27th of May, 1853, when an appeal bond was approved by the presiding judge, which recites that the plaintiffs had obtained a writ of error, returnable to the next term of this court, and filed it in the clerk's office. No such writ of error, however, appears to have been issued. A paper, purporting to be a writ of error, was issued after the commencement of December term, 1853; that is, on the 17th of that month. This paper is made returnable to the Supreme Court in general terms, without naming any day or even any term at which the defendants were required to appear. The transcript before us also contains a citation, signed by the presiding judge, and the service is acknowledged by the attorney for the defendants. But the citation, like the paper purporting to be a writ of error, specifies no day or term at which the defendants are required to appear, and, moreover, is not itself dated.

No further proceedings were had, to bring up the case, until December term, 1856, when the record was filed without any other writ of error, bond, or citation; and at the

same term the defendants, by their counsel, appeared in this court.

It is evident, from this statement, that the case is not before the court. The act of 1789, sec. 22, requires that the writ of error should be made returnable on a certain day, therein named; and, indeed, upon common-law principles, a certain return day in a writ of error is essential to its validity. There is therefore no process by which the case is legally brought before this court, and consequently we have no jurisdiction over it. And if the process was free from exception, and if a writ of error, such as is known and recognised by law, had been issued and filed in the Circuit Court, yet no transcript of the record was filed here until nearly three years afterwards; and this court have repeatedly said that the transcript of the record must be filed at the term next succeeding the issuing of the writ or the taking of the appeal, in order to bring the case within the jurisdiction of this court.

But it is said, on behalf of the plaintiffs in error, that these are mere irregularities, which were waived by the general appearance at the last term, and that the motion at the present term is too late.

Undoubtedly the appearance of the defendants at the last term, without making a motion to dismiss, cures the defect in the citation. The citation is nothing more than notice to the party to appear at the time specified for the return of the writ of error. And if he appears, it shows that he had notice; and if he makes no objection during the first term to the want of notice, or to any defect in the citation, he must be regarded as having waived it. The citation is required for his benefit, and he may therefore waive it if he thinks proper, and proceed to trial in the appellate court. This point was decided in the case of the United States *v.* Yulee et al., 6 How., 603; but the court at the same time said that the appearance did not preclude the party from afterwards moving to dismiss for the want of jurisdiction, or upon any other sufficient ground.

The same point was again decided in the case of Buckingham et al. *v.* McLean et al., 13 How., 150, in which the court said that a motion to dismiss for want of a citation must be made at the first term at which the party appears, and is too late if made at a subsequent term. But the want of a writ of error, such as is prescribed by the act of Congress, stands on different ground. And in the case of the United States *v.* Curry, 6 How., 118, the court held, that where the power of the court to hear and determine a case is conferred by acts of Congress, and the same authority which gives the jurisdiction points

out the manner in which it shall be brought before us, we have no power to dispense with the provisions of the law, nor to change or modify them.

Upon this ground, the case is not legally before us, and must be dismissed for want of jurisdiction.

EDWIN M. CHAFFEE, TRUSTEE OF HORACE H. DAY, PLAINTIFF IN ERROR, *v.* NATHANIEL HAYWARD. HORACE H. DAY, PLAINTIFF IN ERROR, *v.* NATHANIEL HAYWARD.

By the judiciary act of 1789, no civil suit shall be brought against an inhabitant of the United States by an original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

This provision of law is not changed by any subsequent process act, or by the law giving jurisdiction to Circuit Courts in patent cases, without regard to citizenship.

Therefore, where a suit was commenced for an infringement of a patent right, and process was served by attaching the property of an absent defendant, this was not sufficient to give the court jurisdiction.

The defect of an irregular citation (being signed by the clerk of the court, and not by the judge who allowed the writ of error) is cured by an appearance in this court; so that a motion to dismiss the writ, when made at the term succeeding that at which the appearance was entered, comes too late.

THESE cases were brought up, by writ of error, from the Circuit Court of the United States for the district of Rhode Island.

At an early day of the term, *Mr. Pitman*, counsel for the defendant in error, moved to dismiss the writs of error upon the ground stated below, and filed the following affidavit in support of the motion:

SUPREME COURT OF THE UNITED STATES, NO. 51; DEC. TERM, 1857.

Edwin M. Chaffee, Trustee of Horace H. Day, Plaintiff in Error,
v.
Nathaniel Hayward.

The defendant in error in this cause moves that this cause be dismissed, the citation herein having been signed by the clerk of the Circuit Court, and not by the judge, as required by law. By his attorney, JOSEPH S. PITMAN.

I, Joseph S. Pitman, of the city and county of Providence, and State of Rhode Island, &c., attorney at law, on oath say, that I am and have been associated with Charles S. Bradley, Esq., in the defence of the above cause; that he is the junior counsel in said cause; that he left the city of Providence for Europe on the first or second day of December, 1856; that we

had no consultation respecting the management of said cause before his departure, Mr. Bradley expecting to return by the first of March, 1857; that after his departure I caused an appearance to be entered in said cause, and did not file a motion for the dismissal of said cause at the last term, because I did not wish to decide on the expediency of that motion without consultation with him; that I expected he would return in season for such consultation, either before the court adjourned, or that I should have opportunity to make that motion after consultation with him at an adjourned term of this court, which I supposed would be held as at the December term, 1856; that to my surprise this court adjourned about the seventh day of March, and the opportunity was lost, as Mr. Bradley did not return to this country until the twenty-fourth of March, 1857.

JOSEPH S. PITMAN.

RHODE ISLAND DISTRICT, *ss.*

Clerk's Office, Circuit Court of the United States.

On this nineteenth day of December, A. D. 1857, came the above-named Joseph S. Pitman, and made oath that the foregoing statements are true. Before me.

[SEAL.] Witness my hand and official seal, at Providence.

HENRY PITMAN,
Clerk Circuit Court U. S., R. I. Dist.

Upon which motion Mr. Chief Justice TANEY delivered the opinion of the court.

In this case, a judgment in favor of the defendant in error was rendered in the Circuit Court of the United States for the district of Rhode Island, at its June term, 1856. The plaintiff sued out a writ of error on the 27th of October, 1856, returnable to the December term of this court then next following; but the citation to the defendant was signed by the clerk of the court, and not by the judge who allowed the writ of error.

In pursuance of this writ of error, the record was filed here and the case docketed on the 24th of November, 1856; and on the 4th of December the defendant appeared by counsel in this court.

A motion has been made at the present term to dismiss the case, because the citation is signed by the clerk and not by the judge.

The citation is undoubtedly irregular in this respect, and the defendant in error was not bound to appear under it. And if a motion had been made at the last term, within a reasonable time, to dismiss the case upon this ground, it would have

been dismissed. But the appearance of the party in this court, without making a motion to dismiss during the first term, is a waiver of any irregularity in the citation, and is an admission that he has received notice to appear to the writ of error. This point was decided in the cases of McDonogh *v.* Millaudon, 3 How., 693; United States *v.* Yulee, 6 How., 605; and Buckingham et al. *v.* McLean et al., 13 How., 150. And these cases have been recognised and affirmed in the case of Carroll et al. *v.* Dorsey et al., decided at the present term.

Indeed, any other rule would be unjust to a plaintiff in error, and is not required for the protection of the defendant. The latter is not bound to appear, unless he is legally cited, except for the purpose of moving to dismiss. He knows, or must be presumed to know, whether the notice which the law requires has been served on him or not. And if the objection is made at the first term, the plaintiff, by a new writ and proper citation, might bring up the case to the succeeding term. But if the defendant does not, by motion at the first term, apprise him of the irregularity of his proceeding in this respect, and of his intention to take advantage of it, the plaintiff is put off his guard by the defendant's appearance; and if the motion is permitted at the second term, he will be delayed an entire year in the prosecution of his suit, whenever it is the interest of a defendant in error to delay and harass his adversary.

An affidavit has been filed by one of the counsel for the defendant in error, stating that he is the junior counsel in the case, and that he did not make the motion at the last term, because the senior counsel was absent in Europe, and the deponent did not wish to decide on the expediency of the motion to dismiss without consulting him; that he expected him to return before the term ended, but the court adjourned sooner than he anticipated, and the senior counsel did not return until the court had finally adjourned to the next term.

The facts stated in this affidavit cannot influence the decision of the motion. The absence of one or of all the counsel employed by one party, in pursuit of other business, furnishes no ground for delaying a case in this court, without the consent of the adverse party.

The motion comes too late, and is therefore overruled.

DAY
v.
HAYWARD. } No. 52.

The motion to dismiss in this case stands on the same ground with that of Chaffee, trustee of Day, *v.* Hayward, just disposed of; and must, for the reasons assigned in that case, be also overruled.

When the case came up for argument, it was submitted on printed argument by *Mr. Jenckes* for the plaintiff in error, and argued orally by *Mr. Bradley* and *Mr. Pitman* for the defendant.

Mr. Jenckes made the following points:

Point I. The Circuit Court for the district of Rhode Island, having jurisdiction of the subject-matter, may issue its process in the same form, and the process itself may be served in the same manner, as process issuing from the Supreme Court of that State for any cause of action within its common-law jurisdiction. (Process Act of May 8th, 1792, sec. 2, Stat. at L., I, 276.)

If the service was good by the laws of that State as they were at the date of the passage of the process act, then it is good under the laws of the United States.

1. The form of the writs in these cases and the modes of proceedings to bring the defendant before the court, were strictly in accordance with the law of Rhode Island. (Public Laws of Rhode Island, Digest of 1844, pp. 110, 113, 115.)

The statute law of Rhode Island regulating attachments on original writ was the same in 1789 as in 1855. (See Digest of 1767, p. 12; Digest of 1798, p. 201.) In all the statutes authorizing attachments of personal property, the same provision is found which is contained in the Digest of 1844, p. 113, sec. 3: "When any attachment is made in manner aforesaid, the same shall be sufficient to bring the cause to trial." Neither in the case of attachment of personal property, nor of real estate, (p. 115, sec. 11,) is there any provision made for personal service on the defendant. In the case of personal estate, a copy of the writ must be left at the defendant's usual place of abode, (p. 113, sec. 3,) and, in the case of real estate, with the person in possession of the land, and with the clerk of the town where the land lies, (p. 115, sec. 11.) Such service (sec. 3, p. 113) is expressly declared sufficient to bring the cause to trial. In case of real estate, the execution runs against the property attached, (sec. 11, p. 115.)

2. The above-cited statutes of Rhode Island show that the service of the process in a case in the Supreme Court of that State, made in the same manner as in this case, would have been sufficient to compel the attendance of the defendant, for the purpose of giving that court jurisdiction of the cause, and to form the basis of a judgment by default in case of his non-appearance.

Point II. The eleventh section of the judiciary act of 1789 does not prohibit the taking of jurisdiction over this cause.

The provisions of that section apply to the cases of jurisdiction founded on the citizenship of the parties. There is no reference in that section to suits at common law in which the Circuit Courts have jurisdiction over the parties by reason of their exclusive jurisdiction over the subject-matter. Most of the cases decided under that statute were cases where the jurisdiction depended solely on the citizenship of the parties, and were within the letter of the prohibition. (Picquet *v.* Swan, 5 Mason, 561; Richmond *v.* Dreyfous, 1 Sumner, 131; Toland *v.* Sprague, 12 Peters, 300.)

The case of Day *v.* The Newark India Rubber Manufacturing Company, 1 Blatchford, 628, was rightly decided, inasmuch as the mode of proceeding adopted in the commencement of that suit had not been adopted by the Circuit Court in New York; and it is submitted that it was not necessary to construe the eleventh section of the judiciary act as extending to a class of cases not referred to in that statute, and in which the jurisdiction does not depend on citizenship.

It is submitted that the Circuit Court in Rhode Island takes jurisdiction of cases under the patent laws, in the same manner that the Supreme Court of that State takes jurisdiction of any transitory action, and may use the same process to compel the appearance of the defendant, that could have been used by the State court at the date of the passage of the process act.

An objection to this view, taken by Mr. Justice Story in Picquet *v.* Swan, is, that the process act was not intended to enlarge the jurisdiction of the Circuit Courts as defined by the judiciary act. This objection is not tenable in a patent cause, because the jurisdiction of the court is enlarged by the patent laws, and the process acts are to be applied for the purpose of carrying into effect the jurisdiction so conferred, as well as that founded on citizenship.

Point III. This is a case of attachment of specific property, real and personal, which, by the Rhode Island statute at the date of the process act, is made a sufficient service to bring the cause to trial, and therein differs from all the cases decided under the eleventh section of the judiciary act, which were cases of foreign attachment. In Picquet *v.* Swan there was an attempt to attach the real estate of the defendant, but this attempted service was declared, by Judge Story, "defective and nugatory." The statute of Rhode Island in effect declares that a defendant is to be found in that State for the purposes of the jurisdiction of its courts, by his visible personal and real property, which can be seized and levied on by the sheriff. The decisions of the courts of the United States, in cases where

the jurisdiction rests exclusively on citizenship, declare that a defendant is not found in a district where one of his debtors resides. There is no conflict in maintaining both propositions.

If specific property cannot be attached when the owner resides out of the district, then an assignee under the bankrupt laws would be deprived of his remedy against a debtor of the bankrupt, in the Circuit Court of the district where his property might be found, although that court has jurisdiction of the subject-matter of the suit.

So, also, it would be impossible to commence a suit at law against an American residing abroad, for infringing a patent for a product by sales in this country, although he might have here warehouses full of goods.

Point IV. If the dictum in Toland *v.* Sprague, "that even in case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him, except as a part of or together with process to be served upon his person," is to be established as a rule for the service of process from the courts of the United States in all cases, then it is not possible to obtain security for a debt by attachment on original process from the Circuit Court in the district of Rhode Island.

An attachment cannot be made on original writ, if the debtor be within the marshal's precinct. He can attach goods and chattels only when he "cannot find the body of the defendant within his precinct," (Dig. of 1844, p. 113, sec. 3;) and real estate can be attached only when "the defendant's body or personal estate cannot be found within the State," (p. 115, sec. 11; Dig. of 1857, pp. 438, 439, secs. 4, 5, 15.) No provision is made in either case for personal service on the defendant. A copy of the writ is to be left at his last and usual place of abode, if he has any in the State, and, if not, notice is to be given by advertisement. But the form of the writ is such that if personal service can be made, no attachment can be made, and, when an attachment is made, no personal service is required or expected.

Many judgments have been rendered in the Circuit Court of Rhode Island, in suits commenced by attachment against citizens of Rhode Island who have been absent, in the belief that the process of that court was to be served like the process of the State courts, and with like effect. Property has been sold, and titles to real estate have passed, upon sales made on executions issued on judgments obtained by default. A decision against the validity of such attachments would not only unsettle the titles to property thus acquired, but would deprive suitors in the Circuit Court of the United States for that dis-

trict of the most valuable portion of their remedial process against their debtors.

The counsel for the defendant in error referred to the following authorities:

No civil suit can be brought in a Circuit Court against the defendant in any district whereof he is not an inhabitant, or is not found at the date of the alleged service of the writ. (Judiciary act of 1789, sec. 11, Stat. at Large, vol. 1, p. 79; Hollingsworth *v.* Adams, 2 Dallas, 396; Pollard *v.* Dwight, 4 Cranch, 424; Picquet *v.* Swan, 5 Mason, 35, 48, 50; Richmond *v.* Dreyfous, 1 Sumner, 131, 132; Harrison et al. *v.* Rowan et ux., 1 Pet. C. C. R., 489; Toland *v.* Sprague, 12 Pet., 300, 328, 330; Com. and R. R. Bank of Vicksburg *v.* Slocumb et al., 14 Pet., 60; Levy *v.* Fitzpatrick, 15 Pet., 171; Louisville R. R. Co. *v.* Letson, 2 How., 556, 557; Herndon *v.* Ridgway, 17 How., 424; Sadlier *v.* Fallon, 2 Curtis, 579, 581.)

The law has been equally well settled in relation to service of process in patent suits. (Horace H. Day *v.* The Newark India Rubber Manufacturing Co., 1 Blatch., 629; Saddler et al. *v.* Hudson et al., 2 Curtis, 6.)

Mr. Justice CATRON delivered the opinion of the court.

The question of law decided below, and which we are called on to revise, arises on the following facts: On the twenty-second day of October, 1855, the plaintiff in error sued out a writ in the Circuit Court of the United States for the Rhode Island district, against Nathaniel Hayward, styling him as "of Colchester, in the State of Connecticut, commorant of Providence, in the State of Rhode Island," for the recovery of damages alleged to have been sustained by the plaintiff in error, by reason of an alleged infringement of a patent right claimed by said plaintiff.

On the same day, the marshal of the Rhode Island district made return on the writ, that "for want of the body of the within defendant to be by me found within my district, I have attached," &c., (enumerating certain real estate lying in the city of Providence, in the State of Rhode Island,) and a still further return of having made further service of the writ, by attaching all the personal estate of the defendant in the India rubber factory of Hartshorn & Co., and in the store or warehouse No. 7, Dorrance street stores, &c., and "have left true and attested copies of this writ, with my doings thereon, with the city clerk of the city of Providence, and with John Sweet and William E. Himes, they being in possession of the premises, the defendant having no known place of abode within my district."

At the November term of the court, a declaration was filed,

containing the allegations of citizenship of the plaintiff and defendant, and that the defendant was commorant of Providence, as in the writ; and at the same term the defendant, in his own proper person, pleaded to the jurisdiction of the court, that he was at the time of the pretended service of the writ, and is, an inhabitant of the district of Connecticut, and not an inhabitant of the district of Rhode Island, nor was he at the time of the pretended service of the writ within the district of Rhode Island; praying the judgment of the court, whether it can or will take cognizance of the action against him.

To this plea the plaintiff, by his attorney, filed a general demurrer, on which the cause was heard, and at the June term the court overruled the demurrer and dismissed the case for want of jurisdiction; upon which, the plaintiff sued out a writ of error.

By the eleventh section of the judiciary act of 1789, it is provided, "That no civil suit in a Circuit or District Court shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

It has been several times held by this court as the true construction of the foregoing section, that jurisdiction of the person of a defendant, (who is an inhabitant of another State,) can only be obtained, in a civil action, by service of process on his person, within the district where the suit is instituted; and that no jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a State attachment law. The doctrine announced to this effect, in the case of Toland *v.* Sprague, in 1838, (12 Peters, 327,) has been uniformly followed since, both by this court and at the circuits. (15 Pet., 171; 17 How., 424.)

It is insisted, however, for the plaintiff, that these rulings were had in cases arising where the jurisdiction depended on citizenship; whereas, here the suit is founded on an act of Congress conferring jurisdiction on the Circuit Courts of the United States in suits by inventors against those who infringe their letters patent, including all cases, both at law and in equity, arising under the patent laws, without regard to citizenship of the parties or the amount in controversy, and therefore the eleventh section of the judiciary act does not apply, but the process acts of the State where the suit is brought must govern; and that the act of Congress of May 8th, 1792, so declares.

The second section of that act provides, that the forms and modes of proceeding in suits at common law shall be the same as are now used in the Federal courts, respectively, pursuant

to the act of 1789, ch. 21, known as the process act of that year.

This act (sec. 2) declares, that until further provision shall be made, and except where by this act "*or other statutes of the United States is otherwise provided,*" the forms of writs and executions, and modes of process in suits at common law, shall be the same in each State, respectively, as are now used or allowed in the Supreme Court of the same. This was to be the mode of process, unless provision had been made by Congress; and, to the extent that Congress had provided, the State laws should not operate.

Now, the only statute of the United States then existing, regulating practice, was the judiciary act of 1789, (ch. 20,) which is above recited. The eleventh section is excepted out of and stands unaffected by the subsequent process acts, and is as applicable in this case as it was to those where jurisdiction depended on citizenship. It applies in its terms *to all* civil suits; it makes no exception, nor can the courts of justice make any.

The judicial power extends to all cases in law and equity arising under the Constitution and laws of the United States, and it is pursuant to this clause of the Constitution that the United States courts are vested with power to execute the laws respecting inventors and patented inventions; but where suits are to be brought is left to the general law: to wit, to the eleventh section of the judiciary act, which requires personal service of process, within the district where the suit is brought, if the defendant be an inhabitant of another State.

This case, and that of Day against Hayward, depend on the same grounds of jurisdiction, and were both correctly decided in the Circuit Court; and the judgment in each is affirmed.

HORACE H. DAY, APPELLANT, *v.* THE UNION INDIA RUBBER COMPANY.

The party defendants in the present suit have as much right to manufacture various articles of India rubber under Chaffee's patent, as the licensees in the case of Hartshorn *v.* Day, 19 How.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

The case is stated in the opinion of the court.

It was argued by *Mr. Clarence A. Seward* and *Mr. Jenckes* for

the appellant, and by *Mr. Noyes* for the appellees, upon which side there was also a brief by *Mr. Staples.*

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 southern district of New York.

The bill was filed in the court below by Day, as assignee of the patent of Edwin M. Chaffee, for a new improvement in preparing and applying India rubber to cloth, &c., dated the 31st August, 1836, and renewed for seven years from the 31st August, 1850, against the defendants, for an alleged infringement during the running of the renewed term.

The questions involved in the case are, substantially, the same as those presented and decided in the case of Hartshorn et al. *v.* Day, at the last term, and reported in 19 How., p. 211. That was an action at law, brought by the same plaintiff, upon this patent, against the defendants, who were licensees under Charles Goodyear, for the manufacture of India rubber boots and shoes. The defendants in the present case are licensees under Goodyear, for the manufacture of India rubber cloth for various purposes. In both cases, the right to manufacture the article rested upon the authority of Goodyear to grant the license, as derived from Chaffee, the patentee.

The court held, in the case of Hartshorn et al. *v.* Day, that under the agreement of the 5th September, 1850, between Chaffee, the patentee, and William Judson, the entire ownership in the patent, legal and equitable, passed to Judson, for the benefit of Goodyear and those holding rights under him, and on that ground decided in favor of the licensees.

Now, in this case the licenses under Goodyear to manufacture cloth of the description claimed are as broad and ample as were those to the defendants in the case just mentioned. Goodyear became the sole owner of the patent of Chaffee as early as 28th June, 1844, and on the 18th July following gave a license to the Naugatuck India Rubber Company, to manufacture cloths, with certain exceptions, under all his patents—those in which he was then interested or in which he might thereafter be interested, issued or to be issued—and, also, in all renewals of patents. He also gave a like extensive license, on the 28th of March, 1847, to W. E. & John Rider, for manufacturing of ships' letter and mail bags; and in February of the same year, a similar license to manufacture wearing apparel, &c., to Jonathan Trotter; and on the 1st July, 1848, one to Trotter and W. Rider & Brother, for the manufacture of army and navy equipments, sheet rubber, &c. All these various licenses afterwards became consolidated in the Union

India Rubber Company, the defendants in this suit, and present therefore a complete defence to the suit, if Goodyear was the true owner of the Chaffee renewed patent. And this, as we have seen, has already been held in the case of Hartshorn *v.* Day.

Besides, in the agreement of the 5th September, 1850, between Chaffee and Judson, it is expressly stated that the patent was conveyed to the latter, to secure it for the benefit of Goodyear and those holding rights to use it under and in connection with his licenses; and Judson was also directed to hold it for their benefit.

The license of the defendants therefore, in this case, stands upon two grounds, either of which would seem to constitute a sufficient defence to the suit for infringement: First, authority from Goodyear, the owner of the renewed term of the patent; and second, the express recognition of Chaffee, the patentee, of the right of these parties as licensees of Goodyear to use the improvement. And we may add to these grounds of defence, that upon the interpretation of the court in the case of Hartshorn *v.* Day, of the several agreements relating to this patent, and especially that of 5th September, 1850, Day took no interest in it under the assignment of Chaffee of 1st July, 1853, he having previous to that time parted with all his interest for the benefit of Goodyear and his licensees.

Some evidence has been given in the case for the purpose of showing that the agreement of 5th September was not sealed at the time of its execution, and that the seal must have been annexed afterwards without any authority. But it is too slight and uncertain to be entitled to any weight.

It has also been insisted that this instrument was procured by fraud from Chaffee, through the contrivance of Judson. But the evidence relied on is very general and unsatisfactory; and, besides, it is too late to set up any such ground of defence after Chaffee himself has carried the agreement into execution, and acted under it, receiving its benefits for some three years. And what is remarkable on this point, he is the chief witness to make out the alleged fraud.

It has also been urged that the licensees have not contributed to the fund for paying the expenses of the renewal of the patent. But this is a matter in which Chaffee had no interest. He has taken the indemnity of Judson against these expenses. The licensees were never liable to him for them.

Without pursuing the examination further, we are entirely satisfied, for the reasons above stated, that the decree below is right, and should be affirmed.

JACOB U. PAYNE, J. P. HARRISON, AND GEORGE W. HUNTINGDON, COMMERCIAL PARTNERS, UNDER THE NAME AND FIRM OF PAYNE & HARRISON, INTERVENORS, PLAINTIFFS IN ERROR, *v.* JONATHAN J. NILES, JAMES M. NILES, LEANDER H. COREY, AND STEPHEN ALLEN, PARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF NILES & CO., PLAINTIFFS, AND WILLIAM A. BROADWELL, SYNDIC OF ANDREW KNOX, DECEASED, DEFENDANT.

No one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court.

Therefore, where there was a judgment in the court below, and certain persons intervened, whose petition for intervention was dismissed, they have no right to sue out a writ of error from the judgment to which they were not parties; nor was any process, upon their intervention, served upon the original defendant.

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

As originally brought, the suit was Niles & Co. *v.* Knox, and the circumstances which led to the change of title are stated in the opinion of the court.

On the 8th of February, 1856, the Circuit Court dismissed the intervention, with costs, when the intervenors sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Chilton* for the plaintiffs in error, and by *Mr. Benjamin* for the defendant. There were also briefs of *Mr. Chilton* and *Mr. Davidge* for the plaintiffs in error, and *Mr. Pike* for the defendant.

Mr. Benjamin thus noticed the point upon which the decision of the court turned:

1st. The writ of error must be dismissed. There is no such record as is required by the eleventh and thirty-first rules of the court. There is nothing but a petition of intervention, and an agreed statement of facts without any date, but which seems to have been made up after the new trial was refused; no answer, no pleadings, no bill of exceptions. (Keene *v.* Whitaker, 13 Pet., 459; Curtis *v.* Petitpain, 18 How., 110.)

2d. The judgment appealed from is one of which this court has no jurisdiction; the writ ought to be dismissed. (Bayard *v.* Lombard, 9 How., 550; Curtis *v.* Petitpain, 18 How., 110.)

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

This case is brought here by a writ of error directed to the Circuit Court for the eastern district of Louisiana.

It appears by the transcript, that Niles & Co., citizens of Ohio, brought suit in the Circuit Court against Andrew Knox, of Louisiana, for the price of certain machinery furnished to the latter for the use of his plantation. They claimed the vendor's privilege on the articles sold, which were still in possession of the vendee. The suit was instituted on the 21st of February, 1855, and on the 17th of April, 1855, a decree was rendered in favor of the plaintiff for two thousand six hundred and eighty-six dollars and sixty-nine cents, with interest, and with the vendor's privilege on the machinery.

On the 19th of March, 1855, Payne & Harrison, the plaintiffs in error, citizens of Louisiana, filed in the Circuit Court a petition of intervention in the above-mentioned suit, alleging that Knox was indebted to them in a large sum of money, for which they held a mortgage on the plantation on which the machinery in question was erected; and claiming that their right by virtue of this mortgage was superior to the vendor's lien of Niles & Co., and prayed a citation for Niles & Co.; but did not pray for any process against Knox. Nor does the record show that he ever voluntarily appeared to or answered this petition. And on the 8th of February, 1856, it was by the judgment of the Circuit Court finally dismissed, with costs.

A statement of facts was afterwards agreed on between the counsel for Niles & Co. and the counsel for Payne & Harrison, which is set forth in the transcript, but it does not appear that Knox assented to it, or indeed had any knowledge of it.

Afterwards, on the 18th of February, 1856, the counsel for Payne & Harrison represented to the court that Knox had died after the suit on their intervention was instituted, and that no one had qualified as his executor or administrator, and that there was no representative of his estate, except William A. Broadwell, of New Orleans, who was the duly-appointed and qualified syndic of said Knox; and thereupon moved the court that the said Broadwell be made a party to the cause, which was accordingly ordered by the court, and a copy of the order served on him by the marshal on the succeeding day; and on the day of the service, this writ of error was sued out by the intervenors, Payne & Harrison.

The writ recites that a judgment was rendered in a case between Niles & Co., plaintiffs, and Broadwell, syndic of Knox, defendant, and Payne & Harrison, intervenors in said suit, who were plaintiffs, both as against Niles & Co. and Broadwell, syndic of Knox; and citations were issued and served on Niles &

Co. and Broadwell, to appear in this court upon the return of the writ of error.

It will be seen, from this statement, that Payne & Harrison were not parties to the judgment in the suit of Niles & Co. *v.* Knox. The only judgment in the Circuit Court to which they were parties, was the judgment dismissing their petition of intervention; and Knox was not made a party defendant in that proceeding, nor was he a party to that judgment. The order of the court to make Broadwell, his syndic, a party, was passed after this judgment was rendered.

Writs of error to remove the judgment of an inferior tribunal to this court are, under the acts of Congress, governed by the principles and usages of the common law. And it is very well settled in all common-law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error, who was not a party to the judgment in the inferior court. Payne & Harrison, therefore, have no right to sue out a writ of error upon the judgment in the suit between Niles & Co. and Knox, to which they were not a party, nor can they make Knox or his representative a defendant in a writ of error brought upon the judgment on the petition of intervention, to which neither Knox nor Broadwell, his syndic, was a party.

This writ of error attempts to do both, and is therefore not warranted by law. It cannot bring the judgments referred to, or either of them, before this court, and must therefore be dismissed, with costs.

JOHN MCGAVOCK, PLAINTIFF IN ERROR, *v.* PETER W. WOODLIEF.

A broker who negotiates the sale of an estate is not entitled to his commission until he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and the vendor.

Where the judge files the statement of facts after the trial, *nunc pro tunc*, it is reasonable to presume that he had been requested to do so at the trial.

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

The case is stated in the opinion of the court.

It was argued by *Mr. Benjamin* for the plaintiff in error, and *Mr. Taylor* for the defendant.

Mr. Benjamin for plaintiff in error:

It is difficult to institute an argument on a proposition which appears so plain as that the plaintiff's case was not made out on the facts stated to be proven; but as the judge below, even after argument for new trial, persisted in the opinion that plaintiff had proven his case, we will analyze the *allegata* and *probata.*

The plaintiff's petition was clearly demurrable; but as he was allowed to make all the proof he could, the case will be argued on the merits alone. It was necessary for plaintiff to prove—

1st. That he was employed as a broker by McGavock, to effect a sale of his plantation.

2d. That he did find a purchaser willing and able to buy the plantation at the price and terms fixed by McGavock, to wit, for $130,000, payable $20,000 in cash, and the remainder in five equal annual instalments, without interest.

3d. That the sale was actually made and the price received; or, at all events,

4th. That it was his employer's own fault that the sale was not effected; and that the employer's refusal to carry out the sale agreed on resulted from (to use the language of the judge) whim, or caprice, or insufficient reasons.

1st. The statement of facts finds the first fact essential to plaintiff's recovery.

2d. On the second point, the evidence directly contradicts the plaintiff's case.

According to the statement of facts, the purchaser to whom McGavock agreed to sell was one George M. Long; the price was to be $120,000 for the plantation, and $13,500 for the growing crop, to be paid as the crop was sold. This price was to be paid, says the statement, *mainly* in the notes of a Dr. Bard, which notes belonged to Mrs. Long.

Was Long a purchaser able and willing to make the purchase?

The statement says "that he owned no property; or, if he did, that it stood in the name of his wife, and that he had little credit. His credit was not good."

The statement also says of the notes, which were the *main* portion of the price, "that they were the property of Mrs. Long, the wife of George M. Long; that although she at first refused to permit the notes to be used in the purchase of the plantation and slaves from McGavock, she afterwards consented that they should be so used, *on condition that the sale of the plantation and slaves should be made to her.*"

Can anything be clearer, then, than the fact that the pur-

chaser procured by the broker was unable to buy, because he could not pay the price agreed on?

The petition contains no allegation of a sale to *Mrs.* Long. The statement of facts shows no consent of McGavock to sell to her. It shows not even a proposition to McGavock to sell to Mrs. Long; nothing but a power of attorney from her to the broker, to buy the property for her, with her husband's consent. It does not appear that her husband ever agreed to this, nor that her offer was ever communicated to McGavock.

The only purchaser procured by the broker being shown to be unable to comply with his bargain, on what conceivable ground could McGavock be compelled to pay a brokerage commission?

But the statement shows that Mrs. Long herself was unable to comply with the terms agreed on. It says, "that it was in the contemplation of purchaser and seller that the notes of Dr. Bard should be substituted in the place of those which had been given by McGavock to Thibodaux, when McGavock purchased it from Thibodaux."

Here, then, McGavock stipulated that his own notes should be taken up and returned to him, by substituting Bard's notes. But some of McGavock's notes, amounting to at least $20,000, were in the hands of Cammack, Squires, & West, and the statement says "that application was made by the plaintiff, and by Long, to the said firm, to substitute the notes, &c., but that no satisfactory answer was received."

How is this difficulty to be obviated? Here is a positive condition of the sale, an important condition, which the purchaser finds it impossible to comply with. Was McGavock bound to sell, and leave his own notes for $20,000 outstanding? It is true, that in the statement of facts the judge says that he "sees no reason to doubt that *Long and wife* would have been prepared to comply with the terms of the contract, * * * even if they were required to pay cash the amount for which Cammack, Squires, & West, were endorsers, by *having discounted a portion of Dr. Bard's obligations.*"

It is obvious that this last quotation contains no statement of any *fact*, but a mere inference of the judge from the other facts proven; in other words, it is a *reason* given for his judgment.

But this passage is curious, as exhibiting how far the court had travelled away from the true issue, which was simply this: "Was George M. Long, who made the purchase, able to comply with the condition of substituting Bard's notes for McGavock's?" The statement admits that he did not own Bard's notes, and could not get them for his own purchase; and that

if he did, the holder of McGavock's notes would not make the exchange.

Thereupon the court decides that McGavock was bound to sell to *Mrs.* Long, or to *Long and wife*, and infers, in opposition to the direct fact that the substitution of notes was impracticable, that "Long and wife *would have been prepared to pay cash by discounting Bard's notes.*"

Surely this is making a bargain for McGavock, not executing one made by him.

3d. It is admitted that no sale was actually made, and no brokerage due therefor for actually effecting a sale.

4th. If it were admitted that brokerage could ever be recovered without an actual sale effected, (a point which it is unnecessary to discuss under a state of facts like that above disclosed,) it is perfectly clear that the recovery could only be had in a case where the party employing the broker had, through his own fault and caprice, prevented the accomplishment of the condition on which the broker's right to commission depends, to wit, the effecting of a sale. As nothing of this kind appears in this case, it is our confident conclusion that the plaintiff in error has been erroneously condemned in the lower court. (Broad *v.* Thomas, 7 Bingh., 99; Read *v.* Rann, 10 Barn. and Cress.)

Mr. Taylor's points were the following:

1st. There is nothing in the record which can enable the court to revise the judgment of the court below. (Lathrop *v.* Judson, 19 How., 69.)

2d. The plaintiff in error employed the defendant in error, in his capacity of broker, to find a purchaser and to negotiate a sale of his (the plaintiff in error's) plantation, &c., for him. The defendant in error found a purchaser, brought the parties together, and they came to a distinct understanding and agreement to make and complete a sale of the property, and the sale was not completed only through the fault of the plaintiff in error.

3d. The right of the defendant in error to the usual commission of brokers in such cases became perfect when the minds of the parties to the negotiation were brought to a concurrence, and thus the consideration and terms of the contract of sale with respect to the property to be sold were agreed upon. (C. C. of La., Art. 1797, 1765; Story on Agency, sec. 329; Hammond *v.* Holliday, 1 Cur. and Payne, 387.)

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United

States, held by the district judge for the eastern district of Louisiana.

The suit was brought by Woodlief, a broker in the city of New Orleans, against the defendant, to recover the sum of two thousand six hundred dollars, as a commission for negotiating the sale of a plantation and slaves.

The petition sets out that on the 16th November, 1855, the defendant employed the plaintiff to procure a purchaser for his sugar plantation, situate on the Bayou La Fourche, in the State of Louisiana, and seventy slaves, for the price of $130,000, of which $20,000 was to be paid in cash, and the remainder in five equal annual instalments, with interest. That the plaintiff soon thereafter found a purchaser, namely, George M. Long, of the parish of Carroll, State of Louisiana; and on the 20th November, said Long, with the plaintiff, went to the residence of the defendant, examined the property, and concluded an agreement of purchase according to the terms stated.

The facts set forth in the petition were denied by the defendant, and the cause went down for trial before the court, a jury having been waived, when a judgment was rendered for the plaintiff, for the amount claimed.

The case comes up on a writ of error to this court upon a statement of facts by the judge. The issue was tried in the court below, and the judgment rendered on the 24th June, 1856. A motion for a new trial was heard, and denied on the 9th of October following. The writ of error was then prayed for and allowed, and the statement of facts drawn up and ordered to be filed, *nunc pro tunc*, as of the 24th June, 1856, the day the cause was first tried before the court.

An objection was made on the argument, that this statement of facts could not be noticed, it having been made up after the term in which the cause was tried, and as it did not appear that the court was requested to draw it up at the time of the trial. We are of opinion that, as the judge has drawn up and filed the statement as of the day of the trial, it is but reasonable to presume that he had been so requested at the trial by the counsel for the defendant. We agree that the request must be made at this time, in order to enable the court to notice it in error; but the statement may be drawn up afterwards, as shall be convenient for the judge. This is the settled practice in courts where the proceedings are according to the common law. The bill of exceptions may be settled after, though the exceptions must be taken at the trial.

As to the merits, we are of opinion that there was error in the decision of the court below.

The terms of the sale, as given by the vendor to the plain-

tiff, the broker, were simple and specific—the price $130,000, $20,000 in cash, and the remainder in five equal annual payments. Long, the purchaser, agreed to these terms, as averred in the petition, and not questioned in the case; and if he had offered and was in a condition to consummate the agreement according to its terms, no doubt the commission would have been earned, and the recovery below right. But when the parties proceeded to the execution of the contract of sale, a change was proposed by Long, the vendee, which, for aught that appears upon the facts or in the finding of the judge, was never assented to by the defendant. The change was substantial, and called for a new and distinct agreement before the vendor could be bound. The wife of Long was interposed as the purchaser, the husband being a person of no means or credit. Her means, it appears, consisted of notes given to her by Dr. Bard, for a plantation which she had sold to him; and the greater part of the statement of facts is made up of various negotiations with third parties, by the plaintiff and Long, with a view to turn these notes for the benefit of the defendant, so as to apply them towards payment of the $130,000, the purchase-money. This was to be brought about by substituting them in the place of notes which the defendant had given to one Thibodaux, from whom he had purchased his plantation. Thibodaux was willing to receive the notes of Dr. Bard, in lieu of the defendant's, if the substitution could be legally made, and he could retain a first mortgage on the plantation and slaves as a security. Whether this security could be given, or was agreed to be given, nowhere appears. Twenty thousand dollars of these notes of the defendant were, in some way, under the control of a commercial firm, who were endorsers upon them. A difficulty existed in making a substitution for these. No satisfactory arrangement was made in respect to them, and none at all as concerned the sum of $20,000, which was to be paid to the defendant in cash.

The evidence in the case therefore neither shows that the defendant agreed to this change of the conditions of sale, nor, if he had, that they could or would have been carried into effect by the third persons concerned, nor any evidence of the condition to pay the $20,000 down.

The terms of sale, as we have stated, were very distinct and easily understood; but the terms and conditions of the proposed fulfilment are complicated, confused, involved in doubt and uncertainty, and the fulfilment itself, even upon these conditions, rather conjectural than otherwise.

The learned judge observes, in his statement, "that the court see no reason to doubt that Long and wife would have been

prepared to comply with the terms of the contract, by meeting the wishes of McGavock, the defendant, in regard to the notes given by him when he purchased the plantation from Thibodaux, even if they were required to pay cash for the amount for which the commercial firm were endorsers, by having discounted a portion of Dr. Bard's obligations." This is an opinion of what might have been effected towards the consummation of the contract of sale, rather than what had been done preparatory, and with a view to the fulfilment, which would have been much more pertinent to the issue in the case. As the terms of sale were explicit, the proposal to fulfil should have been equally so. Nothing should have been left to conjecture or speculation. There should have been as much certainty on the one side of the contract as upon the other. Certainty in the offer to fulfil is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale.

Judgment of the court below reversed.

THE COVINGTON DRAWBRIDGE COMPANY, PLAINTIFFS IN ERROR, *v.* ALEXANDER O. SHEPHERD, ELIJAH F. GILLAN, JAMES DAVIDSON, SAMUEL MCCLURE SAMUEL PETERS, AND GEORGE WILLARD.

An averment, in pleading, that the Covington Drawbridge Company were citizens of Indiana was sufficient to give jurisdiction to the Circuit Court of the United States, because the company was incorporated by a public statute of the State which the court was bound judicially to notice.

The former decisions of this court upon this subject examined.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Indiana.

Shepherd and the other defendants in error, styling themselves citizens of Ohio, brought an action of trespass on the case against the Covington Drawbridge Company, citizens of the State of Indiana, for injuries sustained by a steamboat belonging to the plaintiffs, in consequence of negligence in attending to the draw. The defendants pleaded not guilty, and the case was tried by a jury, who found a verdict for the plaintiffs, awarding $6,084.93. There were no prayers to the

court or bills of exceptions. But the defendants sued out a writ of error, and brought the case up to this court, upon the ground that "the Circuit Court had no jurisdiction of the cause. The averment of the citizenship of the defendants below, as stated in the declaration, is not sufficient to give jurisdiction to the court."

It was argued by *Mr. O. H. Smith* for the plaintiffs in error, and submitted on printed argument by *Mr. R. W. Thompson* for defendants.

Mr. Smith contended that the declaration did not give jurisdiction to the court. The only part of the declaration that refers to the citizenship of the parties is in these words: "Alexander O. Shepherd, James Davidson, Elijah F. Gillan, Samuel McClure, Samuel Peters, and George Willard, citizens of the State of Ohio, complain of the Covington Drawbridge Company, citizens of the State of Indiana, defendants in this suit, in a plea of trespass on the case."

I refer to the following authorities, showing that the question is *res adjudicata*, in this court: Bingham *v.* Cabot, 1 Curtis, 267; Emory *v.* Greenough, ib., 265; Turner *v.* Enville, ib., 311; Abercombie *v.* Dupins, ib., 422; Wood *v.* Wagnon, ib., 427; Marshall *v.* Baltimore and Ohio Railroad Company, 16 How., 314; Lafayette Insurance Company *v.* Maynard French et al., November term, 1855, Supreme Court of the United States; this latter case decides the very question. Mr. Justice Curtis, in the opinion of the court, says: "In the declaration, the plaintiffs are averred to be citizens of Ohio, and they complain of the Lafayette Insurance Company, a citizen of the State of Indiana." "*This averment is not sufficient to show jurisdiction.* It does not appear from it that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what State it was created. The averment that the Company is a citizen of the State of Indiana can have no sensible meaning attached to it. *This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution. And therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed.* But the *plaintiff's replication* alleges that the *defendants* are a *corporation, created under the laws of the State of Indiana, having its principal place of business in that State.* These allegations are confessed by the demurrer, *and they bring the case within the decision of this court in Marshall* v. *The Baltimore and Ohio Railroad Company*, 16 *How.*, 314, *and the previous decisions.*" The italics are my own.

In this case, there was no replication to supply the defect in the declaration, and therefore I maintain that the judgment must be reversed, and the suit dismissed.

The first branch of *Mr. Thompson's* argument was to show that it was not necessary to aver that the defendants below were a corporation. The second branch was as follows:

It being then settled that the defendants in this case are to be taken to be a corporation, it remains to be considered whether it appears from the declaration that the corporators are citizens of the State of Indiana, or that the corporation is engaged in its legal and proper vocation in said State. We maintain that both propositions are true. No one will deny that the averment of the citizenship of the plaintiffs is well stated, and the allegation is the same with reference to the defendants. In the case of the Bank of the United States *v.* Deveraux et al., 5 Cranch, 61, the averment of the citizenship of the corporation plaintiffs was, "and your petitioners aver that they are *citizens* of the State of Pennsylvania;" and Chief Justice Marshall, in delivering the opinion of the court upon the authority of a case in 12th Mod., said, "*the court was authorized to look to the character of the individuals who composed the corporation on a question of jurisdiction.*"

"*Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.*"

Surely, the averment in that case was no stronger than this. The averment in the declaration in this case is equivalent to a statement that the Covington Drawbridge Company was a corporation, (for the name implies it,) and that all the members of that corporation are citizens of the State of Indiana; this last averment is the essential element of jurisdiction. This court held in the case of Louisville Railroad Company *v.* Letson, 2 How., that jurisdiction might be maintained against a corporation defendant in a State where it was incorporated and had its principal office of business, though all of the corporators did not reside in the State of the corporation; and the decision proceeds on the ground, that where the corporation is created and exercises its powers, *that is its place of residence*, and that, on the assumption that the individual corporators are said to be inhabitants there, within the purview of the statute.

The cases in this court, since the case of the Commercial Bank of Vicksburg *v.* Slocum, 14 Peters, in which the question of jurisdiction has been decided, have proceeded upon the ground that jurisdiction might attach, though all the cor-

porators, defendants, did not reside in the State where the suit was brought, but certainly the court has not said that averments which were held sufficient in the cases of Strawbridge, Deveraux, & Slocum, when the utmost strictness was required, would be insufficient now. The modern cases proceed upon the assumption that the residence of the corporators is presumed to be where the company is incorporated and does business, and that the jurisdiction is founded, in fact, upon the citizenship of those corporators, and not upon the citizenship of the corporation itself. It is the citizenship of some living, tangible being, that gives the court jurisdiction. Could a negro or set of negroes, though incorporated, (which they undeniably may be,) sue in the Federal courts? And yet, if it is the corporation that is the person, *the citizen*, they could. It is evident that the jurisdiction must rest upon the citizenship of the corporators, and be made expressly to apply by positive averment, or to be implied from the place of transacting business and the granting the charter, in which last case the corporators are estopped "from averring a different domicil." (See Justice Grier's opinion in Marshall *v.* B. and O. R. R., 16 How.)

But these corporation defendants are well described in the declaration as inhabitants of the State of Indiana, and exercising the functions of the corporation within the State. It is averred that they built a bridge with a draw across the Wabash river, in that State, that they had charge of said draw, that it was their duty to have raised it upon the approach of boats for their safe passage; that though notice was given, "yet the defendants unjustly and wrongfully *kept said draw down*, and did not raise the same to permit the passage of plaintiff's boat, *and compelled* the said boat to run backward up the river from said bridge and draw, *and await the action of said defendants in raising said draw.*" The declaration had before alleged the construction of the bridge by the defendants. These allegations sufficiently show that the corporation was exercising its corporate powers in Indiana, and the power delegated to the corporation emanated from the State of Indiana; for no other State or power could authorize the erection of a bridge over a public highway situated in that State. By the rules of pleading applied to the declaration in this case, the Covington Drawbridge Company is to be regarded as a corporation, which had built and maintained a drawbridge upon the Wabash river, at Covington, Indiana, as their name would indicate they should, and that all the corporators or members of that company were and are citizens of Indiana.

If the court shall renounce the jurisdiction of the Circuit Court in this case, then every decision of this court upon the

question of jurisdiction anterior to the case of Letson *v.* Louisville R. R. Co., 2 How., 497, will be completely overthrown, and not a vestige remain. The corporation will, in effect, be held to be the citizen, though Mr. Justice Curtis says, in the case of French, that this court does not hold a corporation to be a citizen of a State, within the meaning of the Constitution. It was understood, by the decision in Letson's case, to be the relaxing of a rigid rule theretofore existing, and allowing a larger class of cases to be brought within the jurisdiction of the court, founded upon the presumption that the corporators must of necessity be and reside at the place of business and property of the company.

It certainly never was intended to declare that the court had no jurisdiction where *all* the corporators were *citizens* of the State in which they were sued, and carried on their corporate business.

In the case of the Bank of Augusta *v.* Earle, 13 Pet., 512, it is said that a corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It must dwell in the place of its creation.

This corporation, the Covington Drawbridge Company, dwelt at the bridge upon the Wabash river, at Covington, which they built and maintained, and upon which the plaintiff's boat was ruined. The corporation, dwelling at that bridge, in the State of Indiana, must necessarily have been created by the Legislature of the State of Indiana.

Again, Mr. Justice Grier, in delivering the opinion of the court in the case of Marshall *v.* The B. and O. R. R. Co., 16 How., 328, 329, reiterates the law for which we contend, "*that in deciding the question of jurisdiction, the court will look behind the corporate collective name given to the party, to find the persons who are the stockholders—the real parties to the controversy;*" and the question being whether an allegation that the "*defendants are a body corporate by the act of the General Assembly of Maryland,*" was sufficient to make it appear that the "real defendants," the stockholders, were citizens of that State, held that it was.

If that indirect averment by intendment and estoppel is held to be a sufficient allegation of the citizenship of "the real defendants," how much better is the more full and comprehensive allegation used in the case in hand, the "Covington Drawbridge Company, CITIZENS of the State of Indiana, defendants?"

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

The writ of error in this case is brought upon a judgment recovered by Shepherd and others, against the Covington Draw-

bridge Company, in the Circuit Court of the United States for the district of Indiana.

The only error assigned here is, that upon the declaration and pleadings in the case, the Circuit Court had no jurisdiction.

This objection is founded upon the description of the parties in the declaration, which is in the following words:

"Alexander O. Shepherd, Elijah F. Gillan, James Davidson, Samuel McClure, Samuel Peters, and George Willard, citizens of the State of Ohio, plaintiffs in this suit, complain of the Covington Drawbridge Company, citizens of the State of Indiana, defendants in this suit, in a plea of trespass on the case."

The plaintiff in error, who was defendant in the court below, contends that it does not appear by this averment that the Drawbridge Company was a corporation chartered by Indiana, and had its principal place of business in that State; and that, unless this appears in the pleadings, the averment that they were citizens of that State was not sufficient to give jurisdiction to the Circuit Court.

It is very true, that where individuals voluntarily associate together, and adopt a name or description intended to embrace all of its members, and under which its contracts and engagements are made, and its business carried on, such a company can neither sue nor be sued by the name they have adopted, and under which they act, in any court of common law, whether it be the court of a State or of the United States. They must sue and be sued in their individual names as partners in the company.

But the answer to the objection taken by the plaintiff in error is, that the twenty-seventh section of the fourth article of the Constitution of Indiana provides that "every statute shall be a public law, unless otherwise declared in the statute itself." The statute of the Legislature of Indiana, incorporating the Covington Drawbridge Company, is therefore a public law, of which the Circuit Court and this court are bound to take judicial notice, without its being pleaded or offered in evidence. For wherever a law of a State is held to be a public one, to be judicially taken notice of by the State courts, it must be regarded in like manner by a court of the United States, when it is required to administer the laws of the State.

This being the case in this instance, the averment that the Covington Drawbridge Company are citizens of the State of Indiana is sufficient, according to the decision of this court in the case of the Louisville, Cincinnati, and Charleston Railroad Company *v.* Letson, 2 How., 497, which has ever since been adhered to, and must now be regarded as the settled law of the court.

The question as to the jurisdiction of the courts of the United States in cases where a corporation is a party, was argued and considered in this court, for the first time, in the cases of the Hope Insurance Company *v.* Boardman, and of the Bank of the United States *v.* Deveaux, 5 Cr., 57 and 61. These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And in the last-mentioned case, the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular State (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators not named in the suit or the averment.

But in the case of the Louisville, Cincinnati, and Charleston Railroad Company *v.* Letson, the court overruled so much of this opinion as authorized a corporation to plead in abatement, that one or more of the corporators, plaintiffs or defendants, were citizens of a different State from the one described, and held that the members of the corporate body must be presumed to be citizens of the State in which the corporation was domiciled, and that both parties were estopped from denying it. And that, inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the State from which this legal being derived its existence, and its faculties and powers. And in the case of the Bank of Augusta *v.* Earle, 13 Pet., 519, the court said that a corporation can have no legal existence outside of the dominion of the State by which it is created. Consequently, the Covington Drawbridge Company being chartered by the State of Indiana, it necessarily has its home and place of business in that State; and the only averment in the declaration necessary to show a case for jurisdiction, was that of the citizenship of the parties who composed the company.

In the case of the Lafayette Insurance Company *v.* French, the declaration stated that the corporation itself was a *citizen* of Indiana. Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a

citizen of a State in the sense in which that word is used in the Constitution of the United States, and the averment was rejected because the matter averred was simply impossible. But it appeared from other parts of the pleadings that the corporation was chartered by Indiana, and had its principal place of business in that State. And the court, therefore, applied the principle decided in the case of the Louisville, Cincinnati, and Charleston Railroad Company *v.* Letson, and held that the members of the corporate body must be presumed to be citizens of the same State. The citizenship of the corporators was regarded as the necessary and legal consequence of the facts stated in the pleadings, without any positive and direct averment to that effect. The case of Marshall against the Baltimore and Ohio Railroad Company was decided upon the same ground. But in the case before us, the citizenship of the corporators is not left to be inferred by the court from other facts stated in the pleadings, but is directly and positively averred, and consequently freed from all objection on that head. Indeed, it is the same form of pleading in this respect that was used in the case of the Bank of the United States *v.* Deveaux, and which this court ruled to be good.

If the act of incorporation had not been a public law, which the court is bound to notice, then, undoubtedly, the proper description of the defendants would have been "The Covington Drawbridge Company, citizens of the State of Indiana, incorporated by that name, by the said State, and having their principal place of business therein." But in the case before us, the averment of the citizenship of the members of the corporation is all that is required, because the existence and domicil of the corporate body is judicially known to the court.

The judgment of the court below is therefore affirmed.

Mr. Justice CAMPBELL concurs in the result of the opinion of the court.

Mr. Justice DANIEL. In dissenting from the decision of the court in this cause, it is not designed to reiterate objections which in several previous instances have been expressed. I will merely remark, with reference to the present decision, and to others in this court, numerous as they are said to have been, that they have wholly failed to bring conviction to my mind, that a *corporation* can be a *citizen*, or that the term *citizen* can be correctly understood in any other sense than that in which it was understood in common acceptation when the Constitution was adopted, and as it is universally by writers on government explained, without a single exception.

SAMUEL A. WHITE, WILLIAM M. COOKE, CHAMBERS ETLER, JOHN H. BALDWIN, HENRY J. HUCK, AS ADMINISTRATOR OF HERMAN H. RODGERS, AND IN HIS OWN RIGHT, JOHN P. O'BRIEN, OLIVER H. STAPP, AND THOMAS ROOKE, PLAINTIFFS IN ERROR, *v.* ALBERT T. BURNLEY.

In the present case, the land granted in Texas was alleged to be within the *empresario* contract of De Leon. After proof that many of the documents upon the subject were destroyed in the revolution, the court left it to the jury to decide whether or not the land was thus situated. This ruling was correct.

The fact that the surveyor included more land than was called for, does not avoid the grant. Whatever the State might do to annul it, third parties have no right to consider it void.

A grantee having been compelled to leave Texas, there was no evidence of his voluntary and final abandonment of the country. As there was no evidence, the jury could not express an opinion upon the subject.

Nor was there any evidence which would justify the court in leaving it to the jury to decide whether or not this grantee was an alien enemy when he made a conveyance, he being then a resident of Louisiana. The mere fact of his being a Spaniard was not sufficient for an inference that he was an enemy of Texas. The averment in the deed that he was a citizen of Mexico was not sufficient.

Where a deed of land in Texas was executed in Louisiana, and recorded in a notary's books, a copy of it which had been compared with the original by a witness who was acquainted with the handwriting of the notary (being dead) and the subscribing witness, was properly admitted in evidence. It was also admitted as a record of another State.

In order that the statute of limitations shall begin to run, the defendant, claiming under a younger title to land which conflicts in part with an elder title, should have been in actual possession of the part which was overlapped by the elder title.

THIS case was brought up, by writ of error, from the District Court of the United States for the district of Texas.

It was an action of trespass, to try title brought by Burnley against the plaintiffs in error, in the District Court of the United States for the district of Texas, to recover a league of land, situated in Calhoun county, of that State.

Upon the trial, Burnley traced his title in this manner:

1. A document purporting to be the original *testimonio*, in Spanish, of a colonial grant in the colony of Martin De Leon, made by Fernando De Leon, commissioner, to one Benito Morales. The date of it was 11th April, 1835.

2. A deed from Benito Morales to Leonardo Manso, dated 27th May, 1835.

3. Conveyance from Manso to Peter W. Grayson, dated 6th April, 1836. This deed was executed in the parish of St. Landry, Louisiana, before Pierre Labiche, a notary of that place.

4. Conveyance from the executors of Grayson to Burnley and Jones, dated 22d of May, 1844.

The second and fourth of these deeds were given in evidence without objection. The first and third were objected to.

The objection to the original grant constituted the subject of the first bill of exceptions. The defendants, by their counsel, objected to its admission, on the ground that the want of authority in the commissioner of the colony to make the grant, appears upon the face of the grant itself, viz: that it appears therein that it includes more than one *sitio* or league of land, which was the limit of his authority; and thereupon, the court expressing a willingness to hear testimony as to law and usage on this subject, evidence was produced on both sides, when the court allowed the grant to be read in evidence to the jury. To this ruling the defendants excepted.

The plaintiff then proceeded with the deduction of his title, and read the deed from Morales to Manso, without objection. The next step in his title was the deed from Manso to Grayson, which was executed in Louisiana. What was offered in evidence purported to be a copy taken from a notary's books, and began in this way:

"Be it known that this day, before me, Pierre Labiche, notary public in and for the parish of St. Landry, duly commissioned and sworn, personally came and appeared Leonardo Manso, *citizen of the Republic of Mexico*, who declared," &c., &c. This deed was certified in such a manner as to induce the counsel for the defendants to agree as follows:

"I admit the sufficiency of the certificates to the foregoing deed as conformably to the act of Congress, March 27th, 1804, waiving want of notary's seal, &c.; but do not admit that the deed could be certified under that law.

"GEORGE W. PASCHALL,
"ALLEN S. HALE,
"*Attorneys for Reuss S. Bendewald.*"

There was also offered the deposition of a witness that he had examined the deed on file, a certified copy of which was paraphed by him; that he was acquainted with the notary's handwriting, &c., &c.

To the admission of which copy of said deed of conveyance the defendants by their counsel objected, on the following grounds, that is to say—

First. Because it was not executed in accordance with the then existing law of Texas in this, to wit:

1. That it did not appear that it was executed before any notary or other officer authorized by law to take and authenticate public instruments.

2. That it does not appear that the foreign notary, before whom it purports to have been passed and executed, made out

and delivered to the interested party at the time a *testimonio*, or second original, as by the then existing law was required.

Secondly. Because the protocol or first original should be produced, or satisfactorily accounted for, before said copy, which is secondary evidence, can be admitted.

Thirdly. Because, if any *testimonio* or second original was ever in fact issued, its absence is not accounted for.

Fourthly. Because the showing that the protocol, or first original, is in the office of a notary in the parish of St. Landry, in the State of Louisiana, is not satisfactorily accounting for the non-production of the original.

Fifthly. Because the notary's office in the State of Louisiana is not, *quoad* the original paper, a public office within the meaning of the act of Congress of March 27, 1804, entitled "An act supplementary to an act entitled 'An act to prescribe the mode in which the public acts, records, and judicial proceedings, in each State, shall be authenticated, so as to take effect in every other State.' "

Sixthly. Because the notary's office in the State of Louisiana is not, *quoad* the original paper, a public office within the true intent and meaning of the rule of the common law.

Seventhly. Because it is not proven in accordance with the rule and principle of the common law, in this, to wit:

1. That the witness, Guy H. Bell, does not prove that it is an examined copy, compared by him with the original.

2. That the witness, Guy H. Bell, does not state his means of knowledge of the handwriting of the witness, John Simons, nor that he was acquainted with his handwriting.

3. That the said witness, Guy H. Bell, does not state his means of knowledge of the handwriting of Pierre Labiche, the notary; and

4. That all proof relating to the handwriting of the notary, Pierre Labiche, is irrelevant, inasmuch as he was not an instrumental, assisting, or subscribing witness, to said original paper.

Eighthly. And to the deed itself it was further objected, that it has neither instrumental nor assisting witnesses, as by the law of Texas, in force at the time, was required.

Ninthly. That the deed of conveyance shows upon its face that it was executed upon the 6th of April, in the year 1836, by Leonardo Manso, reciting therein that he was a citizen of the Republic of Mexico, to Peter W. Grayson, reciting therein that he was a citizen of Texas, late a portion of said Republic of Mexico; and the fact being judicially known to the court that said Republic of Mexico and said Republic of Texas were then engaged in an open and public war with each other, the said deed of conveyance was and is therefore void.

But the court allowed the deed to be read, and this constituted the defendant's second bill of exception.

The plaintiff then, proceeding with his title, proved the will of Peter W. Grayson, deceased, with the probate thereof, and the grant of letters testamentary to the executors, who conveyed to Burnley and Jones the undivided three-fourths interest in and to all the lands conveyed by Leonardo Manso to Grayson. A deed from Jones to Burnley completed the plaintiff's title.

The third bill of exception by the defendant related to the introduction of certain depositions *de bene esse* by the plaintiff, which need not be further noticed.

The plaintiff then rested.

The defendants then offered a vast mass of evidence, which it is impossible to specify minutely. Their line of defence was this:

1. That the grant contained within its alleged boundaries a much greater amount of land than the grant called for, viz: fifty millions and upwards of square varas, being over two leagues, instead of one; and that there was not over a *laber* of marsh and water on the tract.

2. That the *empresario* De Leon had no right to grant the *locus in quo*, because it was not within the jurisdiction of his *empresa*, and because he, De Leon, had never had the consent of the Federal Executive to his colonizing the coast leagues.

Upon this point, the plaintiff offered rebutting evidence.

3. That White had resided upon his own head right ever since 1842, had laid off a town there, and the other defendants held under him.

The defendants offered other matters in defence, which will be sufficiently explained by the rulings of the court below upon those points which formed the basis of the decision of this court. There were twenty-nine prayers made to the court by the counsel for the plaintiff, all of which were granted; twenty-four prayers by the counsel for the defendants, which were refused, and nine instructions given to the jury by the court, at the instance of the defendants. Instead of inserting all this voluminous matter, the reporter prefers to take up in succession the points decided by this court, and to show what were the rulings of the court below or refusals upon those points.

The first proposition decided by this court is the following, viz:

"The land granted was alleged to be within the *empresario* contract of De Leon. After proof that many of the documents

upon the subject were destroyed in the revolution, the court left it to the jury to decide whether or not the land was thus situated. This ruling was correct."

Upon this point, the rulings of the court below were as follows:

The court refused the following instructions, asked by the defendants, viz:

3d. That the official acts of the various authorities of Coahuila and Texas, and of the Vice President of Mexico, show that the controversy between Power and Hewetson and De Leon, as *empresarios*, only related to such conflict as existed between the calls of their respective grants, between the Nueces and Lavaca rivers, and the documents showing the decisions of the respective Governments in relation to their controversy being Alaman's dispatch of December 23d, 1831, and Letona's dispatch of March 10th, 1832, are to be understood in no other way than as intending to place De Leon in possession of such lands as were embraced within his two contracts, (the first of the date of April 18th, 1824, the other his augmentation contract of April 30th, 1829,) and said dispatches and the law did not authorize the political chief of the department of Bexar to enlarge or extend those grants, or embrace within De Leon's colony any portion of the coast leagues not properly embraced within his said contracts; and any putting De Leon in possession beyond this, would have been without authority, and would not change or enlarge the true boundaries of De Leon's *empresa.*

4th. That after the national colonization decree of August 18th, 1824, and the State colonization decree of March 24th, 1825, and the instructions to the commissioners of the 4th September, 1827, the State had no right to extend to De Leon the right to colonize any portion of the coast leagues without the previous consent of the Federal Executive of Mexico, nor could the commissioners of colonies give possession to any colonist settled, or intending to settle, within the ten littoral leagues, unless the persons interested had presented the commissioner a special order of Government, wherein the approbation of the National Government to such grant had been manifested. And thereupon, if the jury believe, from the evidence, that De Leon had not the consent of the Federal Executive to colonize below the calls of his grant of 1824, as defined by himself in his letter of February 1st, 1825, and agreed to by the Government of Coahuila and Texas, and as shown by the decree of said Government through Gonzales on the 6th of October, 1825, do not embrace the lands in controversy, then there was no authority in the commissioner to make the grant, unless the

plaintiff has affirmatively proven a special order of the Government, wherein the approbation of the National Government to make the grant had been manifested; and in the absence of such proof, the jury will find for the defendant.

5th. That the report of the Government of Coahuila and Texas transmitted to the President of Mexico, dated October 2d, 1826, in which it is stated that the littoral leagues lying between the Guadalupe and Lavaca rivers were vacant, is *prima facie* evidence of the truth, and the contrary can only be established by proving that the lands so comprehended were the property of individuals, corporations, or towns not subject to colonization.

6th. That the consent of the Republic of Mexico in favor of Power and Hewetson's colonizing said littoral leagues between the Guadalupe and Lavaca rivers, expressed in his dispatch of the 22d April, 1828, and the contract between Power and Hewetson, and the Government of Coahuila and Texas on the 11th of June, 1828, gave to Power and Hewetson the legal and exclusive right to colonize said lands, except so far as they were already the property of individuals, corporations, or towns. And if De Leon's contract of 18th April, 1824, conflicted with any portion of said lands embraced within Power and Hewetson's contract of April 22d, 1828, the law only gave him preference to the extent of said conflict, and the political chief of the Department of Bexar could not divest Power and Hewetson's right beyond this conflict, nor vest it in De Leon. And therefore it will be the duty of the jury to ascertain from the evidence the lower boundary of De Leon's contract or grant of 1824; and if they find that the land in controversy was below said lower line, then there was no power in the commissioner of De Leon's colony to make the grant, and they must find for the defendants.

But the court gave the following instructions asked by the defendants, viz:

1. That if the jury believe, from the evidence, that the land in controversy was not embraced within the boundaries of Martin De Leon's colonial contracts of April 18th, 1824, or of his augmentation contract of April 30th, 1829, then there was no authority in the commissioner of De Leon's colony to extend the title, and it is null and void.

2. That, in determining the boundaries specified in these contracts, the jury will examine the calls in said contracts and documents themselves, and then determine for themselves whether the witnesses acquainted with the calls in the grants proved that the land in controversy was without these boundaries; and if so, then they will find for the defendants.

3. That the evidence of the witnesses as to the acts of the political chief of Bexar can only be understood as proving such acts as he could lawfully do; but in so far as it proves acts beyond the authority transmitted to him, and the law arising out of the documentary evidence before the jury, such evidence is to be disregarded.

The court also gave the following instruction asked by the plaintiff:

7th. That if the jury believe from the evidence that there was a controversy between the *empresarios* Power and Hewetson on one side, and Martin De Leon on the other, each claiming a grant including the land in controversy, and that this controversy was decided by the Supreme Executive of Mexico in favor of De Leon, and that decision was carried into effect by the authorities of the State of Coahuila and Texas, and thereby a boundary assigned to the colony of De Leon which included the land herein sued for, such settlement of the controversy will be received as binding and conclusive, and the grant claimed by plaintiff cannot be held invalid, either for want of the approval of the Supreme Executive authority of Mexico, or as being without the jurisdiction of De Leon's colony.

The second proposition decided by this court was this:

"The fact that the surveyor included more land than was called for, does not avoid the grant. Whatever the State might do to annul it, third parties have no right to consider it void."

Upon this point, the defendants prayed the court to instruct the jury as follows:

1. That the colonization laws of Coahuila and Texas did not authorize the commissioner of De Leon's colony to extend to Benito Morales a title for more than one league of land, (a league being twenty-five millions of square varas;) and the title being upon its face for fifty millions square varas, it was from the beginning null and void, and gives no right to recover.

2. That even if there was authority of law to include the excess of twenty-five millions square varas in the area, and exclude it from the computation because such excess was covered with salt bays as expressed in the grant, yet if the jury believed from the evidence that the reasons were false, and that there was in fact a great excess of land (over and above twenty-five millions square varas) which was not covered with water or salt bays, the grant was void because of the excess, and the jury will find for the defendants.

But the court refused to give these instructions, and gave

to the jury the following instructions, at the instance of the plaintiff:

1. That at the date of the grant under which plaintiff claims, both by the general law and the colonization law, saline bays, extending from the gulf or the large bays, could not properly be included in a grant to a colonist, such bays, though embraced in the lines of the survey, would properly have been deducted from the computation of the area of the grant, and the plaintiff's grant on its face is not invalid on that account.

2. The statement made in the survey contained in plaintiff's grant, that half of the survey was covered with saline bays, is *prima facie* to be taken as true at that time.

3. Any change which may have taken place since in the country included in the lines of the survey, will not affect the validity of the grant.

4. Although the jury should believe that the grant when surveyed did not contain an entire league covered by saline bays, yet if they believe that the statement in the survey was caused by the mistake or neglect of the surveyor, it will not vitiate the grant; and in order to render the grant invalid on this ground, the jury must believe from the evidence that there was intentional fraud committed by Benito Morales, the grantee.

The third proposition decided by this court is this:

"A grantee having been compelled to leave Texas, there was no evidence of his voluntary and final abandonment of the country. As there was no evidence, the jury could not express an opinion upon the subject."

Upon this point, the court instructed the jury as follows, at the request of the plaintiff:

11th. That if the jury believe from the evidence that Leonardo Manso was a native Spaniard, who emigrated to Mexico in his youth, and before the revolution by which Mexico was separated from Spain, and adhered to the cause of Mexican independence, and became a citizen of the Republic of Mexico, and then emigrated to and acquired the land in controversy in De Leon's colony, in order that there should have been an *ipso facto* forfeiture of said land, on the ground of abandonment of the country by said Manso, under the colonization law, it must be proved, to the satisfaction of the jury, that prior to the declaration of independence of Texas, on the 2d of March, 1836, the said Manso abandoned and left the country, and became domiciliated in a foreign country, without the intention of returning to Texas, or any other part of Mexico; and if his leaving the country was intended to be temporary, and with the design of continuing his allegiance as a Mexican citizen, and

returning either to Texas or some other part of Mexico, it was no abandonment of the country within the meaning of colonization laws, and did not divest his right to his land.

12th. If the jury believe from the evidence that Manso was forced to leave the country by the public authorities, on account of his being a Gauchapin, and his doing so was not voluntary, it was no abandonment of the country within the meaning of the colonization laws, and did not divest his right to his land.

13th. That the burden of proof is on the defendants, to show a final and complete abandonment of Mexico, prior to the 2d of March, 1836, on the part of Manso, in order that an *ipso facto* forfeiture of his land under the colonization laws should be made out, and the facts on which it is sought to disfranchise a party, and to divest his title to property, ought to be clearly and conclusively established.

The fourth proposition decided by this court was this:

"Nor was there any evidence which would justify the court in leaving it to the jury to decide whether or not this grantee was an alien enemy when he made a conveyance, he being then a resident of Louisiana. The mere fact of his being a Spaniard was not sufficient for an inference that he was an enemy of Texas. The averment in the deed that he was a citizen of Mexico was not sufficient."

The ruling of the court below upon this point was follows:

The following instructions were asked by the defendants' counsel:

7th. It appearing on the face of the conveyance from Leonardo Manso to Peter W. Grayson, that it was made on the 6th day of April, A. D. 1836, between the said Manso, a citizen of the Republic of Mexico, and the said Grayson, a citizen of the Republic of Texas, the States of Mexico and Texas being then engaged in an open and public war with each other, the said conveyance is absolutely null and void, and passed no right of property from the grantor to the grantee therein.

8th. That the contract being in relation to land between citizens of countries then at war with each other, the fact that it was made in the United States, a neutral country, does not take the case out of the rule, but it draws after it all the consequences of the laws of war, and is as void as though it had been made in Texas or Mexico.

9th. That the sale from Manso to Grayson being, as expressed in the deed, between citizens of Mexico and Texas, countries then at war with each other, the contract was contrary to the laws of war governing belligerents, was forbidden by the organic law of Texas, the criminal law of England

which it had adopted, its public policy, good morals, and the duty of Grayson as a citizen of Texas, and was therefore void.

11th. That if Manso had resided in Texas when the revolution commenced, in 1835, he had the right to make his election, whether he would adhere to his allegiance to Mexico, or adopt the new State of Texas; and the fact of his election is to be determined by his subsequent acts of declaring in the deed that he was a citizen of Mexico, and by his soon after returning to Mexico, and residing permanently there.

12th. That Grayson and those claiming under him in privity of estate, are estopped by the recitals of citizenship in the deed; and no proof of temporary residence in a neutral country, even if it had been made, could be allowed to contradict their own solemn act.

But the court refused to give these instructions, and gave the two following sets, the first being asked by the defendants, and the second by the plaintiffs:

The defendants asked the following, which were granted:

4th. It appearing on the face of the conveyance from Leonardo Manso to Peter W. Grayson, that it was made on the 6th day of April, A. D. 1836, between the said Manso, a citizen of the Republic of Mexico, and the said Grayson, a citizen of the Republic of Texas, the said States of Mexico and Texas being then engaged in open and public war with each other, the said deed of conveyance is absolutely null and void, passed no right of property from the grantor to the grantee therein, unless the jury should find from the evidence that the said Leonardo Manso was, at the time of making said conveyance, domiciled in the State of Louisiana, where said conveyance was executed.

5th. That to constitute a domicil requires an union, or joint operation of act and intention, residence in a particular place with the design of remaining there permanently. In attaining a just conclusion on the question of domicil, the chief point to be considered is the intention to remain in the particular place or country; if it sufficiently appears from the evidence that the said intention of removing from one place to another was to make a permanent settlement at the latter place, or for an indefinite time, that is, without looking to a departure from thence at any future time, when any particular business shall have been accomplished, the person may then be said to be domiciled in the country or place where he is residing; unless, therefore, the jury find from the evidence that Leonardo Manso was residing in the State of Louisiana on the 6th of April, 1836, with the intention to remain there permanently, or for an indefinite time, as above explained, he cannot be said to

have been at the time domiciled in Louisiana so as to render the conveyance made by him on that day to Peter W. Grayson, a citizen of Texas, legal and valid.

And the plaintiff asked the following, which were granted:

8th. That if the jury believe from the evidence that Leonardo Manso was a native Spaniard, who emigrated to Mexico in his youth, and before the revolution by which Mexico was separated from Spain, and adhered to the cause of Mexican independence, and became a citizen of the Republic of Mexico, and in the year 1833, or before that time, emigrated to Martin De Leon's colony in Texas, settled in said colony, was received as a colonist and domiciliated therein, and thenceforward until the date of this conveyance remained either in Texas or in Louisiana, without having re-established his domicil in any other part of Mexico, then the said Leonardo Manso was not, up to the date of said deed, an alien enemy to Texas, and his deed to Grayson is not invalid on that ground.

9th. That if Manso's domicil, at the date of his conveyance to Grayson, was either in Texas or Louisiana, and the jury do not believe from the evidence that he had taken up arms or engaged in the contest against Texas, his mere election to consider and calling himself a citizen of Mexico, would not make him an alien enemy, so as to render his said deed invalid on that ground.

The fifth proposition decided by this court is the following:

"Where a deed of land in Texas was executed in Louisiana, and recorded in a notary's books, a copy of it which had been compared with the original by a witness who was acquainted with the handwriting of the notary (being dead) and the subscribing witness, was properly admitted in evidence. It was also admitted as a record of another State."

The ruling of the court below upon this point was as follows:

The plaintiff asked the court to give the following instructions to the jury, which the court gave, viz:

16th. The conveyance from Manso to Grayson, executed in Louisiana before a notary public in conformity to the law prevailing in civil law countries, does not require further proof of delivery to the party, as the making the agreement before a notary, its reduction to writing, and making a protocol of such writing, includes delivery.

17th. If the jury find from the evidence that the deed from Manso to Grayson was made in Louisiana before a notary public, and was executed by the parties, and left with him to become a record of his office, further evidence of the delivery of the said deed is not necessary.

The last proposition decided by this court was the following:

"In order that the statute of limitations shall begin to run, the defendant, claiming under a younger title to land which conflicts in part with an elder title, should have been in actual possession of the part which was overlapped by the elder title."

Upon this point the court below gave the following instruction to the jury, at the request of the plaintiff.

18th. Though White, and those claiming under him, may have had more than three years' adverse possession on his third of a league claimed in this action, yet if said third of a league survey conflicted in part only with plaintiff's grant, and there was not an actual adverse possession within the interference of the surveys for three years or more before the commencement of this action, the defendants will not be entitled to the bar of the fifteenth section of the act of limitations.

The verdict and judgment were for the plaintiff, and the defendants brought the case to this court by writ of error.

It was submitted on printed argument by *Mr. Reagan* for the plaintiffs in error, and argued by *Mr. Bibb* and *Mr. Hughes* for the defendants. There was also upon that side a brief filed by *Mr. Ballinger.*

The analysis of the rulings of the court below has occupied so much room, that the points and arguments of counsel must be omitted.

Mr. Justice CATRON delivered the opinion of the court.

This suit was brought and tried in the District Court of Texas, to recover a league of land lying in that State, fronting in part on Matagorda bay, east of the mouth of the Guadalupe river, and purporting to be in Martin De Leon's colony or *empresa.*

1. The first objection made on the trial, was to the introduction of the grant offered in evidence, on the ground that the land did not lie in the colony, and therefore the officers of the same wanted jurisdiction, and had no power to grant to Benito Morales, under whom Burnley claims. If the premises were true, the conclusion would certainly follow. (McLemore *v.* Wright, 2 Yerger's Ten. R.)

It is a historical fact, established as such by the decision of the Supreme Court of Texas, in the case of De Leon *v.* White, (9 Texas R., 598,) that the *empresario* contract of Martin De Leon was so amended by order of the General Government of Mexico as to include the littoral leagues along the coast of the Mexican gulf, including that portion thereof where the land in dispute lies.

It is not only established by the history of the country; but

here, it was also proved by witnesses, after proof had been made to the court, that many of the documents of the *empresa* had been destroyed by the soldiers of the Texas army during the revolutionary struggle. The court left it to the jury to determine whether the land lay in the *empresa* of Martin De Leon, and they so found. In doing this, we think there was no error committed as against the defendant.

2. The next question appears on the face of the grant. All the steps leading to the grant, with one exception, are regular. The quantity of land that the lines of survey include, is equal to two leagues, whereas only one league is called for; and the reason the surveyor gives in his certificate of survey for the excess is, that he included in the survey a bay of the ocean, which was not subject to grant, a quantity equal to a league.

This statement was proved to be untrue—almost entirely. The grant contains two leagues and more of fast land; and for this reason it was insisted at the trial that it was fraudulent and void. But the court charged the jury to the contrary, with several qualifications. These we deem to have been useless; as our opinion is, that a regular grant (that is, a completed title, made by those exercising the proper political power to grant lands) is not open to this objection, by an opposing claimant setting up a younger title; and we understand, that on this principle the well-considered cases of Hancock *v.* McKinney, (7 Texas,) and of Swift *v.* Herrera, (9 Texas,) proceed. Such is the settled doctrine elsewhere. (Overton *v.* Campbell, 5 Hayw. Ten. R.)

How far the Government of Texas might interefere by "due course of law," (that is, by a suit in its name and behalf,) is a question for that Government to decide. Owen *v.* Rains's Lessee (5 Haywood's Ten. R., 106) is to the effect that it can only be done by suit.

To hold that this grant was *void*, because the surveyor returned an excess in his survey, without any evidence that the grantee participated in the matter, as is the case here, would be an alarming doctrine through a wide-spread portion of the United States. No instance is recollected where the State has interfered by suit to reform a land patent for excess of quantity. The consideration of more or less of excess, to constitute a *prima facie* case of fraud, would give a latitude of discretion to the judicial department over the executive and granting power, inconsistent with the independence of the latter in this branch of administration. Under the Spanish and Mexican Governments, the judiciary had no authority to interfere at all in any case. The political department retained to itself all the power to reform or to annul titles.

But where the executive authority intervenes, and calls on the courts of justice to aid "in the due course of law," no collision between the two departments can occur.

That a case of excess sufficiently gross could arise to justify a proceeding by suit on the part of the State of Texas, to reform a Spanish grant, we do not doubt. (United States *v.* Hughes, 11 How., 552.) But the question here is not of reform; it is of original nullity.

What was the condition of Morales's title? He applied for a league of land as a colonist; his petition was granted, and a survey ordered. The surveyor made return of his survey to the commissioner, who in effect exercised the granting power in De Leon's colony. The lines of the survey call for other adjoining tracts, and their corners previously made. On the faith of this survey, the commissioner proceeded to extend the title to Morales. It is probable that no actual survey was made on the ground; and hence it happened that the surveyor's certificate stated that more than one-half of the boundary shown on the plat was covered by water, and not subject to grant. Of this matter, the surveyor and the commissioner, as the judge of land distribution, had jurisdiction; it was their duty to act justly between the Government and the grantee. The commissioner acted by extending the title of possession, and thus vested a full title in Morales. No one at that time had any right to complain, if the Government was content; it has so far acquiesced, and younger grantees are bound by that acquiescence.

There is not the slightest evidence that Morales had any knowledge that the statement made by the surveyor in his certificate of survey was untrue; and therefore the grant as to him is not *void*, and could only be voidable in part, if it could be reformed at all.

3. Morales conveyed to Manso, who was a citizen of Texas, residing in De Leon's colony when resistance to the Central Government of Mexico was first agitated by the inhabitants of Texas.

All Spaniards were ordered to leave the country by the party which eventually proved successful; and Manso, being a Spaniard, left and went to Louisiana; and it is insisted that this forced removal was an abandonment of the country, and a forfeiture of his land, according to the colonization laws of Coahuila and Texas. Manso took no part in the revolutionary movement, quietly left, and resided in Louisiana from the fall of 1834 up to the time when he conveyed to Grayson, in April, 1836. Such was the only proof of his acts, so far as they affect this controversy.

The evidence did not warrant any charge from the court on the ground of abandonment of the country by Manso. The case of Hardy *v.* De Leon (5 Texas R.) is conclusive on this ground of defence. To hold otherwise, would violate the entire doctrine laid down in the case of McMullin *v.* Hodge, (5 Texas R.)

There must be *some* evidence on which a charge to the jury is founded, otherwise it cannot be lawfully given. As there was no evidence from which an abandonment could be found by the jury, an instruction on the subject could only mislead. (Chirac et al. *v.* Reinecka, 2 Pet., 625.)

In the next place, we are of the opinion that there was no evidence introduced on the trial below which could have warranted the court to give any instruction to the jury destructive of Grayson's title, on the supposition that Manso was an alien enemy at the time of conveying, and therefore had no capacity to convey.

When one nation is at war with another nation, all the subjects or citizens of the one are deemed in hostility to the subjects or citizens of the other; they are personally at war with each other, and have no capacity to contract. Here Manso was a citizen of Coahuila and Texas, when he was forced to leave his country, and continued away, subject to the same coercion, until after independence was declared by Texas, March 2d, 1836. The Constitution of Texas was adopted March 17th, 1836; by the tenth section of which it is provided, that "all persons (Africans, &c., excepted) who were residing in Texas on the day of the declaration of independence shall be considered citizens of the Republic, and entitled to all the privileges of such." Manso conveyed to Grayson in April, afterwards. There was a *suspicion* (he being a Spaniard) that he sympathized with the federal authorities of Mexico, and *might* take sides with the enemies of Texas; but this record affords no proof that he did so, up to the time when he conveyed to Grayson; nor is there any proof showing that he had abandoned his domicil in Texas, which he was forced to leave some sixteen months before independence was declared; nor is it of any consequence, whether he did, or did not, become domiciled in Louisiana, if he was not an alien enemy to the Republic of Texas, and to her citizen Grayson, the grantee; as an alien friend can convey his lands situate in a foreign Government; and that the title is defeasible, is nothing to the purpose in this case.

It is again insisted that Manso, after he conveyed to Grayson, removed to Mexico, and that this must be taken as evidence that he was an alien enemy when independence was

declared. The Texas courts hold that forcing a party to leave the country should not operate to his prejudice. (Hardy *v.* De Leon, 5 Tex. R.) And this court held, in the case of McIlvane *v.* Coxe's lessee, (4 Cra., 216,) that a citizen of New Jersey did not forfeit his citizenship by joining the British army during our revolutionary war, and that his heirs took by descent, although their ancestor continued to reside abroad. Nor did the expression in the deed that Manso was a citizen of Mexico *establish* alienage, as the State might claim his citizenship, notwithstanding. To this effect is Coxe's case; and which is followed by the doctrine maintained in Ingle *v.* The Trustees of the Sailors' Snug Harbor. (3 Peters R.)

4. The conveyance from Manso to Grayson is dated April 6, 1836, and was executed before a notary public in Louisiana. It embraced seventeen leagues in all, including the one in dispute. It was a civil-law conveyance, made in a notary's book, and a copy furnished to the grantee, as a second original. This copy was offered in evidence. In December, 1836, the Legislature of Texas enacted, that "the common law of England, as now practiced and understood, shall, in its application to juries and evidence, be followed and practiced by the courts of this Republic." The conveyance had two attesting witnesses to it, besides the signature of the notary. To let in the copy, it was proved by a witness that he had examined the original on file on the notary's book; that the copy was a true one; that the notary before whom the conveyance was executed was dead; that the witness knew his handwriting, which was genuine; that he, the witness, was well acquainted with the handwriting of John Simonds, one of the subscribing witnesses to the act of sale, who was also dead, and that the signature of Simonds was genuine.

The original of the conveyance from Manso to Grayson remained in the archives of the notary in Louisiana, and consequently could not be produced, and the copy was of necessity offered. This is according to the case of Watrous *v.* McGrew, (16 Tex. R., 512.) We are of opinion that the paper offered was sufficiently proved to be admitted on common-law principles.

The copy from the notary's books was also duly authenticated, according to the act of Congress of 1804, as a record of another State. The Supreme Court of Texas held, in the case of Watrous *v.* McGrew, that as the sixth article of the Constitution of Texas of November, 1835, creating a provisional Government, had recognised the civil code and code of practice of Louisiana; and as the ordinance of January 22, 1836, (Hart. Dig., 321,) had adopted, "in matters of probate the laws and principles in similar cases in the State of Louisiana," the

courts of Texas must recognise the Louisiana laws, and the proceedings under them, in cases of conveyances executed by notarial act in Louisiana; and on this ground the copy of the conveyance then before the court was admitted in evidence, being in all its features a copy of a record like the present.

5. The remaining question is, whether the defendants are protected by the act of limitations of three years? They pleaded, specially, that they, and those under whom they claim, have been in *adverse* possession of the premises sued for under color of title for three years next before the commencement of this suit; and that the plaintiff's cause of action accrued more than three years next before the commencement of said suit.

The fifteenth section of the act of 1841 (Hart. Dig., 729) declares that every suit to recover real estate as against any one in possession under title, or color of title, shall be instituted within three years next after *the cause of action* shall have accrued, and not afterwards.

The defendants had both title and color of title, as required by the act; and they, or some of them, had been in actual possession of their lands more than three years before this suit was commenced.

The younger title, owned and occupied by the defendants, lapped over one side of the grant to Morales, and to this interference the dispute extends. But no one of the defendants had been in actual possession of the disputed part for three years when the suit was brought.

The act of 1841, section 15, requires suit to be instituted within three years "next after the cause of action shall have accrued." And we think it too plain for reasoning or authority to make it plainer, that, until the land of the plaintiff was trespassed upon, this action of *trespass*, to try title, could not be maintained. Such are the decisions of the elder States on statutes having corresponding provisions. (Trimble *v.* Smith, 4 Bibb Ky.; Pogue *v.* McKee, 3 Mar. Ky.; Talbot *v.* McGavock, 1 Yer. Ten. R., 262.)

We have endeavored carefully to follow the doctrines of the Supreme Court of Texas in this opinion, because we are bound to follow the settled adjudications of that State in cases affecting titles to lands there.

On the effect *of excess of quantity* in a grant, and on the three years' act of limitations, we had no direct guide, and therefore have expressed our independent views on these questions.

For the reasons here stated, it is ordered that the judgment of the District Court be affirmed.

Mr. Justice DANIEL dissented.

The United States, Plaintiff in Error, *v.* Gotlieb Breitling.

The Circuit Court of the United States in Alabama, by a general rule, adopted the practice of the State courts, which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court, unless with the consent of counsel, &c.

But where a judge holding the Circuit Court in Alabama signed a bill of exceptions under special circumstances, after adjournment, and without the consent of counsel, this court will consider the exception as properly before it. It is in the power of a court to suspend its own rules, or except a particular case from them, to subserve the purposes of justice.

And the signature of the judge was attached to the bill, in conformity with the decisions of this court.

The exception brings up the charge of the court to the jury, but not the admission of evidence which was objected to on the trial, but to the admission of which no exception was noted.

The charge of the court, being founded on a hypothetical state of facts of which there was no evidence, was erroneous.

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 submitted on printed arguments by *Mr. Black* (Attorney General) for the United States, and *Mr. Percy Walker* for the defendant.

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

This action was brought by the United States against the defendant in error, as one of the sureties in the official bond of David E. Moore, who was receiver of the public moneys at Demopolis, in the State of Alabama. Under the instructions given by the court to the jury, the verdict and judgment were in favor of the defendant.

A bill of exceptions to these instructions, signed and sealed by the judge who tried the case, is set forth in the transcript. But the defendant contends that the exception was not taken by the United States according to law and the rules and practice of the Circuit Court, and that it cannot therefore be regarded as a part of the record of the proceedings in that court, nor considered here in revising its judgment.

A brief extract from the exceptions, together with the note attached to it by the judge, will show how this question arises.

After setting forth the bond and the testimony of several witnesses, examined on the part of the defendant, the exception proceeds in the following words:

"The defendant then offered to read in evidence the deposi-

tions above referred to, when the plaintiff's counsel objected to the reading of the depositions of McDowell, W. H. Roberts, and George G. Lyon, as they were severally offered, which objection the court overruled. The plaintiff's counsel objected to the evidence of D. C. Anderson, who was examined as a witness by defendant, whose evidence went to show that Smith, one of the obligors to the bond, was poor and in straitened circumstances, which objection was overruled. This, together with the depositions above referred to, was all the evidence offered by defendant, and the same having been submitted to the jury, and argued by counsel, the court, at the request of the defendant's attorneys, charged the jury, 'that if the jury believe, from the evidence, that at the time Breitling's name was signed to the bond, it was understood and intended that other persons were to sign it as obligors, and he was to have notice that they did so, and who they were, and then, if satisfied, was to acknowledge the bond in the presence of witnesses, who were to attest it, and if this was not done, and the bond was not afterwards ratified by him, the jury ought to find for the defendant;' to which charge the plaintiff's counsel excepted.

"And the judge therefore signs and seals their bill of exceptions, this 15th day of May, 1856, a day after the adjournment of the court. JOHN GAYLE, [seal.]"

Explanations attached to the Bill of Exceptions.

"During the term of the court, the attorney for the United States presented a bill of exceptions. The bill was presented on Saturday before the court adjourned, which was on Wednesday. On Monday morning, the bill was handed to the United States attorney, with the request that he submit it to the opposing counsel. On the third day after this, the minutes were signed, and the court adjourned.

"I heard nothing further from the bill till the 9th or 10th May, when it was presented by the plaintiff's attorney again, with the written objections of the attorneys of the defendant, that it should be signed after the adjournment. The clerk will subjoin this explanation to the bill of exceptions.

"JOHN GAYLE."

"Filed 15th May, 1856."

The objection stated in the note is founded upon a rule of the Circuit Court, which in general terms adopts the practice of the State courts; and the practice of the State courts, in relation to exceptions, is regulated by a law of the State, which

provides that no bill of exceptions can be signed after the adjournment of the court during which the exception is taken, unless by consent of counsel in writing, when it may be signed within ten days thereafter, except in such cases as is otherwise provided.

But the answer to this objection is, that the statute of Alabama, and the regulation it prescribes to the courts of the State, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it. The attention of this court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this: the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards. This point was directly decided in the case of Phelps *v.* Mayor, 15 How., 260; and again, in Turner *v.* Yates, 16 How., 28. And the time within which it may be drawn out and presented to the court, must depend on its rules and practice, and on its own judicial discretion. In the case before us, the judge who tried the case has deemed it his duty to seal and certify the exception to this court; and under the circumstances stated in the exception and the note, we think he was right in doing so, and that this exception is legally before this court as a part of the record of the proceedings of the court below.

In proceeding to examine the points raised upon it and argued in this court, it is not necessary to state at large the testimony given by the witnesses for the defendant, nor the grounds upon which the United States objects to the admissibility of the evidence; for it does not appear that the plaintiff excepted to any one of the decisions of the court overruling his objections. The exception states that he made the objections which have been argued here, and that the court overruled them. But the fact that he made the point at the trial, and the court decided it against him, is not sufficient to bring the question before this court. He must show that he excepted to the opinion. And as there is no evidence that he did so while the jury were at the bar, the objections to the testimony of the witnesses are not before us.

It is otherwise, however, in relation to the charge of the court to the jury. This, it appears, was excepted to, and consequently is regularly and legally before this court, and we think the judge erred in giving it.

It is clearly error in a court to charge a jury upon a supposed

or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony.

In the case before us, we do not see any evidence in the record which tends, in the least degree, to prove any one of the facts hypothetically assumed in the opinion. If such testimony was given, it certainly does not appear in the transcript. And upon this ground, without examining further into the opinion of the court below, the judgment must be reversed.

AUGUSTUS HEMMENWAY, CLAIMANT OF THE SHIP INDEPENDENCE, *v.* WILLIAM B. FISHER.

Where a judgment of the Circuit Court, sitting in admiralty, was affirmed here by a divided court, interest was not to be calculated upon the judgment.

The eighteenth rule of this court never applied to cases in admiralty which are brought up by appeal, and the rule itself is repealed by the sixty-second rule.

THIS was an appeal from the Circuit Court of the United States for the district of Massachusetts, sitting in admiralty.

It was argued at the preceding term of this court by *Mr. Loring* for the appellant, and *Mr. Bartlett* and *Mr. Thaxter* for the appellee. The judgment of the Circuit Court was affirmed by a divided court, and a mandate was issued for the amount named in such judgment, but no interest was mentioned, as none was given in the judgment of the Circuit Court. The mandate was not filed in the Circuit Court, and at the present term *Mr. Bartlett* made the following motion, which was argued by *Mr. Gillett:*

And now the appellee moves to amend the judgment rendered in this cause at the December term of this court, in the year of our Lord 1856, by giving to the appellants damages on the decree of the Circuit Court, at the rate of six per centum per annum, and that the judgment be so reformed, and for cause shows—

1st. That the mandate in said cause, though issued, has never been presented to the Circuit Court, and is now returned herewith, and filed with the clerk.

2d. That, upon inquiry of several of the judges, it has been ascertained that the question of damages was not passed upon by the court, and so this motion is not precluded by the past action of this court.

3d. That by the rules of this court, (Nos. 17 and 18,) "Where there are no special circumstances, six per cent. interest is allowed on the judgment of the court below," and the omission to insert the same in the record and mandate is deemed by this court a mere *clerical error*, capable of amendment at a succeeding term of this court, if the mandate has not been presented to the Circuit Court, and shall be restored to the files of this court. (Bank of Kentucky *v.* Withers, 3 Peters, 431.)

4th. The fact that the judgment in this case was affirmed upon a division of opinion among the members of the court cannot make it a case of "special circumstances" within the case above cited, since it is hardly to be presumed that in all cases where there are difficulties in a cause, the party ultimately prevailing is to lose his damages.

Any rule that should make damages in such case on a division of opinion upon the main question among the members of the court, would be open to the suggestion that in principle it ought not to make them depend upon an exact equal division, but apportion them according to the number of dissenting opinions among the members of the court.

S. BARTLETT, *for the Appellee.*

The appellant objects to the amendment proposed in the judgment rendered in the above entitled cause, and to the allowance of the interest claimed.

1st. Because no interest or damages were claimed at the hearing in this cause; the proper time to have presented this claim was at the hearing; and it is too late, after a decree has been rendered and a mandate issued, to seek at a subsequent term to raise that question. In the case of the Santa Maria, 10 Wheat., 431, 436, the court say, "In this view, it (the claim of interest) was matter open for discussion upon the original appeal; and no interest having been asked or granted, the claim is finally at rest. What was formerly before the court cannot again be drawn into controversy." A decree in which no damages are allowed is conclusive and final.

In the case Boyce's Ex'r *v.* Grundy, reported 9 Peters, 275, the court say, "It is solely for the decision of the Supreme Court, whether any damages or interest (as a part thereof) are to be allowed in cases of affirmance, (p. 290.) If, upon affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages, (p. 290.)

In the present case, the motion assumes and admits that no such allowance was made by the court; this decree, therefore, is equivalent to a denial of damages.

The case referred to in 3d of Peters would seem to have been an error of the clerk in not entering the judgment, with the damages which the court decreed, or intended to decree.

This is a different case; no damages were claimed by the appellant, and none were decreed, or intended to be decreed, by the court. Here was no clerical error, but an omission or waiver of a claim to damages by the appellee; and consequently the court did not decree any.

2d. The appellee cannot rest any claim on the fact that the mandate has not been delivered to the Circuit Court; that is his own wrong.

It was his duty to have delivered it immediately upon its being issued.

And had it been so delivered, the appellant would have paid the amount of the judgment; and has in fact held the money unused from that time to the present, for the purpose, and will do so until the final decree in the Circuit Court.

If therefore the decree is to be changed, and any interest allowed, the appellant claims that he ought not to be charged with interest after the mandate was issued, none having been claimed by the appellee; and the mandate having been retained nearly twelve months in his hands, to the detriment of the appellant.

WILLIAM DEHON, *for Appellant.*

Appellee's Reply.

1st. The ground that appellee must be deemed to have waived the application of *a standing rule of this court* to his case, because he did not specially ask at hearing that it be applied, cannot, it is submitted, be maintained.

2d. The case of the Santa Maria, 10th Wheaton, cited by appellant, has, it is submitted, no application, since it was an attempt to alter the terms of a stipulation made in the admiralty by a claimant, and insert an engagement to pay interest on the sum stipulated. Nor does the case of Boyce *v.* Grundy, 9 Peters, affect this application, since that case proceeds on the ground that the court passed on the question of allowing damages, and purposely entered the decree without making the allowance. This application proceeds on the ground (supposed to be ascertained) that the court did not pass on the question at all, and that under the general rule damages are to be allowed unless purposely denied; and this is the point determined by 3d Peters, 431.

3d. The suggestion, that at all events interest ought to be denied after the mandate issued, ought not to prevail, if there was what the court deem a clerical error, since appellee had no remedy in the vacation of this court, and appellant has in the mean time enjoyed the use of the money.

S. BARTLETT, *for Appellee.*

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

This case was decided at the last term. It was an appeal from the decree of the Circuit Court for the district of Massachusetts, sitting as a court of admiralty. The decree was affirmed here by an equal division of the Justices of this court; and the decree of affirmance was entered by the clerk for the sum awarded by the Circuit Court and costs, and did not give interest on the amount decreed by the court below. The mandate was issued according to the decree; but it was not filed or proceeded on by the appellee, because he supposed that, under the eighteenth rule of this court, he was entitled to interest upon the amount recovered in the Circuit Court, from the date of the decree, and that its omission was a clerical error. And he has now moved the court, to correct it by amending the decree and mandate.

If an error has been committed by the clerk, it is, without doubt, in the power of the court to correct it at the present term.

But the judgment is correctly entered, and the mandate conforms to it. And the mistake on the part of the appellee has arisen from supposing the eighteenth rule to be still in force, and to be applicable to cases in admiralty. But it never applied to admiralty cases.

It will be observed by reference to the seventeenth rule, to which the eighteenth refers, that these rules are in express terms confined to cases brought here by writ of error. And it is true that, by the original judiciary act of 1789, decrees in chancery and admiralty, as well as judgments at common law, in the Circuit Courts, were removable to this court by writ of error, and were not made removable in any other manner. And if that provision in the act of 1789 was still in force, and the rule unrepealed, the appellee would be entitled to the interest he claims, to be calculated under the twentieth rule, to the day of the affirmance of the decree.

But the writ of error, from its form, and the principles which govern it, is peculiarly appropriate to judgments at common law, and is inconvenient and embarrassing when used as process to remove decrees in chancery and admiralty to a su-

perior court. The ordinary and uniform mode of removing such decrees to the appellate and revising court, wherever such jurisdictions have been established, has been by *appeal*, with the single exception of this act of Congress. And, in order to remove the inconvenience and embarrassment which this provision in the act of 1789 created, it was repealed by the act of March 2, 1803, and the ordinary mode of *appeal* substituted in the place of the *writ of error*. And as this case came up by appeal, the rules of this court referred to in the argument do not apply to it.

Nor indeed were they intended to apply to chancery or admiralty decrees. They were adopted at February term, 1853, and that term continued until the 2d of March. It was on that day that the act of Congress changing the provision in the act of 1789 was approved by the President. And it appears by the minutes of the court that the rules in question were adopted on the same day, that is, March 2d. This act of Congress had therefore, undoubtedly, passed both Houses of Congress before these rules were adopted, and it is evident that they were carefully framed with reference to this change in the law, so as to exclude from their operation admiralty and chancery appeals.

It may be proper to add, that the eighteenth and twentieth rules are no longer in force, even in common-law cases. They have been superseded and annulled by the sixty-second rule, adopted in 1851. By this last-mentioned rule, judgments at common law and decrees in chancery, upon affirmance in this court, carry interest until paid; and the interest is to be calculated according to the rate of interest allowed in the State in which the judgment or decree of the court below was given. The object in changing the rule in this respect was to place the suitors in the courts of the United States upon the same footing with the suitors in the State courts in like cases. For the interest allowed in the several States differs, and in many of them it is higher than six per cent., and in most if not all of them a judgment or decree in a court of the State carries interest until it is paid.

Cases in admiralty, however, are not embraced in the sixty-second rule. It applies to cases of law and equity only. And, indeed, cases in admiralty could not have been justly included. For there could be no reason for giving one rate of interest where a case of collision or salvage was in the first instance tried and decided in Louisiana, and another rate of interest where it was tried and decided in New York, or in any other State where the interest allowed by the State laws was different.

Moreover, in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates, and the opinions of persons acquainted with the subject; and, acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.

And it will sometimes happen in an admiralty case, that this court will think that the damages estimated and allowed in the Circuit Court are too high, and yet the opinion here may approximate so nearly to that of the court below, that this court would not feel justified in reversing its judgment. Besides, new testimony may be taken here, in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved, to add to the damages awarded by the court below, further damages by way of interest, in cases where, in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court. If given by this court, it must be in the exercise of its discretionary power, and, *pro tanto*, is a new judgment.

In the case before us, no new judgment could be given in this court, because, upon the question of affirming or reversing the decree of the Circuit Court, the Justices of this court were equally divided; and the judgment was affirmed by operation of law, which from necessity affirms the judgment of the inferior tribunal when the judges of the appellate court are equally divided. Upon such an affirmance, the appellee was entitled to the full benefit of the decree of the Circuit Court, but nothing more. The court, being equally divided, could not change the decree of the Circuit Court, nor exercise its discretionary power to allow interest on the decree; for this would have been a new decree. And those Justices who were of opinion that the decree of the Circuit Court ought to be reversed because the damages were too high, were of course opposed to making it still higher by the addition of interest.

The motion to amend the decree and mandate, and give interest on the amount awarded by the Circuit Court, must therefore be overruled.

THE UNITED STATES, APPELLANT, *v.* JUANA S. DE PACHECO. THE UNITED STATES, APPELLANT, *v.* SAMUEL J. HENSLEY. THE UNITED STATES, APPELLANT, *v.* JOHN BIDWELL. THE UNITED STATES, APPELLANT, *v.* ANTONIO SUNOT ET AL.

As the act of Congress passed on the 3d of March, 1851, does not specify the time within which an appeal must be made to this court from the District Courts of California, the subject must be regulated by the general law respecting writs of error and appeals. Either party is at liberty, therefore, to appeal from such a decree within five years from the time of its rendition.

Under the sixty-third rule of this court, an appellee in a case from California may docket and dismiss according to that rule; but a new appeal may be taken at any time within five years, or it may be that the record may be filed by the appellant at the same term at which a certificate or record had been filed by the appellee, and the case dismissed.

After a case has been thus docketed and dismissed at the instance of an appellee who is a claimant of land, if a patent should be taken out, it will still be subject to be reviewed by this court at any time within the five years above mentioned.

THESE four cases are put together, because they were all covered by one decision of the court. They were cases from California.

In the first, *Mr. Crittenden* moved to dismiss the appeal.

1st. Because it was not taken during the term at which the decree was rendered.

2d. To docket and dismiss pursuant to the sixty-third rule of court.

Mr. Crittenden offered with his motion a duly-certified transcript of the record; from which it appeared that the decree of the District Court confirming the grant was made on the 22d September, 1856, and that the United States appealed therefrom at the next stated term, to wit 24th March, 1857.

UNITED STATES *v.* HENSLEY.

In this case, *Mr. Blair* moved to docket and dismiss pursuant to the sixty-third rule of this court, accompanied by a duly-certified transcript of the record; from which it appeared that the decree of the District Court, confirming the grant, was made 5th July, 1855, and that the United States appealed therefrom on the said 5th July, 1855.

UNITED STATES *v.* BIDWELL.

Mr. Blair moved to docket and dismiss pursuant to the sixty-third rule of court, accompanied by a duly-certified transcript

of the record; from which it appeared that the decree of the District Court, confirming the grant, was made on the 16th of July, 1855, and that the United States appealed therefrom on the said 16th of July, 1855.

UNITED STATES
v.
SUNOT ET AL.

Mr. Blair moved to docket and dismiss pursuant to the sixty-third rule of court, accompanied by a duly-certified transcript of the record; from which it appeared that the decree of the District Court, confirming the grant, was made on the 14th of January, 1856, and that the United States appealed therefrom on the 24th of March, 1857.

The opinion of the court refers to the first-mentioned case, because the first reason given by *Mr. Crittenden* was peculiar to that case; the second reason was common to all the cases.

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

A motion has been made to docket and dismiss this case.

It appears, by a certified copy of the record in the District Court of the United States for the northern district of California, that a decree was passed by that court on the 22d of September, 1856, confirming the title of Pacheco to certain lands therein mentioned. No appeal was taken by the United States at the term at which the decree was made, but an appeal was entered at the next succeeding term, in March, 1857.

Pacheco by his counsel now moves to docket and dismiss the case, upon two grounds: 1st. Because the appeal was not taken at the term at which the decree was rendered; and, 2d. If the appeal might legally be taken at the succeeding term, yet no transcript of the record was filed here within the first six days of the present term of this court.

The first question raised by the motion depends upon the construction of the act of Congress of March 3, 1851, which authorizes an appeal to this court in cases of this description. The act gives the right in general terms to the party against whom the judgment is rendered; and does not limit the time within which the appeal shall be made; nor refer to any particular act of Congress by which the time shall be regulated. It must therefore be governed by the judiciary acts of 1789 and 1803, which regulate writs of error and appeals to this court from inferior tribunals. And by these acts the party may take his appeal at any time within five years after the passing of the decree by the inferior court. The appeal in question was therefore made in time; and this motion cannot be maintained on that ground.

The second reason assigned in support of the motion depends upon the sixty-third rule of this court. Under this rule, the appellee in a case from California is entitled to have the case docketed and dismissed, if the transcript of the record is not filed in this court within the first six days of the term next ensuing such appeal; provided the decree of the court below was rendered sixty days before the commencement of the said term of this court.

As we have already said, the decree was rendered in September, 1856, and the appeal taken in March, 1857. Consequently it was the duty of the appellant in this case to file a transcript of the record within the first six days of the present term. This was not done. And it appears that no transcript of the record has yet been filed by the appellant. The appellee is therefore entitled to have the case docketed and dismissed under the rules above mentioned.

It is true he has not filed the certificate mentioned in the rule, but has filed a full transcript of the record. But the transcript shows all of the facts which the clerk by the rule is required to certify; and it has always been held by the court to be equivalent to the certificate which the rule prescribes.

It is proper, however, to add in order to prevent mistake on this subject, that the only effect of docketing and dismissing a case under this rule, is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that court, which the appeal created, and does nothing more. And after the case has been docketed and dismissed, the party against whom the decree was rendered, may still, at any time within five years from the date of the decree take a new appeal in the inferior court; and if he files the transcript of the record in this court within the first six days of the term next ensuing his appeal, the appeal will be valid, and the case as fully before this court, for examination and revision, as if it had been brought here at the first term. The act of Congress authorizes the appeal at any time within five years, and the period allowed by law cannot be shortened by any rule or practice of a court. Nor was it intended to be diminished by the rules in question. And when an appeal is taken in the court below, if the appellee desires a speedy and final decision of the controversy, it is in his power to bring the case up to the next succeeding term of this court.

Indeed, it sometimes happens, under this rule, that the court permits the transcript of the record to be filed by the appellant, and the case docketed for argument, at the same term at which it had previously been docketed and dismissed on the motion of the appellee. And where the appellant satisfies the

court that the omission to file the transcript within the first six days was not owing to any fault or negligence on his part, the court has always allowed him to file it at the same term, and docket the appeal for trial, without putting him to the expense and delay of another appeal.

It follows, from what we have said, that although the case before us must be docketed and dismissed, yet this will not prevent the United States from filing a transcript at the present term, and docketing the case for argument, if they can show that the delay has not arisen from any fault or negligence on their part. And if they fail to do so, they may yet take another appeal at any time within five years, and bring here the decree of the District Court for examination and revision. And if the appellee, after the case is docketed and dismissed, proceeds upon the decree of the District Court, and obtains a patent for the land, his title will still be subject to the decision of this court, if the Government shall hereafter bring up the case within the time limited by law.

We have deemed it proper on this occasion to enter into this full explanation of the rule of court referred to, on account of the multitude of appeals which must unavoidably come up from the District Courts of California, and which, in some shape or other, may be brought before this court, upon motions to dismiss.

ELIPHAS SPENCER, PLAINTIFF IN ERROR, *v.* JOHN W. LAPSLEY.

The judge of the District Court of the United States in Texas had power to order the record of a suit in which he was interested to be transmitted to the Circuit Court of the United States in Louisiana.

A plea in abatement, filed in connection with pleas in bar, was irregular; and the refusal of the court below to allow the plea to be filed is not subject to the review of this court.

A contract for the sale of eleven leagues of land in Texas, issued before the revolution, and subsequently located within the colonizing grant of Austin and Williams, with their consent, and certified by the Secretary of State, was good without the signature of the Governor.

So far as the land was within the colonizing grant of Robertson, his consent was not necessary, the term of his grant having expired.

Where no organization of a colonial grant had taken place by the introduction of settlers, the land not occupied was open for public sale, with the consent of the empresario, and the alcalde was a proper person to put the purchaser in possession.

That the survey was made before the order of survey was directed to the surveyor, was not fatal to the grant. Any preliminary defects were cured by the patent. The fairness of the grant cannot be investigated at law, at the instance of a third party.

A power of attorney, authenticated before a regidor, proved by the handwriting of the regidor and the assisting witnesses, held sufficient.

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

It was an action of trespass to try title, brought by Lapsley against Spencer, originating in the District Court of the United States for Texas, which sat at Galveston, thence removed to the District Court which sat at Austin, and thence removed to the Circuit Court of the United States for the eastern district of Louisiana.

The narrative of the facts of the case, and of the points which successively arose upon the trial, is fully given in the opinion of the court; and the statement of the points which were made by the counsel who argued the case in this court, renders it unnecessary for the reporter to repeat them.

It was argued by *Mr. Benjamin* for the plaintiff in error, and *Mr. Hughes* for the defendant, upon which side there was also a brief by *Mr. Hale.*

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendant in error, Lapsley, commenced this suit in January, 1851, in the District Court of the United States for Texas, against the plaintiff in error, Spencer, to recover a parcel of land, and damages for the ouster he had suffered. At the April term of the court, 1851, the defendant appeared and demurred to the petition, assigning—1st. The description of the premises is insufficient. 2d. The citizenship of the parties is not specifically averred. 3d. There is no endorsement on the petition, as the statutes of Texas require.

With this demurrer, an answer containing pleas of not guilty, the statute of limitations, and that the plaintiff claims under a grant with conditions, and that the grant is fraudulent, and the conditions were not performed, was filed. Subsequently to the act of Congress of 3d March, 1851, (9 Stat. at L., ch. 32, sec. 6, p. 618,) this cause was transferred to the District Court of Texas, held at Austin. No order of the court appears for this transfer, and it is presumed it was done by consent. The defendants appeared to the cause at Austin, by attorney. At the November term of that court, in 1854, the following order was made by the District Court:

"This day came the plaintiff aforesaid, by his attorney, and on motion of said plaintiff, by his attorney, the judge now presiding states and enters upon the record that he has an interest with the plaintiff in the land in controversy in this suit, which, in his opinion, renders it improper for him to sit in the trial of the same; and, thereupon, the court upon further motion orders, because there is no Circuit Court of the United States

in this State, that an authenticated copy of this order, and of all the record and proceedings in this action, be forthwith certified to the Circuit Court of the United States for the eastern district of the State of Louisiana, at New Orleans, that court being the most convenient of the United States Circuit Courts in adjoining States."

The authority to make this order is supposed to be derived from the act of Congress of the 3d March, 1821, (3 Stat. at L., ch. 51, p. 643,) which provides: "That in all suits and actions in any District Court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court." He was then required to order an authenticated copy of the record to be certified to the most convenient Circuit Court of an adjacent State; which Circuit Court shall, upon such record being filed with the clerk thereof, "take cognizance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such Circuit Court shall extend to all such cases, so removed, as were cognizable in the District Court from which the same was removed."

The record was filed in the Circuit Court in Louisiana, in April, 1855, and the cause was continued until the April term of 1856, before it came to trial. In April, 1856, the defendant moved to dismiss the cause: 1st. Because the record shows that the judge of the District Court for Texas, before the suit was brought, had an interest in the land in dispute. 2d. Said interest disqualified said judge from making an order in the cause. 3d. That his orders were void. 4th. That the Circuit Court at New Orleans had no jurisdiction.

It is quite unimportant to consider whether a judge can make any, and if any, what orders, in a suit in which he is interested. This was much discussed in the Grand Junction Canal Company *v.* Dimes, 12 Beav., 63; 3 H. L. Ca., 759. The act of Congress proceeds upon an acknowledgment of the maxim, "that a man should not be a judge in his own cause," and requires a judge found in that predicament, on the motion of either party, to make an order for the removal of the cause to another competent jurisdiction. No other order in this cause was made by the district judge, and he was not authorized to act under the statute, except on motion, and when the motion was made the order was entered. The entry on the

record by the judge imports verity, and his order authorized the Circuit Court at New Orleans to take cognizance of the cause.

The defendant obtained leave of the Circuit Court to amend his answer the third term after the transfer. In the amendment, after adding to his pleas in bar of the action, he pleaded that the apparent legal title was vested in the plaintiff by collusion between him and three other persons, who were citizens of Texas, (one of whom was the judge of the District Court,) to litigate and establish a fraudulent grant in that court, and that these persons were the only persons interested in the said grant. In so far as this statement contained any defence to the action, it was comprehended in pleas already on file. As a plea in abatement of the suit, it was open to the objections that it was pleaded, without an affidavit, five years after pleas in bar had been filed, and which were undisposed of, and that it was filed, in connection with other matter, in bar. Such pleading was contrary to the rule and practice of the courts, and was properly disallowed. (Shepperd *v.* Graves, 14 How., 505; Bailey *v.* Dozier, 6 How., 23; Drake *v.* Brander, 8 Tex., 351; Dallam —— ——, 590.)

The defendant then applied for leave to file a formal plea in abatement, containing the same allegations as those before stated; and with this plea the defendant propounded thirty-one interrogatories to the plaintiff, to obtain evidence for its support; and also filed an affidavit, to the effect that he had not discovered the facts pleaded at the time his plea of the general issue had been filed in 1851. But the defendant made no offer to withdraw his pleas in bar; nor did the affidavit show when or in what manner his discovery was made; nor why the application to file the plea and obtain the evidence had not been made at an earlier date; nor why it was delayed till a time when any allowance of it might operate a continuance, when the case had already been pending for a year in the Circuit Court. The Circuit Court denied the application. This court has decided that such applications are addressed to the judicial discretion of the inferior court, and its decision is not open for revision here. It has decided that the refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or a continuance, or to reinstate a cause which has been legally dismissed, cannot be questioned for error in this court. (Marine Ins. Co. of Alexandria *v.* Hodgson, 6 Cr., 206; Sims *v.* Hundley, 6 Howard S. C. R., 1.)

A fortnight after these dilatory motions had been disposed of, the cause was submitted to the Circuit Court on its merits.

The title of the plaintiff consists of a petition of Thomas De La Vega and two other persons, addressed to the Government of Coahuila and Texas, the 14th June, 1830, each to purchase eleven leagues of vacant lands, under the twenty-fourth section of the colonization law of Mexico. The Governor responded to the petition, that "he concedes in sale to each one of the petitioners the eleven leagues they solicit;" to be selected after the commissioner of the Supreme General Government shall have reserved a sufficiency of lands to meet the debt of the State. He orders the constitutional alcalde of the municipality to which the lands selected may belong, to give the possession of the leagues, to settle the class of the lands, so as to adjust the price, and to despatch the corresponding title in form. No further proceedings took place until May, 1832, upon this contract. At that date, one of the parties, for himself and the others, represented to the Governor the facts contained in his former memorial, and the executive order; that no impediment existed to the fulfilment of the contract, and that it might happen the parties would select lands within an empresario contract, and therefore prayed that either the alcalde before whom they might present themselves, or in case that he could not do so, that the commissioner of surveys might perform the acts requisite to the delivery of possession and the perfection of the title.

The Governor thereupon nominated the commissioner for the distribution of lands in the empresa to which the lands selected might belong, to perform the acts necessary; but, if they did not belong to an empresa, that the first alcalde of the respective municipality, or that most convenient, might act, so that, according to law and the instructions, possession might be given.

In the following year, (3d October, 1833,) Samuel M. Williams, professing to be attorney in fact for La Vega, presented authenticated copies of the petitions and orders before mentioned to the alcalde of the municipality of San Felipe de Austin, and solicited the location of his contract of purchase upon lands at a designated point on the Brazos river, within the colony of Austin and Williams, if they would consent, and referred to the order of the 2d May, 1832, as conferring an authority for that purpose. The alcalde granted the prayer of the petitioner, and directed that the consent of the empresarios should be obtained, and that the surveyor of the colony should survey the lands at the place designated, and should classify them so that theprice might be settled. The empresario, Williams, consented for himself and as attorney for his partner, and the surveyor returned the order of survey with a figurative

plan and notes of survey of the eleven leagues. On the 4th October, 1833, the constitutional alcalde despatched the title in form, which contains a recital of the petitions, orders, consents, and survey, the authority conferred, the price settled, and the investiture of the possession and property. The plaintiff, on the trial, connected himself with this grant by conveyances which had been recorded, and as to which no question arose, except in reference to a power of attorney from La Vega to Williams, under which a deed had been executed in 1840 to Menard and Williams, in trust for Sophia St. John.

The defendant produced no documentary evidence of title, and relied on a possession of some two or three years.

No exception was taken in the Circuit Court to the introduction of the various public acts which constitute the evidence of a title in La Vega; nor was there exception to the charge of the court which pronounced the evidence adduced of its authenticity, competent. It may be proper to state that the title, in the Mexican language, was authenticated from the land office of Texas, and that the translation in the amended record in this court was used in the Circuit Court for convenience only. But the sufficiency of those papers to vest a title in the grantee, and their supposed want of conformity to the laws of Coahuila and Texas, were much debated, and the opinion of the court upon them has been properly reserved for the examination of this court.

The power of the Governor of those States to sell lands to Mexicans, not exceeding eleven leagues in quantity, is unquestionable; and the petition and order in 1830, in connection with the petition and order of May, 1832, are evidence of such a contract. The proceedings in 1830 are sufficiently identified by the statements and recitals of the papers dated in 1832, even if we were to hold that the absence of the Governor's signature to the first order is a fatal defect. But that petition and the executive order are certified by the Secretary of State as official documents; they were so treated by the Governor and the constitutional alcalde, and the petitioners, in the subsequent proceedings. The Secretary of State is designated in the Constitution of the confederate States to authenticate "all laws, decrees, orders, regulations, and instructions, circulated among the towns, or directed by the Governor to a particular corporation or person," and that without this requisite they shall not be obeyed or be productive of faith. At the present term of this court, we have decided that a decree not signed by the judge, but which is found in the record, and is certified by the clerk, and which has been executed by the parties, cannot be collaterally impeached for the want of the signature. (Se-

combe *v.* Steele, supra.) And the courts in Texas have decided that titles in form, executed without the requisite number of witnesses, are still valid, though there is a special requirement on the subject of the number of the witnesses in the law. (14 Texas R., 189.) We do not feel authorized to deny faith to the act certified by the Secretary of State as an official paper, nor can we assume that the order certified did not receive the executive sanction.

The Circuit Court instructed the jury, "that the court was required to take notice of the organization of the States of Coahuila and Texas, and of the officers who were competent to perform the duties imposed in the decree of the Governor, upon the petition of La Vega.

"The court charged, that there was no such organization of the colonies of Robertson, or of Austin and Williams, as to render it indispensable for the grantee to apply to a commissioner for distribution to perfect the grant of the Governor; that those colonies were not empresas in the sense in which that term was used in that decree; and that having reference to the location of the land and the situation of the parties, as is shown by the evidence, the alcalde of Austin was a proper officer for taking the measures requisite for the perfection of the grant." The land described in the title was situated within the limits of both the colonies before mentioned. The colonization contract of Robertson was granted in 1825; its execution was suspended in 1830; and it expired, by limitation, in 1831, and was not again renewed until 1834. The selection of the lands was made after it had expired, and before it was renewed. The history of this empresa has been judicially ascertained by the Supreme Court of Texas; and they have also decided that lands in a colony thus situated might be sold without reference to the empresario in such a contract. (Houston *v.* Robertson, 2 Texas, 1; Jenkins *v.* Chambers, 9 Texas, 167.)

The empresario contract of Austin and Williams was concluded in 1831, and included land embraced in the Robertson colony. This land was excluded from their contract in 1834, when Robertson's contract was renewed, and was restored in 1835. (Houston *v.* Perry, 5 Tex., 462.) No commissioner was appointed for this colony until September, 1835. The contract of an empresario obliged him to introduce colonists into a specific district. The colonist having a family was entitled to one league of land, of a particular quality, for which he paid a small sum to the Government. The empresario was paid five leagues and five labers for every one hundred families introduced. Of course, the excess of land within the limits of the colony, after

supplying the colonists and the empresario, remained to the Government. The commissioner of distribution was an officer of the Government, who superintended the fulfilment of the contract by the empresario. He ascertained the character of the colonists, allotted to them and the empresario their shares of land, and for that purpose appointed surveyors, received returns of survey, and executed the final titles. Usually this officer was not appointed until colonists were introduced, and a community was to be formed. The sale of the land within the limits of the colony might disturb the interest of the empresario or of the colonists, and hence reference of the contracts of sale to the commissioner for execution. If there were no colonists, and the empresario opposed no objection, there was no reason why sales should not be made, nor was there any occasion for the services of a commissioner.

Sales of land could only be made to Mexicans, and no inquiries as to their character were required. We understand the decisions of the Supreme Court of Texas to be, that the alcalde was a competent and proper person to complete the titles on a contract of sale, where no organization of the colony had taken place. The case of Clay *v.* Holbert, 14 Tex. R., 189, resembles that before the court. The contract of sale is dated in 1831. The commissioner or alcalde was ordered to put the purchaser in possession, and to issue the corresponding titles. The lands were selected in the colony of Austin and Williams, in September, 1833. Williams consented for himself and partner. The survey was returned by Johnson, the surveyor. The alcalde, (Lesassier,) who officiated in this case, completed the title. The Supreme Court of Texas determined the grant to be valid. (Watrous *v.* McGrew, 16 Tex., 512; Ryon *v.* Jackson, 11 Tex., 374; Hancock *v.* McKenny, 7 Tex., 384; Jenkins *v.* Chambers, 9 Tex., 167.)

The Circuit Court further instructed the jury, "that the grant could not be defeated by proof that the principal surveyor did not in person perform the work of making the surveys, or because the survey was made before the order directed to the surveyor by the alcalde was entered on the grant," and, upon the whole case, that there was no such evidence of fraud in the making of the grant which would serve to defeat it in this action.

The charge of the court in reference to the survey, followed adjudications of the Supreme Court of Texas and of this court, in analogous cases. It was a common practice in Texas for empresarios and others to have their surveys completed in anticipation of the arrival of colonists, or the measures requisite for the procuremeut of the final title. The return of such sur-

veys by a surveyor, and their recognition by the commissioner or alcalde, was treated as a substantial compliance with the law. A surveyor might adopt the surveys of other persons. (Jones *v.* Menard, 1 Tex., 789; Howard *v.* Perry, 7 Tex., 259; Horton *v.* Pace, 9 Tex., 81; Jenkins *v.* Chambers, 9 Tex., 167; Doswell *v.* Lanzo, 20 How. S. C. R.)

In Hoofnagle *v.* Anderson, 7 Wheat., 212, this court say: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation." In Boardman *v.* Reed, 6 Pet., 328, the defendants offered to prove that the lines were not run by a qualified surveyor; that the plats and certificates were made out by protraction, and had been surreptitiously returned to the register's office, and patents obtained.

The court said, "that at law no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defects in an entry and survey cannot be taken advantage of at law. The patent appropriates the land, and gives the legal title to the patentee." (White *v.* Burnley, 20 How.)

So, if we were to consider the discrepancy of one day between the date of the preliminary order and the date of the certificate of the Secretary, and the absence of the Governor's signature, and the fact that one empresario consents for himself, and as attorney for his partner, without adducing that power; and that the officers do not affix to their names the name of their respective offices; and that the survey must have been made before the order, and probably by a deputy or other person, as marks of irregularity or of malpractice, our opinion could not be affected. In Stevenson *v.* Newman, 16 L. and Eq., Baron Parke, in delivering the opinion of the Court of Exchequer Chamber, says: "The effect of ordinary fraud is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable, at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance, the property passes in the subject-matter," and "vests till avoided." And this court, after a full review of the subject, in Field *v.* Seabury, 19 How., 324, states the question and the answer applicable to this case. The question was: "When a grant or patent for land, or a legislative confirmation of title to land, has been given by the sovereignty or legislative authority having the exclusive power to make it, without any provision having been made in the patent or by the law to inquire into its fairness, as between the grant-

or and grantee, or between third parties, can a third party raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the grant?" The reply of the court is, we are not aware that such a proceeding is permittted in a court of law.

But we do not assert that the circumstances enumerated constitute evidence of fraud. We have seen that the preliminary title is referred to, and recited in all stages through which it passed, and by every officer whom the law appointed to superintend its perfection, and that the survey was in accordance with the current and recognised practice of the country.

The title emanated from the State of Coahuila and Texas, a quarter of a century ago, when Texas was a wilderness. Colonists from abroad were invited, and a league of land was offered to the colonist having a family, for thirty dollars. Mexicans were allowed to purchase eleven leagues of ordinary grazing land for one hundred dollars the league; or of arable land for one hundred and fifty dollars. These eleven leagues were sold for less than twelve hundred dollars. Since that time, two revolutions in the condition of that State have been accomplished, and a vast improvement in the political condition of the country effected. The defendant entered upon the land in dispute after the second revolution was terminated, and after the burden and heat of the contest were over. He entered without a color of title. Neither the State of Coahuila and Texas, nor the Republic of Texas, nor the State of Texas, has taken measures to cancel this grant, nor have they conferred on the defendant any commission to vindicate them from wrong. He is a volunteer.

The doctrines of this court do not favor such a litigant.

The remaining questions presented by the bill of exceptions relate to the power of attorney from La Vega to Williams, under which a conveyance to Menard and Williams, in trust for Mrs. St. John, of Connecticut, was made in 1840.

The paper produced was the testimonio of an authentic act passed before the regidor of the illustrious Ayuntamiento of the city of Leona Vicario, and second alcalde in turn in it and its jurisdiction, who, by reason of the sickness of the first alcalde, &c., and bears date in 1832. The donee of this power located the land for La Vega, and solicited the final title in 1833, and conveyed the land in 1840. Its authenticity has never been questioned by La Vega, so far as is shown by the record.

The regidor is an officer known to the Spanish law, and to the legislation of Coahuila and Texas, (1 Tapia Freb., p. 197, sec. 10; Decrees 124, sec. 6; 262, sec. 11; Laws C. and T.;

Edwards *v.* James, 7 Tex., 383,) and was authorized to discharge the duties recited in the act. Evidence was adduced to the handwriting of the regidor and the assisting witnesses; besides, proof was made that two of them were dead, and the other, beyond the limits of the United States. Considered as the act of a foreign officer, without the support of this proof, the Supreme Court of Texas, in Paschal *v.* Perez, 7 Tex., 348, say: "Its admissibility and effect is by no means a settled question at common law, and on the principles of international jurisprudence. Whether the rules of evidence of the forum are to be exclusively observed, or whether those of a foreign country are to have weight, was considered by Mr. Justice Story as an embarrassing question, and which was not settled. (Story's Conf. Laws, 634.) But the court in that case, and in the case of De Leon *v.* White, 9 Tex., 599, decide that a testimonio is sufficiently established by evidence of the handwriting of the officer, and the assisting witnesses. (8 Tex., 210.) The conveyance to the trustees, for the benefit of Mrs. St. John, an alien, was not invalid, nor can the conveyance be impeached by this party, or in this mode of proceeding.

The averment in the petition of the citizenship of the parties corresponds to the form commonly used in the District Court of Texas, and which has never been questioned in the various causes which have heretofore been before this court from that district.

We think that the allegation is sufficiently specific.

Judgment affirmed.

Mr. Justice DANIEL dissenting.

I find myself constrained to differ with my brethren as to the views they have taken of this case—views more accurate, perhaps, than my own; yet differing so materially from my apprehension of the law of the case as to impose, according to that apprehension, the duty of endeavoring to explain what by me is deemed its true aspect.

The difficulties and irregularities incident to the removal or to the modification of pre-existing institutions by the introduction and superior control of systems really or seemingly incompatible with the former, must necessarily involve the hazard of error, and impress therefore the propriety of great caution with respect to innovations to be adopted.

Wherever the obligation exists to harmonize portions of the previous system with the creation and the exigencies of a new regime, the safest, indeed the only safe guide, must be found in the adherence to enlightened and generally-admitted principles, as a guaranty for the rights and duties deducible both

from the past and from supervening institutions. In following such a guide, I am conducted to conclusions differing from those which have been reached by the majority of this court in this case.

Conceding in its utmost extent a power in the colonial Governor or political head of Texas to make grants of land; conceding, too, for argument's sake, an entire exemption in the plaintiff below from all obligation to produce the original of a grant made by the competent officer; admitting, also, the sufficiency of a copy from the record, still I hold that a copy, in order to become evidence, must purport upon its face to be a full and perfect copy, and must be verified by some competent person. The grant, or the paper claimed to be a grant in this case, is defective upon its face. In the first place, it is without date, and consequently can be identified or coincident as to *time* with no document in this cause; it is not signed by any person whomsoever, in the name or character of Governor, nor by a deputy, nor by a person professing to be clothed with authority to sign such an instrument. In its structure, it commences by speaking in the *first person*, as if by the maker of the grant, but breaks off before reaching the conclusion, and is incorporated or converted into a certificate, dated June 13th, 1839, by Santiago del Vallee, signing himself a Secretary, stating that so far as he has given this document, it is a true copy. This certificate, then, is a confession, *in terms*, that the entire act of the Governor is not given, but that the document is incomplete.

The rule of evidence is, with regard to copies, that they must be *complete*, and must be properly authenticated. Records are never allowed to be adduced in evidence, unless they are perfect records. It is never permitted to garble them, nor to read parts of them, or extracts from them, as evidence. Yet here we have a paper introduced as a *record*, as the act of the Governor, when the proof relied on to sustain it conclusively shows that the record, if it be one, is incomplete; that it in fact is falsified by itself; and the act of the Governor, if it be his act, is not permitted to speak for itself; but an attempt is made to establish that act by a wholly distinct and independent declaration, by a person styling himself a Secretary.

Every foundation of the plaintiff's claim, so far as it is made to rest upon this alleged grant, or on the verity of the copy, must fail.

This defect in the evidence appears to have been perceived, and its force felt; and hence, perhaps, the effort at the removal or remedy thereof, by the introduction of a petition bearing date on the 2d of May, 1832, signed by Joseph Maria Aguirre, on

behalf of himself and the other parties to the former petition, in which it is recited that the Government had conceded to himself and his associates on sale on certain conditions, on the 14th of June, 1830, the leagues of land now asked for in this renewed petition, (no quantity or number being set forth,) and then further states, that the conditions on which the concession here spoken of having been removed or fulfilled, it prays that the proper officers may be appointed to survey the lands, and to put the petitioners in possession. Following this petition, is an order or decree of the same date with the petition, and signed Letona, not styling himself Governor, nor assuming any official designation; but the order is certified by Santiago del Vallee as being a copy from the archives in his charge, and stating that he had been commanded to take this copy from the archives by the disposition of the most excellent Governor.

Upon a recurrence to this petition of the 2d of May, 1832, signed Jose Maria de Aguirre, and to the decree or order of the same date, it will be perceived that neither of these papers contains any description or quantity of land. The petition has reference to an alleged grant as made on the 14th of June, 1830, (nowhere shown;) the order or decree refers to some act or proceeding of the political chief of the Department of Bexar, (nowhere exhibited on this record,) of the 2d of June, 1830, which, of course, cannot be identified with the alleged concession of a different date, viz: of the 14th of June; and the prayer of this petition of Aguirre and the order of Letona can by no correct induction be received as curing the defects in the first alleged grant, or as supplying the absence of date and of signature, by any official, of any denomination or of any grade of power whatsoever.

But it has been supposed that these material defects have been remedied by the act of Lesassier, purporting to put the parties, or rather La Vega, one of them, into possession. To this suggestion it may be replied, in possession of what? It surely cannot be pretended that Lesassier had any rightful authority to create or to originate or to authenticate a grant. He could not determine the rights of claimants, nor decide upon the extent of concessions made by the Government. He had no judicial or discretionary powers touching these matters; he was merely a ministerial and subordinate agent, to execute the orders of his superiors; and accordingly it is seen that in his account of his proceeding he has constant reference to the orders and decrees, recognising these as the only authority for his acting at all. His acts could have no effect whatever, either to confirm or to invalidate those orders or decrees, and of course

could not supply any defect or insufficiency in their provisions, or in the authentication of them.

This paper, purporting to be the act of Lesassier, is in itself defective as to the proof of its verity; for it is not introduced as a copy from a record, nor established upon proof of the signature thereto; nor upon the testimony of the assisting witnesses at its execution; nor is the absence of those witnesses accounted for.

In the next place, with respect to the deduction of title from La Vega, to whom it is said a grant was made by the Government, by the decrees just examined. The first step in the deraignment of this title is the paper styled the power of attorney from La Vega to Williams, dated May 5th, 1832. The authenticity of this paper rests upon no foundation of legitimate evidence. It cannot be considered as possessing the dignity and verity of a record, nor of a copy from a record. It is not shown that the laws of Texas required it to be recorded; and without such a requisition it could not be made in legal acceptation a record, by the mere will or act of a private person. This paper does not appear to have been placed on record, and if in truth it had been recorded in a proper legal sense, still there is no copy said to have been taken from a record, or certified by any legal custodian of the record or of the original document. This paper is signed by Juan Gonzales, who certifies that it was copied, *not* from the *public archives*, but from the *original*, with which he says that it agrees. This certificate is an assertion that the document certified was not copied from a record—that it is not the original, and that the certificate was not and did not purport to be proof of the *execution* of the original. Where, then, is found proof of this instrument, with respect either to its dignity as a record, as a copy from a record, or as to the truth of its *execution* by the parties thereto? It has been seen, then, that this document is neither a record nor a copy from a record. The language of the instrument and that of the certificate of Gonzales alike contradict any such conclusion; the certificate declares it to be a copy of a private paper, and nothing more. The next inquiry pertinent to this alleged power is as to any authority in Gonzales to certify copies of records, and still more to certify copies of private papers in the possession of parties—papers, the execution of which he did not see—and by such certificate to conclude or prevent all inquiry into the *fact* of their execution, or of the *bona fides* with which they may have been prepared. Here there is no pretence to proof of *execution* of the alleged power. The *instrumentary witnesses*, as they are termed, the witnesses present at the execution of the instrument, (and in this instance there appear to

have been three,) were not called, nor was any reason assigned for their absence; they seem not to have been even thought of; and with respect to those who are called the *assistant witnesses*—the witnesses to the certificate of Gonzales—although it is sworn by Hewetson that one of these witnesses was dead, and the other, J. M. Morel, resided in Mexico, no effort by commission or otherwise was made to procure his testimony, nor was there proof of the impracticability of procuring it. The irregularities connected with this alleged power of attorney seem to me too glaring, and too obviously liable to gross abuse, and tend too strongly to injury to the rights of property, to be tolerated in courts governed by correct and safe rules of evidence.

The objections urged by the defendant below to the legality of the documents above commented upon, and to their relevancy to the issue between the parties, appear to have been substantially and sufficiently reserved in the fourth and fifth bills of exception by the defendant, and satisfy me that those documents should have been ruled out of the cause.

It seems to me that there was error in the instruction of the court to the jury, that there was no fraud in the transactions by which the alleged title to the land in controversy had been obtained or transmitted to the plaintiff.

In this action, the plaintiff could succeed or should have succeeded in virtue of a legal, valid, perfect title, and none other adverse possession, with claim of right, was title until a clear, fair, honest, legal, paramount title in the plaintiff was shown. If, therefore, the documents upon which the claim of the plaintiff was based should have been found to carry with them, either upon their face or in the manner of their procurement, any of the badges of fraud, this would have been a sufficient objection to their validity. A blemish, or a defect, or an infirmity, in that necessarily fair and legal title, by which the possession of the defendant, presumed legal as against all but the true and rightful claimant, could be displaced, would be fatal. What were the circumstances attending the fabrication or procuring of the documents relied on by the plaintiff, or the manner in which they were transmitted to him, were, it seems to me, subjects exclusively appropriate to the consideration of the jury. The inquiry in this case was not one arising solely upon the construction of written instruments; it embraced also the conduct of agents alleged to have been the makers of those instruments; the discharge of these duties in the exercise of powers ascribed to them; and the honesty and good faith of those professing to have dealt with them, and to have derived and to have transmitted rights founded upon

those transactions. These considerations, in connection with the incongruities as to dates, and the apparent deviations from regular official proceedings, and in the conduct of those through whom the title is traced by the plaintiff, from what is usual, appear to be inseparable from the inquiry of fraud in fact and in intent, and should have been submitted to the jury, from whom they were withdrawn by the instruction of the court.

It is unquestionably true, that in courts whose proceedings are regulated by the rules of pleading at the common law, matter in *abatement* is not allowed to be pleaded after pleading in *bar*, unless, indeed, the matter tendered in abatement shall have arisen, or shall have come to the knowledge of the pleader, *puis darrein continuance;* and when such matter is allowed in defence, all that has been previously relied on in bar is considered as relinquished. Such, however, has been represented as not having been the rule adopted in Texas. There it has been said that a defendant may plead both in bar and in abatement. In this case, the matter tendered was accompanied by an affidavit of its discovery since the issue in bar; but no evidence appears upon the record of an offer to withdraw the latter; nor am I aware of the necessity of a formal proffer to that effect. The matter tendered in abatement should, if material, be admitted; and where so admitted, the matter previously relied on in bar is by legal consequence, and without any necessity for an express order upon the defendant, thereby waived. It is true that the decision of the Circuit Court rejecting this plea is not matter for reversal here, but the consent or acquiescence of the party in sheltering himself under an artificial rule, in a controversy in which was impugned the good faith of that party, is matter for regret, at least, and cannot be altogether indifferent in an inquiry seeking an examination into the fairness of the transactions involved. The removal of this cause from one portion of the district of Texas to another, in neither of which the district judge, upon the facts conceded as known to him, was competent to take cognizance of it, we are told may be presumed to have taken place by consent. Upon what fact such a consent can be inferred, this record does not disclose; and it is difficult to conceive any reason existing with the defendant below for such consent. There are presumptions, however, connected with this removal *within* the district, from which there can be no escape.

First. It must be presumed that the district judge was cognizant *ab initio* of his acknowledged interest in the subject in controversy.

Secondly. It must be presumed that he was also cognizant of his absolute disqualification, by reason of that interest, from

making any decision or holding any plea in the cause; and that the removal of it from one point to another within the district was an useless as it was an irregular and illegal act.

Thirdly. It must be presumed, that knowing himself to be thus disqualified, he could have no legitimate power to retain the cause under his own control for several years; that such a retention might be oppressive as it was illegal; and that his only power was that which the law imposed upon him as a duty, the power of an immediate removal of the cause, upon its institution, to a tribunal exempt from disqualifications which he knew existed with reference to himself. It may truly be thought to have been a mistaken and unfortunate course in those to whom the interests of the district judge were confided, that they did not seek, nay, challenge and insist upon investigation, rather than exclude it under the stress of a *formula* in pleading, the application of which was of doubtful propriety, if not irregular in this case. By a different proceeding, they might have met directly charges openly alleged, and might have removed implications, to which the suppression of inquiry may have imparted a semblance of truth.

Upon the considerations hereinabove stated, and with a view to the more thorough investigation as to the law and the facts of this cause than the record before us has disclosed, it is my opinion that the judgment of the Circuit Court should be reversed, and this cause remanded to that court for a new trial to be had therein.

EX PARTE IN THE MATTER OF JACOB MUSSINA AND ANGELA GARCIA LAFON DE TARNEVA, ET AL. APPELLANTS, *v.* RAFAEL GARCIA CAVAZOS AND WIFE, ET AL.

A rule laid upon the district judge of the State of Texas, to show cause why a mandamus should not be issued for him to allow an appeal in a certain case; but upon an examination of the case, the mandamus refused.

ON motion for a rule on the Hon. John C. Watrous, judge of the District Court of the United States for the eastern district of Texas, to show cause, &c.

Mr. Benjamin, of counsel for the said Jacob Mussina and Angela Garcia Lafon de Tarneva, appellants as aforesaid, and two of the defendants in the above-entitled cause, moved the court for a rule on the Hon. John C. Watrous, judge of the District Court of the United States for the eastern district of Texas, requiring him to show cause, on the first Monday of

February next, why a peremptory writ of mandamus should not issue, directing him to allow the appeal of the said defendants from the final decree rendered against them in the above-entitled cause, and to grant all such legal orders as may be necessary to enable said defendants to bring said appeal regularly before this court. On consideration whereof, it is now here ordered by the court that a rule on the Hon. John C. Watrous, judge of the District Court of the United States for the eastern district of Texas, requiring him to show cause, on the first Monday of February next, why a peremptory writ of mandamus should not issue for the purposes above stated, be, and the same is hereby, granted. And it is further ordered, that a copy of this rule be forthwith served on the said district judge.

December 24, 1857.

A copy of this rule was served upon Judge Watrous, when he filed the following answer:

In answer to a rule recently made by this court, requiring me to show cause why a peremptory writ of mandamus should not be issued, commanding me to allow the appeal of Jacob Mussina and Maria Angela Garcia de Tarneva, two of the defendants in a cause heretofore mentioned, in the District Court of the United States for the district of Texas, I most respectfully state that I am now ready to allow said appeal, and always have been. That I have never been disposed to oppose or hinder it. My desire has always been that my decision in the case should be revised by this honorable court, where, if it was right, it would be affirmed, and where any error into which I may have fallen will be at once detected and reformed. Some time before the 15th day of January, 1857, Mr. Daniel D. Atchison, of Galveston, stated to me at chambers that he wished to take an appeal for Mussina, in the Cavazos case. I asked him whether the time limited for taking appeals had expired or not. He said that it had not. I then replied, "Mr. Mussina has a right to the appeal, and I will give it to him, as a matter of course. Call it up in the court-house at any time when the opposing counsel is present, and I will fix the amount of the bond and perfect the appeal." It has been my practice, whenever it is convenient, to hear both sides as to the amount of the bond. The opposing counsel, Mr. Hale, resided in Galveston—his office is but a very short distance from the court-house. The court at the time of the application was in session, and Mr. Hale was in daily attendance upon it. Notice might have been served upon him very easily, at any time. If notice had been served upon him, I should

have proceeded without his presence and perfected the appeal. But I was never informed that Mr. Hale had notice of the application. No citations were ever presented to me for signature—no bond for my approval.

I have no recollection that the application was ever renewed to me, either in open court or at chambers. The conversation which occurred at my office, between Mr. Atchison and myself, as above stated, is the only one of which I have any remembrance. I do not say that the appeal was never brought to my notice in open court, but I do say, that if it ever was, I do not remember it.

The session of the court continued for several weeks, and I believe months, after the application of Mr. Atchison was made to me. Mr. Hale was in almost constant attendance upon the court in attention to his business, and it would have been very easy for Mr. Atchison to present the matter to the court when Mr. Hale was present. If he had done so, I should, without the least hesitation, have proceeded to do anything necessary to perfect the appeal. If he had stated that he could not procure the attendance of Mr. Hale, or could not wait further for his attendance without injury to his client, I should have proceeded to act on the application at once. The intervention of this court is entirely unnecessary, as I am ready at any moment, when requested, to proceed to approve a proper and sufficient appeal bond, and to sign a proper citation; and even if I should not be satisfied with the bond which might be presented to me, and should refuse to approve it, the parties affected by such refusal could at once obtain their appeal from any of the judges of this court, either during the term or afterwards. I submit, therefore, that the rule should be discharged.

JOHN C. WATROUS.

Washington, Jan. 23, 1858.

In support of this answer I beg leave to refer to several affidavits received since it was written, and which accompany it.

JOHN C. WATROUS.

February 1, 1858.

District Court of the United States, Eastern District of Texas, at Galveston.

RAFAEL GARCIA CAVAZOS ET AL. *v.* CHARLES STILLMAN ET AL. *In Chancery, No.* 41.

I, Joseph E. Love, deputy clerk of the District Court of the United States for the eastern district of Texas, at Galveston, make oath and say: That, on the 13th day of January, A. D. 1857, Daniel D. Atchison, Esq., brought into the clerk's

office of said court a paper purporting to be a petition of Jacob Mussina and others, to join in an appeal theretofore taken in the above-entitled cause. Affiant believes that this was in the afternoon of said day, and the endorsement of filing made on that day is in my handwriting. I was present when the petition was presented to Judge Watrous by Mr. Atchison. His honor asked him if the five years allowed by law for taking an appeal had expired? Mr. Atchison replied, "No." Judge Watrous then replied, as near as I can remember, in these words: "Certainly, sir, I will grant your request, and any day you will get the opposing counsel and come to me, I will fix the bond and perfect the appeal." It was my duty to be in court whilst it was in session, and I was there during the greater part of the time. F. J. Parker officiated in the absence of the clerk and myself. To the best of my remembrance and belief, no application for appeal in said cause was made in open court, from the 13th to the 16th of January, inclusive. I believe I was in court, on those days, all the time it was in session. J. E. LOVE.

United States District Court for the Eastern District of Texas.

CAVAZOS ET AL. *v.* STILLMAN ET AL. *In Chancery, No.* 41.

I, James Love, clerk of the United States District Court, sitting at Galveston, state, on oath, that it appears from the minutes of the court now before me, entered in my own handwriting, that I was in court from the 13th to the 20th January, 1857, inclusive; that during that time, whilst I was in court, to the best of my recollection and belief, no application was made, in open court, by D. D. Atchison, or any other, for appeal in the above cause, on any of those days. I further state, that I was not in court all the time of its session on the days named, but was never absent without leaving one or both of my deputies, F. J. Parker and Joseph E. Love, with strict injunctions that one of them should always be at the clerk's table. The court opened at 10 A. M., at 2 P. M., with an uniformity I have not seen equalled. I usually left court between 11 and 12 o'clock. JAMES LOVE.

In the United States District Court for the Eastern District of Texas.

CAVAZOS ET AL. *v.* STILLMAN ET AL. *In Chancery, No.* 41.

I, F. J. Parker, state, on oath, that I was present at the January term of the United States District Court for the eastern district of Texas, sitting at Galveston, on each of the days from the 13th to the 16th of January, 1857, inclusive; that during that time no application was made in open court, from any

source, for an appeal in said chancery cause, No. 41, or for any other action relating to the same, while I was present in court. I further state that, at the said term of said court, I was acting as deputy clerk of the same for James Love, the clerk of the court, at Galveston, and that it was my custom always to be present during the absence of the said James Love, or J. E. Love, his deputy; and that, to the best of my recollection, I was never absent from court when one or the other of the said gentlemen were not present. F. J. PARKER.

In the United States District Court, Eastern District of Texas, Galveston.

CAVAZOS ET AL. *v.* STILLMAN ET AL. *Chancery, No.* 41

I, J. A. H. Cleveland, state, on oath, that I am deputy marshal, and have been since the appointment of Ben. McCulloch as marshal of the district of Texas, in 1853; and that, as such deputy marshal, it is my duty and my business to be present each day when the court is in session, and I can safely say that, to the best of my knowledge, I have never been absent a day when it was my duty to be present in court.

I attended regularly the January term, 1857, every day, and I never saw nor heard of any petition for an appeal in the above case until I received, a few days ago, from Mr. Hale, a document, the affidavit of Mussina for mandamus, which was copy, as he wrote me, filed by Mussina in the Supreme Court of the United States, and which said copy of affidavit he, the said Hale, wrote me to hand to Judge Watrous.

I am positively certain that the attorney for Mussina did not at any time during the January term, 1857, present or read any such paper in open court. From the fact that this case was an important one, and much clamor raised against Judge Watrous about it, I have been particular in noticing all the action taken by counsel in court in relation thereto, and thus the reason why I am so positively certain as to the statement above made. J. A. H. CLEVELAND.

Subscribed and sworn to before me, this fourteenth day of January, 1858. F. J. PARKER, *U. S. Commissioner.*

United States District Court for the District of Texas.

CAVAZOS ET AL. *v.* STILLMAN ET AL. *In Chancery, No.* 41.

I, Joseph E. Love, deputy clerk of the United States District Court for the eastern district of Texas, do, upon oath, depose and say, in addition to my affidavit of this date, previously made and sworn to before F. J. Parker, commissioner, etc.,

at the request of Ebenezer Allen, of counsel for the plaintiffs in the above-entitled and numbered cause, that I have this day carefully examined the minutes of the court for the entire month of January, 1857, and find that they contain no entry whatsoever in the said cause, of or relating to any proceeding had therein, either upon the said petition of appeal mentioned in the affidavit of Simon Mussina, filed in the Supreme Court of the United States, at the December term thereof, 1857, (as appears by a copy of said affidavit, duly certified by William Thomas Carroll, clerk of said court, which I have read,) or upon any other matter whatsoever pertaining to said cause. And I further say, that if any action had been taken or proceeding had in said cause, in open court, upon said petition, or touching the matter thereof in any manner whatsoever, the same would have been entered at the time, and would now appear upon the said minutes. J. E. Love.

Sworn to and subscribed before me, this fourteenth day of January, A. D. 1858. F. J. Parker,

U. S. Commissioner for the Eastern District of Texas.

District of Texas.

Rafael Garcia Cavazos et al. *v.* Charles Stillman et al. *In Chancery, at Galveston.*

I, John S. Jones, make oath and say, that I was crier of the District Court of the United States for the eastern district of Texas, at Galveston, during the January term, 1857, of said court; that during the most of the time said suit was pending in said court, I was deputy clerk thereof, and was familiar with said cause, and that but little transpired in the progress of said cause, of any importance, with which I was not familiar.

I further say that said cause was one of deep and exciting interest, and that circumstances attending said cause drawing attention especially thereto.

And I further say, that from the 1st to the 15th of January, 1857, I was but rarely absent from said court during its sessions, and that I have no recollection of any application having been made in open court, during the time aforesaid, for an appeal in said cause, nor do I believe that such application could have been made and refused by the court without my knowledge. I further say, that I am personally acquainted with some of the parties, and am well acquainted with almost every counsellor who from time to time was engaged in said cause.

John S. Jones.

Sworn to and subscribed before me, this 14th day of January, A. D. 1858. F. J. PARKER,

U. S. Commissioner for the Eastern District of Texas.

United States District Court for the District of Texas—now the United States District Court for the Eastern District of Texas.

CAVAZOS ET AL. *v.* STILLMAN ET AL. *In Chancery, No.* 41.

On motion of *J. P. Benjamin*, of counsel for Jacob Mussina and Angela Garcia Lafon de Tarneva, two of the defendants in the above-entitled cause, ordered that the Hon. John C. Watrous, judge of the District Court of the United States for the eastern district of Texas, show cause on the first Monday of February next why a mandamus should not issue, directing him to allow the appeal of said defendants from the final decree rendered against them in the above-entitled cause, and to grant all such legal orders as may be necessary to enable said defendants to bring said appeal regularly before this court.

United States District Court for the District of Texas.

CAVAZOS ET AL. *v.* STILLMAN ET AL. *In Chancery, No.* 41.

Simon Mussina, being duly sworn, deposeth that he is the agent of Patrick C. Shannon, Jacob Mussina, and Angela Garcia Lafon de Tarneva, three of the defendants in the above-entitled cause, and is intrusted by them with the care and protection of their interests in said suit; that said suit was instituted in the District Court of the United States, having and exercising the powers and jurisdiction of a Circuit Court of the United States for the district of Texas, on the 12th day of January, 1849, and that a final decree was rendered in said cause, against said three defendants and other co-defendants, by the Hon. John C. Watrous, judge of said court, on the 15th day of January, 1852, and that an appeal was taken from said final decree by said Shannon on the 30th July, 1856, which appeal is now pending in this honorable court; that at the last term of this honorable court, to wit, in the month of December, 1856, this affiant retained the services of counsel for the argument of said cause in this court in behalf of said Shannon, and that, on examination of the record, this deponent was advised by said counsel that the said appeal had been taken irregularly, and would be dismissed for this, to wit, that the said final decree was joint against the several defendants in said suit, and that the co-defendants of said Shannon had not joined in the appeal, nor been notified to join; that thereupon this deponent, being desirous to perfect said appeal in behalf of said Shannon, and also desirous to make said Jacob Mussina and Angela

Tarneva joint appellants with him, did, prior to the expiration of five years from the date of said final decree, to wit, in the month of January last, (1857,) and several days before the fifteenth day of said month, cause to be presented to the said Judge Watrous, in chambers, a petition of appeal in the name and behalf of said Jacob Mussina and Angela Tarneva from said final decree, and in said petition prayed for a citation of all parties in interest, to the end that said co-defendant, Patrick C. Shannon, might join in said appeal, and that all the other co-defendants might also join or refuse to join in said appeal; and said petition of appeal further contained an offer to give such appeal bond as might be required by said Judge Watrous; as the whole will more fully appear by reference to a duly-certified copy of said petition of appeal, hereunto appended as part of the affidavits, marked A.

And this affiant doth further depose, that the said honorable judge declined at the time of said presentation of said petition to allow said appeal, or to order the other parties in interest to be cited, or to fix the amount of or approve any appeal bond, but declared that he would consider the subject, and report his decision to the attorney who signed said petition of appeal; that after the lapse of some days, without any decision having been given as promised by said judge, he was again requested in open court, and prior to the said fifteenth day of January last, and by the said attorney who had signed said petition of appeal, to allow said appeal and grant said order of citation, and approve an appeal bond as aforesaid; but said Judge Watrous again declined to allow said appeal or grant any order in the premises, saying he would fix the amount of bond to be given by petitioners when the opposite counsel should be in court; and this deponent further saith that the said John C. Watrous, judge as aforesaid, hath not yet allowed said appeal, but declines and neglects to allow the same, or to grant any order for citations as aforesaid, or to approve any appeal bond, so that, without the aid and interposition of this honorable court, the said Patrick C. Shannon, Jacob Mussina, and Angela Garcia Lafon de Tarneva, are utterly without remedy in the premises, and without the means of exercising their legal right of having said final decree examined and revised on appeal in this honorable court.

SIMON MUSSINA.

Sworn and subscribed in open court.

WM. THOS. CARROLL, *Clerk*
Supreme Court of the United States.

December 24, 1857.

United States of America, District of Texas.

CAVAZOS ET AL. *v.* STILLMAN ET AL. *In Chancery, No.* 41.

To the Honorable John C. Watrous, Judge of the United States District Court for the District of Texas.

The petition of Jacob Mussina and Angela Garcia Lafon de Tarneva, who are defendants with Patrick C. Shannon in the above-entitled and numbered cause, and in which said cause a final decree was rendered in this court on the 15th day of January, 1852, being the highest court in which a decision could be had; that the real estate disposed of by said decree, and the property there set forth, was of more than two thousand dollars in value; that the decision and decree of your honorable court, rendered in the above-entitled and numbered cause, was adverse to the right title, &c., of petitioners, and that it so appears of record; that said Patrick C. Shannon, the co-defendant of petitioners, having prayed an appeal to the United States court from the decision of your honor, petitioners referring to the petition of said Shannon, and the appeal bond filed in said cause by the said co-defendant, now comes and prays your honor to allow your petitioners to join and unite with your co-defendant in said appeal from the decree rendered as aforesaid by your honor, and that all parties in interest be cited, &c., and for such orders as may be necessary in effecting said appeal; and petitioners are ready to tender such bond for costs, &c., as may be required, &c., by this honorable court. JACOB MUSSINA,

ANGELA LAFON DE TARNEVA,

By their Attorney, DANIEL D. ATCHISON.

United States of America, Eastern District of Texas.

I, James Love, clerk of the District Court of the United States for the eastern district of Texas, certify the foregoing to be a true copy of the original—purporting to be a petition for appeal to the Supreme Court of the United States in the case No. 41 in chancery, wherein Rafael Garcia Cavazos and others are complainants, and Charles Stillman and others are defendants, by Jacob Mussina and Angela Garcia Lafon de Tarneva.

{SEAL.} In testimony whereof I hereunto set my hand and affix the seal of said court at the city of Galveston, this eighth day of July, A. D. 1857. JAMES LOVE, *Clerk.*

Mr. Justice McLEAN delivered the opinion of the court.

A motion was made at this term for a rule on the district judge of Texas to show cause why a mandamus should not be issued, commanding him to allow an appeal in the above case.

This rule was granted on the affidavit of Simon Mussina, as agent for a part of the defendants.

In his answer the judge says, "I am now ready to allow the appeal, and always have been; that some time before the 15th day of January, 1857, Mr. Daniel Atchison, of Galveston, stated to him, at chambers, that he wished to take an appeal for Jacob Mussina in the above case, and that the judge inquired whether the time limited for taking appeals had expired, and was informed it had not. The judge then replied, "Mr. Mussina has a right to an appeal, and I will allow it as a matter of course, when the opposing counsel shall appear, and I will fix the amount of the bond." It is his practice to allow appeals in the presence of counsel. Mr. Hale, the counsel for the defendants, lives in Galveston, near to the place where the court was held, and was daily in court. No application seems to have been made in court on the subject of the appeal; no citation was presented to the district judge; no bond for his approval. The conversation with Mr. Atchison, at the chambers of the judge, respecting the appeal, is all that was said to him on the subject. If it were mentioned in open court, he has no recollection of it.

The clerk of the court, the deputy clerk, the crier, the marshal of the United States and his deputy, who were in attendance on the court, all corroborate, on oath, the statement of the judge, and say no application was made in open court for the appeal; and no entry on the docket is found of such an application. From the certified copy of the petition for an appeal, it does not appear to have been filed, or that an entry of it was made on the docket.

A party wishing an appeal should make an application for its allowance in open court, or to the judge at his chambers, and should name his securities. And the bond should be prepared for the approval of the judge, and the citation for his signature, unless the appeal was prayed in open court and entered upon the record. It appears the decree in question was entered jointly against several defendants, and that an appeal by Patrick C. Shannon only, who was one of the defendants, was taken. Simon Mussina, on whose oath the rule was entered, was agent for Jacob Mussina, Angela Garcia Lafon Tarneva, who were also defendants, and he desired that these persons might be allowed an appeal, and also the other defendants, so as to remove the case to the Supreme Court. At this time, the cause was pending in the Supreme Court, on the appeal taken by Shannon. That appeal was irregular, as less than all the defendants in a joint decree cannot appeal without a summons and severance in the court below. And this was not done on Shannon's appeal.

The regular mode of proceeding would have been to dismiss the appeal in this court, pray for another appeal in the court below, and for a summons and severance, so that the defendants desirous of an appeal might take it, without the concurrance of those defendants who were opposed to it. Had the appeal been prayed in open court, and entered upon the record, the judge below might well have refused it, as the legal steps for its allowance were not taken. Under such circumstances, it was the duty of the judge to act in the presence of the opposing counsel. (Owings et al. *v.* Kincannon, 7 Peters, 399; Todd et al. *v.* Daniel, 16 Peters, 521.)

Whether an application might not have been made to this court to correct the irregularity of the appeal, is not before us under the rule for the mandamus. The writ is refused.

HORACE C. SILSBY ET AL., APPELLANTS, *v.* ELISHA FOOTE.

Where an appeal from a decree is taken within ten days from the rendition of the decree, it is in time to operate as a supersedeas; and so, also, if taken within ten days after the decree is settled and signed.

THIS was an appeal from the Circuit Court of the United States for the northern district of New York, sitting as a court of equity.

There were two cases upon the docket, with precisely the same caption, one numbered 54, and the other 106.

The case in question was the one numbered 106, which it was moved to dismiss, for the following reasons:

And the said appellee comes into court at the December term thereof, 1857, and moves the said court to dismiss the appeal in this cause, docketed as No. 106 at the said term, upon the ground that there had been previously taken by the said appellants an appeal from the same portions of the decree made below, which are appealed from in this cause, and which prior appeal is still pending and undetermined in this court; and such motion will be made upon the records filed in this cause, and in cause No. 54 on the docket for December term, 1857.

R. H. GILLET,
Of Counsel for Appellee.

December 18, 1857.

Mr. Gillet's argument was as follows:

Foot sued Silsby and others in equity in the Circuit Court for the northern district of New York, for violating his patent. A final decree was rendered therein on the 28th day of August, 1856. On the 4th of September thereafter, the defendants, by

Samuel Blatchford, their solicitor, petitioned for an appeal from certain portions of the decree, which was allowed on the 6th September, by Mr. Justice Nelson, being within ten days of the date of the decree. Upon this appeal, the record of the proceedings were sent, and have been printed, and the case stands as No. 54 on the docket for the present term. (See Record in No. 54, Record, pp. 1, 3.)

The decree was enrolled on the 11th day of December, 1856, on which day the same solicitor, in behalf of the defendants, presented a second petition of appeal from the same portions of the decree, which appeal was allowed on the same day, by N. K. Hall, district judge, and this appeal is now before the court at the present term as No. 106. (See Record, pp. 1, 3.)

A motion is now made by Foot, the appellee, to dismiss the last-mentioned appeal, of which due notice has been given.

The question presented is, which of the two periods is the one contemplated by the twenty-second section of the judiciary act of 1789, which provides, "that *final* judgments and decrees may be removed and reaffirmed in the Supreme Court, and which shall not be done, however, except within five years after the *rendering* or *passing* the judgment or decree complained of." (1 U. S. L., 84, 85, sec. 22.)

When was the decree passed—at the time of the hearing and actual decision, or when it was enrolled?

This question is answered by reference to the mode of doing business in a court of equity. The court sits and decides, and its clerk or other officer enters the same in the minutes of the proceedings of the court. This is the act of the court performing its highest judicial functions. All that follows, whether performed by the clerk or judge, is merely carrying out the judicial determination, and authenticating it. The decision, or rendering, or passing, has been made; and what is subsequently done is mere authentication.

"To enrol" means "to register, to enter on the rolls of chancery or other courts, to make a record." (Bouvier, 1 vol., 469.)

"Enrolment—the registering or entering on the rolls of Chancery, King's Bench, Common Pleas, or Exchequer, or by the clerk of the place of the record of the Quarter Sessions of any lawful," &c. (Ib., Inc. L. Dic.)

Curtis, in his Commentaries, (p. 234,) speaks of the time when a decree is "pronounced," as the time from which the statute runs.

At page 534 he speaks of the "date of the final decree;" if appealed from in ten days thereafter, it will operate as a supersedeas.

Appeals have been recognized on appeal before docketing

or enrolling. In Roy *v.* Law, 3 Cranch, 179, a decree for a sale on a mortgage was held to be a final decree which could be appealed from.

In Whiting *v.* Bank of U. S., 13 Peters, 6, 15, the same decision was made.

Story, J., said the party had a right to appeal as soon "as the decree was *pronounced.*" Michond *v.* Girod, 4 How., 503, proceeded upon the same ground.

In Forgay *v.* Conrad, 6 How., 201, 203, the above cases were cited and approved.

Bank of the U. S. *v.* Daniel, 12 Peters, 32, p. 52. The whole of the matter in dispute has reference to the date of the decree.

Corning *v.* The Troy Iron and Nail Factory, 15 How., pp. 451, 459, 465, 466, is a case to show that there can be no second appeal where the subject-matter has been removed from the court below.

In the present case, the matters appealed from in December had been removed from the court below in September, and there was nothing left for the second appeal to act upon.

Mr. Blatchford opposed the motion.

This is a motion to dismiss No. 106, on the ground that a prior appeal has been taken in No. 54, from the same parts of the same final decree.

What is the decree?

The question is, which is regular?

If the appeal in 106 is irregular, it is because the appeal in 54 is regular. If the appeal in 106 is regular, then the appeal in 54 is irregular. The reasons for taking the two appeals were these: Practically, there is no difference to defendants, except as to the return in No. 106. (See rules 31 and 32, as to complete record.) The court will see why return was so made in 106. Cross appeal in 158, return made in same manner. Taking 54 and 106 together, there is a complete record; and even though the court dismiss 54, they may consider the return in 54 as forming part of the return in 106, as the clerk says, in his return in 106, they do. And if the court deny the motion to dismiss 106, they will please consider us as moving to dismiss 54, which motion would of course be granted, if the motion to dismiss 106 is denied; and then as moving, if necessary, under rule 32, for a certiorari to complete the record in 106. We desire the court to dispose now of all questions of practice connected with these cases, so that if 106 stands for hearing, it may stand with a complete record. The defendants ought not to suffer for the clerk's mistake, but, without a certiorari, the court can order the record in 54 to re-

main here, and form a part of the record in 106, though the appeal in 54 is dismissed.

By p. 22 of the judiciary act of 1789, as modified by p. 2 of the act of March 3, 1803, (chap. 40,) an appeal from a final decree is to be taken within five years after *rendering or passing the judgment or decree complained of.*

By p. 23 (as so modified) the appeal is a supersedeas, and stays execution in cases only where the appeal is taken, and a copy lodged for the adverse party within ten days (Sundays exclusive) *after rendering the judgment or passing the decree complained of,* until the expiration of which ten days, execution shall not issue in any case where an appeal may be a supersedeas.

What is the *passing* of the decree?

Under p. 23, we think it is the recording and enrolling of the decree, in such shape that the party entitled to execution on it can immediately issue his execution. The party is to be stayed for having his execution for ten days after the time when he would otherwise be entitled to it, and the ten days do not begin to run till he would be at liberty, but for this stay, to issue his execution.

Therefore, taking pp. 22 and 23 together, the decree is *passed,* when it is in such a state that an execution can be issued on it, if there be no stay by appeal.

How it is as to the decree. (See pp. 10 and 11, of No. 106.)

Award to pay certain sums, and interest and costs *to be taxed,* and interest, then execution is given for *such costs,* and for the *sums decreed.* He cannot have any execution till his costs are taxed. This is by the decree itself.

But beyond that, by general equity practice, he can have no execution till the decree is signed and enrolled. Here the record says (p. 11) that this final decree is *signed* and enrolled Dec. 11th, 1856, and the appeal in 106 was taken the same day.

Why can't he have execution till the decree is enrolled? Because, till then, the decree is open for rehearing; but after that it is not.

Rule 88 in equity says, "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and *recorded,* if an appeal lies to the Supreme Court." *Entry* alone does not cut off rehearing. The decree must be *recorded,* to cut off a rehearing. *Recording* is *enrolling.* Therefore, there can be a rehearing till the decree is recorded or enrolled, and there can be no execution till a decree is enrolled. And the right to execution on the one side gives, under pp. 22 and 23, the right to appeal on the other side. Because the act manifestly contemplates that the decree is not passed till

the right to execution under it is ripened. Because the ten days spoken of in p. 23 are to run from the passing of the decree, and during that ten days there is to be no execution. Hence, to make the provisions all harmonious, the right to issue execution, but for the stay, must be simultaneous with the passing of the decree.

Now, is it laid down in all the books that there can be no execution till enrolment, and that enrolment is necessary to make the decree a *record?* (1 Barb. Ch. Pr., 342, 2 Dan.; Perkins, ed. of 1846, 1220, 1221.) It will not, till enrolment, be treated by other courts as a record. The reason given is, because, till then, it is open for rehearing. Hence in rule 88 the word recorded is used, which means *made a record* by enrolment.

Till enrolled, it can't be pleaded in bar to another suit for the same matter. (Same reference as above.)

In England, the time for appeal runs two years from the enrolment. (3 Dan., 131.)

Besides, under p. 22, in connection with the act of Dec. 12, 1794, on an appeal which is to be a stay, security is to be given for the amount recovered below, damages and costs. (Catlett *v.* Brodie, 9 Wheat., 553.) How can the amount recovered below, for which this security is to be given, be ascertained till the costs are taxed and the decree enrolled?

The views we maintain seem to follow from those announced by this court in Forgay *v.* Conrad, 6 How., 204. "When the decree directs the defendant to pay a certain sum of money to the complainant, *and the complainant is entitled to have such decree carried immediately into execution*, the decree must be regarded as a final one."

Here a sum of money is directed to be paid, but there can be no execution on the decree till the costs are taxed and the decree is signed and enrolled. Therefore, on the 28th of August, 1857, the plaintiff was not entitled to have the decree carried immediately into execution, and the appeal in 54 was irregular.

As to arguing the cross appeal in 158 with the original appeal, whether it be 54 or 106, the record in 158 is not printed. We prefer to wait.

Plaintiff might have taken his cross appeal as early at least as Dec. 11, 1856. He waited till July, 1857. It is his own fault. We had to appeal, to stay execution.

Mr. Justice NELSON delivered the opinion of the court.

This is a motion to dismiss an appeal docketed as No. 106, on the ground that a previous appeal, docketed No. 54,

had been taken by the same parties, and from the same portions of the decree below. The final decision had been made by the court, between the parties, on the coming in of the master's report on the 28th August, 1854, and an appeal duly taken on the 4th September following. The decree was special in its terms, and was not settled or signed by the judge till the 11th December, 1856, on which day the second appeal was taken. As the appellant desired to appeal within the ten days, so as to stay execution, the second appeal was taken for abundant caution, as there might be a doubt from which period the ten days should be counted, namely, the time of the final decision of the court, or of the signing and filing of the special decree in form.

By the twenty-second section of the judiciary act, modified by the second section of the act of March 3, 1803, an appeal from a final decree must be taken within five years after the *rendering* or *passing* of the judgment or decree complained of. And by the twenty-third section, as modified above, the appeal is a supersedeas, and stays execution in cases only where it is taken and a copy lodged for the adverse party within ten days (Sundays exclusive) after *rendering* the judgment or *passing* the decree complained of. The *time* to be taken as when the judgment or decree may be said to be rendered or passed may admit of some latitude, and may depend somewhat upon the usage and practice of the particular court. In the case of a simple judgment or decree, such as an affirmance or reversal, and the like, there would seem to be no difficulty in taking the appeal at any time within the ten days after the decision on the case was pronounced. But where the decree is special, and its terms to be settled, there is a propriety in waiting for its settlement before taking the appeal. Whether taken or not, may sometimes depend upon the decree as settled. In the second circuit, with the practice of which I am the most familiar, it is supposed by many of the profession that the proper time for taking the appeal in such a case is after the settlement of the decree. As this court, however, has always held, that if an appeal is taken in court at the time of rendering the decision, or during the term, no citation is necessary, and as appeals are, perhaps, more frequently taken within the ten days after the decision is pronounced and entered on the minutes by the clerk, it may be admitted that when thus taken it is regular, and stays execution in the court below. And we are also of opinion, that if taken within ten days after the decree is settled and signed by the judge, and filed with the clerk, that it is in time to stay the proceedings. The recognition of the two periods from which the ten days may be counted

becomes necessary, on account of the difference in the modes of proceeding and practice in the different circuits. This question cannot arise in England, as the time for appeal runs two years from the enrolment of the decree. (3 Dan. Pr., 131.) The time of enrolment cannot well be adopted by this court, as on many of the circuits it is understood, according to the practice, no enrolment of the decree takes place.

As, upon our view of the case, presented on the motion, the first appeal was regular, the one taken and standing on the docket No. 106 should be dismissed.

THOMAS JACKSON, WILLIAM HIGDON, AND ARCHIBALD OLDS, OWNERS OF THE STEAMBOAT WETUMPKA, LIBELLANTS AND APPELLANTS, *v.* THE STEAMBOAT MAGNOLIA, HER TACKLE, &C., WILLIAM F. JAMES, MASTER, &C.

The admiralty jurisdiction of the courts of the United States extends to cases of collision upon navigable waters, although the place of such collision may be within the body of a county of a State, and may be above the flux and reflux of the tide.

The District Courts exercise this jurisdiction over fresh-water rivers "navigable from the sea," by virtue of the judiciary act of 1789, and not as conferred by the act of 1845, which extends their jurisdiction to the great lakes and waters "not navigable from the sea."

THIS was an appeal from the District Court of the United States for the middle district of Alabama.

The case came up on an appeal from the judgment of the District Court, dismissing the libel for want of jurisdiction, after the following agreement had been filed:

Be it remembered, that on the trial of this cause, which was a libel in admiralty, it was agreed that the question of jurisdiction should be submitted to the court on the facts hereinafter stated, which were admitted to be true; and if the court should be of the opinion that the court had jurisdiction of the cause, then the cause should be submitted to a jury for trial. But if the court should be of opinion that it was without jurisdiction, the libel would be dismissed, and in the event an appeal was taken to the Supreme Court of the United States, and the judgment of that court should reverse the judgment of this court, then the cause should be remanded to this court for trial.

The court agreed so to try the question of jurisdiction on the facts, which are admitted to be as follows: The steamboat Wetumpka was a vessel engaged in navigation and commerce

between the port of New Orleans, in Louisiana, and the port of Montgomery, in Alabama, and was regularly licensed and enrolled as a coasting vessel, and was of more than thirty tons burden. The steamboat Magnolia was a boat regularly licensed and enrolled for the coasting trade, but was built for a packet boat to be employed between Mobile, Alabama, and Montgomery, Alabama. She was built in the Western country, and brought round to this State, and has ever since been engaged in running between Mobile and Montgomery, and has never been engaged in any other trade.

The collision, which is the subject of the libel against the Magnolia, took place between her and the Wetumpka, on the Alabama river, about two hundred miles above tide-water. The Magnolia is a boat of over thirty tons burden. The foregoing are the facts in which the question of jurisdiction is submitted to the court, together with the libel and claim, and answer thereto.

WATTS & DARGAN,
For the Magnolia and Claimants.
HENRY C. SEMPLE,
For the Libellants.

The case was argued at the preceding term of this court upon printed arguments by *Mr. Francis Lee Smith* for the appellants, and *Mr. Dargan* for the appellees; also orally by *Mr. Phillips* for the appellees.

The difficulty of abbreviating arguments made by counsel upon constitutional points, and the circumstance that both sides of the question of jurisdiction are fully presented in the opinion of the court and in the dissenting opinions of Mr. Justice DANIEL and Mr. Justice CAMPBELL, are reasons why the Reporter omits sketches of the arguments of counsel. It will be perceived, also, that Mr. Justice McLEAN delivered a separate opinion, although concurring in the judgment of the court.

Mr. Justice GRIER delivered the opinion of the court.

The only question presented for our consideration on this appeal is, whether the court below had jurisdiction.

The libel purports to be in a cause of collision, civil and maritime. It alleges that the steamboat Wetumpka, a vessel of three hundred tons burden, was on a voyage from New Orleans to the city of Montgomery, in Alabama; that while ascending the Alabama river, she was run into and sunk by the steamboat Magnolia, which was descending the same.

The answer of the respondents, among other things, alleges "that the collision took place far above tide-water, on the

Alabama river, in the county of Wilcox, in the State of Alabama, and therefore not within the jurisdiction of the District Court sitting in admiralty."

This plea was sustained by the court, and the libel dismissed. The record does not disclose the reasons on which this judgment was based. It is presumed, therefore, to be founded on the facts stated in the plea, viz:

1. That the collision was within the body of a county.
2. That it was above tide-water.

1. The Alabama river flows through the State of Alabama. It is a great public river, navigable from the sea for many miles above the ebb and flow of the tide. Vessels licensed for the coasting trade, and those engaged in foreign commerce, pass on its waters to ports of entry within the State. It is not, like the Mississippi, a boundary between coterminous States. Neither is it, like the Penobscot, (see Veazie *v.* Moore, 14 How., 568,) made subservient to the internal trade of the State by artificial means and dams constructed at its mouth, rendering it inaccessible to sea-going vessels. It differs from the Hudson, which rises in and passes through the State of New York, in the fact that it is navigable for ships and vessels of the largest class far above where its waters are affected by the tide.

Before the adoption of the present Constitution, each State, in the exercise of its sovereign power, had its own court of admiralty, having jurisdiction over the harbors, creeks, inlets, and public navigable waters, connected with the sea. This jurisdiction was exercised not only over rivers, creeks, and inlets, which were boundaries to or passed through other States, but also where they were wholly within the State. Such a distinction was unknown, nor (as it appears from the decision of this court in the case of Waring *v.* Clark, 5 How., 441) had these courts been driven from the exercise of jurisdiction over torts committed on navigable water within the body of a county, by the jealousy of the common-law courts.

When, therefore, the exercise, of admiralty and maritime jurisdiction over its public rivers, ports, and havens, was surrendered by each State to the Government of the United States, without an exception as to subjects or places, this court cannot interpolate one into the Constitution, or introduce an arbitrary distinction which has no foundation in reason or precedent.

The objection to jurisdiction stated in the plea, "that the collision was within the county of Wilcox, in the State of Alabama," can therefore have no greater force or effect from the fact alleged in the argument, that the Alabama river, so far as it is navigable, is wholly within the boundary of the State.

It amounts only to a renewal of the old contest between courts of common law and courts of admiralty, as to their jurisdiction within the body of a county. This question has been finally adjudicated in this court, and the argument exhausted, in the case of Waring *v.* Clark. After an experience of ten years, we have not been called on by the bar to review its principles as founded in error, nor have we heard of any complaints by the people of wrongs suffered on account of its supposed infringement of the right of trial by jury. So far, therefore, as the solution of the question now before us is affected by the fact that the tort was committed within the body of a county, it must be considered as finally settled by the decision in that case.

2. The second ground of objection to the jurisdiction of the court is founded on the fact, that though the collision complained of occurred in a great navigable river, it was on a part of that river not affected by the flux and reflux of the tide, but "far above it."

This objection, also, is one which has heretofore been considered and decided by this court, after full argument and much deliberation. In the case of the Genesee Chief, (12 How., 444,) we have decided, that though in England the flux and reflux of the tide was a sound and reasonable test of a navigable river, because on that island tide-water and navigable water were synonymous terms, yet that "there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason—and, indeed, contrary to it." The case of the Thomas Jefferson (10 Wheaton) and others, which had hastily adopted this arbitrary and (in this country) false test of navigable waters, were necessarily overruled.

Since the decision of these cases, the several district courts have taken jurisdiction of cases of collision on the great public navigable rivers. Some of these cases have been brought to this court by appeal, and in no instance has any objection been taken, either by the counsel or the court, to the jurisdiction, because the collision was within the body of a county, or above the tide. (See Fritz *v.* Bull, 12 How., 466; Walsh *v.* Rogers, 13 How., 283; The Steamboat New World, 16 How., 469; Ure *v.* Kauffman, 19 How., 56; New York and Virginia S. B. Co. *v.* Calderwood, 19 How., 245.)

In our opinion, therefore, neither of the facts alleged in the answer, nor both of them taken together, will constitute a sufficient exception to the jurisdiction of the District Court.

It is due however, to the learned counsel who has presented the argument for respondent in this case, to say, that he has not attempted to impugn the decision of this court in the case of Waring *v.* Clark, nor to question the sufficiency of the reasons given in the case of the Genesee Chief for overruling the case of the Thomas Jefferson; but he contends that the case of the Genesee Chief decided that the act of Congress of 1845, "extending the jurisdiction of the District Court to certain cases upon the lakes," &c., was not only constitutional, but also that it conferred a new jurisdiction, which the court did not possess before; and consequently, as that act was confined to the lakes, and "to vessels of twenty or more tons burden, licensed and employed in the business of commerce and navigation between ports and places in different States and Territories," it cannot authorize the District Courts in assuming jurisdiction over waters and subjects not included in the act, and more especially where the navigable portion of the river is wholly within the boundary of a single State. It is contended also that the case of Fritz *v.* Bull, and those which follow it, sustaining the jurisdiction of the court of admiralty over torts on the Mississippi river, cannot be reconciled with the points decided in the former case, as just stated, unless on the hypothesis that the act of 1845 be construed to include the Mississippi and other great rivers of the West; which it manifestly does not.

But it never has been asserted by this court, either in the case of Fritz *v.* Bull, or in any other case, that the admiralty jurisdiction exercised over the great navigable rivers of the West was claimed under the act of 1845, or by virtue of anything therein contained.

The Constitution, in defining the powers of the courts of the United States, extends them to "all cases of admiralty and maritime jurisdiction." It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only. Consequently, as Congress had never before 1845 conferred admiralty jurisdiction over the Northern fresh-water lakes *not* "navigable from the sea," the District Courts could not assume it by virtue of this clause in the Con-

stitution. An act of Congress was therefore necessary to confer this jurisdiction on those waters, and was completely within the constitutional powers of Congress; unless, by some unbending law of nature, fresh-water lakes and rivers are necessarily within the category of those that are not "navigable," and which, consequently, could not be subjected to "admiralty jurisdiction," any more than canals or railroads.

When these States were colonies, and for a long time after the adoption of the Constitution of the United States, the shores of the great lakes of the North, above and beyond the ocean tides, were as yet almost uninhabited, except by savages. The necessities of commerce and the progress of steam navigation had not as yet called for the exercise of admiralty jurisdiction, except on the ocean border of the Atlantic States.

The judiciary act of 1789, in defining the several powers of the courts established by it, gives to the District Courts of the United States "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures, &c., when they are made on waters which are *navigable from the sea* by vessels of ten or more tons burden, &c., as well as upon the high seas."

So long as the commerce of the country was centred chiefly on the Eastern Atlantic ports, where the fresh-water rivers were seldom navigable above tide-water, no inconvenience arose from the adoption of the English insular test of "navigable waters." Hence it was followed by the courts without objection or inquiry.

But this act does not confine admiralty jurisdiction to tide-waters; and if the flux and reflux of the tide be abandoned, as an arbitrary and false test of a "navigable river," it required no further legislation of Congress to extend it to the Mississippi, Alabama, and other great rivers, "navigable from the sea." If the waters over which this jurisdiction is claimed be within this category, the act makes no distinction between them. It is not confined to rivers or waters which bound coterminous States, such as the Mississippi and Ohio, or to rivers passing through more than one State; nor does the act distinguish between them and rivers which rise in and pass through one State only, and are consequently "*infra corpus comitatus.*" The admiralty jurisdiction surrendered by the States to the Union had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender. The interpolation of such conditions by the courts would exclude many of the ports, harbors, creeks, and inlets, most frequented by ships and commerce, but which are wholly included within the boundaries of a State or the body of a county.

It seems to have been assumed, in the argument of this case, that because the District Courts had not exercised their admiralty jurisdiction above tide-water before the decision of this court of the case of the Genesee Chief, that such jurisdiction had been exercised by them as conferred by the act of 1845. It is upon this mistaken hypothesis that any difficulty is found in reconciling that case with the case of Fritz *v.* Bull, which immediately followed it.

The act of 1845 was the occasion and created the necessity for this court to review their former decisions.

It might be considered in fact as a declaratory act reversing the decision in the case of the Thomas Jefferson. We could no longer evade the question by a judicial notice of an occult tide without ebb or flow, as in the case of Peyroux *v.* Howard, (7 Pet., 343.) The court were placed in the position, that they must either declare the act of Congress void, and shock the common sense of the people by declaring the lakes not to be "navigable waters," or overrule previous decisions which had established an arbitrary distinction, which, when applied to our continent, had no foundation in reason.

In conclusion, we repeat what we then said, that "courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and a speedy decision of controversies where delay would be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which this Union was formed, to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams of the Western States. Certainly, such was not the intent of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution; that is, perfect equality in the rights and privileges of the citizens of the different States, not only in the laws of the General Government, but in the mode of administering them."

The decree of the court below, dismissing the libel for want of jurisdiction, is therefore reversed, and it is ordered that the record be remitted, with directions to further proceed in the case as to law and justice may appertain.

Mr. Justice McLEAN delivered a separate opinion, and Mr.

Justice CATRON, Mr. Justice DANIEL, and Mr. Justice CAMPBELL, dissented. Mr. Justice CATRON concurred with Mr. Justice CAMPBELL in the opinion delivered by him.

Mr. Justice McLEAN:

I agree to the decision in this case; but as I wish to be on one or two points somewhat more explicit than the opinion of the court, I will concisely state my views.

The Constitution declares that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." The judiciary act of 1789 provides, "that the District Courts shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

The act of the 25th February, 1845, is entitled "An act to extend the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting with the same." This act was considered by Congress as extending the jurisdiction of the District Court; and it was so, very properly, treated by the court in the case of the Genesee Chief.

In the opinion, it was said this act was not passed under the commercial power, but under the admiralty and maritime jurisdiction given in the Constitution. No terms could be more complete than those used in the Constitution to confer this jurisdiction. In all cases of admiralty and maritime jurisdiction, such suits may be brought in the District Court.

This jurisdiction was limited in England to the ebb and flow of the tide, as their rivers were navigable only as far as the tide flowed. And as in this country the rivers falling into the Atlantic were not navigable above tide-water, the same rule was applied. And when the question of jurisdiction was first raised in regard to our Western rivers, the same rule was adopted, when there was no reason for its restriction to tide-water, as in the rivers of the Atlantic. And this shows that the most learned and able judges may, from the force of precedent, apply an established rule where the reason or necessity on which it was founded fails.

In England and in the Atlantic States, the ebb and flow of the tide marked the extent of the navigableness of rivers. But the navigability of our Western rivers in no instance depends upon the tide.

By the civil law, the maritime system extends over all navigable waters. The admiralty and maritime jurisdiction, like the common-law or chancery jurisdiction, embraces a system of procedure known and established for ages. It may be called a system of regulations embodied and matured by the

most enlightened and commercial nations of the world. Its origin may be traced to the regulations of Wisbuy, of the Hanse Towns, the laws of Oleron, the ordinances of France, and the usages of other commercial countries, including the English admiralty.

It is, in fact, a regulation of commerce, as it comprehends the duties and powers of masters of vessels, the maritime liens of seamen, of those who furnish supplies to vessels, make advances, &c., and, in short, the knowledge and conduct required of pilots, seamen, masters, and everything pertaining to the sailing and management of a ship. As the terms import, these regulations apply to the water, and not to the land, and are commensurate with the jurisdiction conferred.

By the Constitution, "Congress have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The provision, "among the several States," limits the power of Congress in the regulation of commerce to two or more States; consequently, a State has power to regulate a commerce exclusively within its own limits; but beyond such limits the regulation belongs to Congress. The admiralty and maritime jurisdiction is essentially a commercial power, and it is necessarily limited to the exercise of that power by Congress.

Every voyage of a vessel between two or more States is subject to the admiralty jurisdiction, and not to any State regulation. A denial of this doctrine is a subversion of the commercial power of Congress, and throws us on the Confederation. It also subverts the admiralty and maritime jurisdiction of the Federal courts, given explicitly in the Constitution and in the judiciary act of 1789.

In this case, the steamboat Wetumpka was engaged in a commerce between New Orleans, in Louisiana, and Montgomery, in Alabama. The Magnolia was running between Mobile and Montgomery, in the State of Alabama. The Wetumpka, within the State of Alabama, was as much under the Federal jurisdiction as it was in the State of Louisiana. No one will contend that one State may regulate the commerce of another; nor can it be maintained that the power to regulate the commerce of the Wetumpka in this case was in either State. It was a commerce between the two States, which comes within the definition of commerce expressly given to Congress. While thus protected and regulated by the power of Congress, the Wetumpka was run into by the Magnolia, and sunk, in the Alabama river; and it is earnestly contended that the admiralty can give no remedy for this aggravated trespass. Since the decision in the case of the Genesee Chief by seven

judges, only one dissenting, the admiralty jurisdiction has been constantly applied on all our lakes and rivers of the North; and some of the cases have been reviewed in this court without objection. The navigators of the Alabama river must have been more prudent and skilful than those of the North, or their voyages were less frequent, if the above collision is the first that has occurred on the Alabama river.

It is true, the Magnolia was engaged in a commerce strictly within the State; but this does not exonerate her, as the trespass was on a vessel protected by the admiralty law. Cases have frequently occurred on the Ohio and Mississippi rivers, where steamboats, having run down and sunk flat-boats, were held responsible for the injury in the admiralty. And if a steamer is liable in such cases, a remedy for an injury done to it cannot be withheld in the same court.

In the Genesee Chief case, (12 How., 443,) this court held: "The admiralty jurisdiction granted to the District Courts of the United States under the Constitution extends to the navigable rivers and lakes of the United States, without regard to the ebb and flow of the tides of the ocean." It is difficult to perceive how this language could have been mistaken, as alleged by the counsel in argument. All the lakes and all the navigable rivers in the Union are declared to be subject to this jurisdiction without reference to the tide, and it overrules all previous decisions on that subject.

It was said in that case the act of 1845 extended the jurisdiction of the admiralty; and this was so, as by the act of 1789 it was limited to rivers navigable from the sea by vessels of ten tons burden and upwards.

It is alleged that the assumption of this jurisdiction will absorb matters of controversy and the punishment of offences and misdemeanors now cognizable in the courts of the State, without the trial by jury, and before a foreign tribunal, contrary to the wishes and interests of a State.

The admiralty and maritime jurisdiction has been in operation on all the navigable rivers of our Atlantic coast since the organization of the Government, and its exercise has not been found dangerous or inconvenient. Experience is a better rule of judgment than theory. If this jurisdiction has been found salutary in that part of our country which is most commercial, it cannot be injurious or dangerous in those parts which are less commercial.

The Federal courts have no cognizance of common-law offences, on the land or on the water. Jurisdiction has been conferred on them of common law and chancery in specified cases, in every State and Territory of the Union; but I am not

aware that this has been considered a foreign jurisdiction, or one that has been dangerous to the people of any State. Occasional conflicts of jurisdiction have arisen between this tribunal and the State courts, to preserve the rights guarantied by the Federal Constitution; but this became necessary in maintenance of the fundamental law of the Union. And if Congress should deem it necessary for the regulation of our internal commerce, amounting to more than ten hundred millions of dollars annually, to enact laws for its protection, they will no doubt be as mindful of the rights of the States as of those who, by their enterprise and wealth, carry on the commerce of the country.

Every one knows how strenuously the admiralty jurisdiction was resisted in England by the common-law lawyers, headed by Coke. The contest lasted for two centuries. The admiralty civilians contended that the statutes of Richard II and 2 H. IV did not curtail the ancient jurisdiction of the admiralty over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, which was shown by an exposition of the ancient cases, as was opposed by the common-law courts; but they continued the contest until they acquired a concurrent jurisdiction over all maritime causes, except prize. The vice-admiralty courts in this country, under the colonial Government, exercised jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas, and this was the jurisdiction conferred on our courts by the Constitution.

But it was not until a late period that the jurisdiction of the admiralty in England was settled by the statute of 3 and 4 Victoria, c. 67, passed in 1840. This is entitled "An act to improve the practice and extend the jurisdiction of the High Court of Admiralty in England." And it is gratifying to the bar and bench of this country to know, that the above statute has placed the English admiralty substantially on the same footing that it is maintained in this country. To this remark it is believed there are but two or three exceptions. Insurance, ransom, and surveys, are believed to constitute the only exceptions. The flow of the tide, as before remarked, is used to designate the navigableness of their rivers. Whether an insurance is within the admiralty, has not been considered by this court. It is singular, that while the English admiralty, by its extension, has been placed substantially upon the same basis as our own, ours should be denounced as having a dangerous tendency upon our interests and institutions, and a desire expressed to abandon the enlightened rules of the civil law, and follow the misconstrued statutes of Richard II.

Antiquity has its charms, as it is rarely found in the common walks of professional life; but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. Whether it be common, chancery, or admiralty law, we should be more instructed by studying its present adaptations to human concerns, than to trace it back to its beginnings. Every one is more interested and delighted to look upon the majestic and flowing river, than by following its current upwards until it becomes lost in its mountain rivulets.

Mr. Justice DANIEL dissenting:

Against the opinion of the court in this cause, and the doctrines assumed in its support, I feel constrained solemnly to protest.

If in the results which have heretofore attended repeated efforts on my part to assert what are regarded both as the sacred authority of the Constitution and the venerable dictates of the law were to be sought the incentive to this remonstrance, this act might appear to be without motive; for it cannot be denied that to earnest and successive remonstrances have succeeded still wider departures from restrictions previously recognised, until in the case before us every limit upon power, save those which judicial discretion or the propensity of the court may think proper to impose, is now cast aside. But it is felt that in the discharge of official obligation there may be motives much higher than either the prospect or the attainment of success can supply; and it may be accepted as a moral axiom, that he who, under convictions of duty, cannot steadily oppose his exertions, though feeble and unaided, to the march of power, when believed to be wrongful, however overshadowing it may appear, must be an unsafe depositary of either public or private confidence. My convictions pledge me to an unyielding condemnation of pretensions once denominated, by a distinguished member of this court, "the silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions;" and still more inflexibly of the fearful and tremendous assumptions of power now openly proclaimed for tribunals pronounced by the venerable Hale, by Coke, and by Blackstone, and by the authorities avouched for their opinions, to have been merely tolerated by, and always subordinate to, the authority of the common law—an usurpation licensed to overturn the most inveterate principles of that law; licensed in its exercise to invade the jurisdic-

tion of sovereign communities, and to defy and abrogate the most vital immunities of their social or political organization. I cannot, without a sense of delinquency, omit any occasion of protesting against what to my mind is an abuse of the greatest magnitude, and one which, hopeless as at present the prospect of remedy may appear, it would seem could require nothing but attention to its character and tendencies to insure a corrective. It must of necessity be resisted in practice, as wholly irreconcilable with every guarantee of the rights of person or property, or with the power of internal police in the States.

Having, in cases formerly before this court, (vid. 6 How., p. 395 et seq., New Jersey Steam Navigation Company *v.* Merchants' Bank; 10 How., p. 607, Newton *v.* Stebbins; 12 How., 465, Genesee Chief *v.* Fitzhugh; 18 How., p. 269, Ward *v.* Peck;) traced with some care the origin of the admiralty jurisdiction in England, and the modes and limits to which that jurisdiction was there subjected, no farther reference will here be made to the authorities by which that investigation has been guided, than is necessary to illustrate the origin and extent of the like jurisdiction as appertaining to the tribunals of the United States. Amongst the novelties which are daily brought to notice, it would not awaken very great surprise to hear it contended, in the support of a favorite theory or posision, that the admiralty courts of England were not governed by the laws and ordinances of that country, or in effect that England did not govern herself; but has been, and still is, controlled by some foreign or extraneous authority. Something not unlike this strange idea has, on more than one occasion, been intimated; and with respect to her colonies, strictly subordinate as they are known to have ever been in political and legislative power to the mother country, it has been broadly asserted that these have been released from the restrictions upon the admiralty in the mother country, whilst this emancipation is coupled with the incongruous position that they (and the United States, as once forming a portion of those colonies) are more or less subject to the admiralty regulations of every petty community in the world. I am constrained to repel such an argument, if argument it can be called, as consonant neither with reason nor historical accuracy. The only known difference between the administration in admiralty courts in the mother country and in her American colonies, was created *by express statute*, with reference to the *revenue;* was limited to the single regulation prescribed by the statute; and has, by every writer upon the subject, been treated as a *special* direction, applicable solely to the matter of which it

treated, and as neither entering into, nor deducible from, any regular and constitutional attribute of the admiralty jurisdiction. It was an exception, an anomaly, and in its nature and operation was unique and solitary. Of the same character, precisely, is the provision of the eleventh section of the judiciary act of 1789, which invests the District Courts with jurisdiction in cases of seizure under the laws of imposts of the United States. This provision confers, in the first place, in general terms, without limitation, on the District Courts, *admiralty and maritime jurisdiction.* So far, then, as it was the purpose to constitute these tribunals courts of admiralty, the jurisdiction conferred by the language of the act just quoted was complete. The District Courts were thereby created courts of admiralty to all intents and purposes; but the section goes on to add to the powers of the District Courts, the cognizance of other subjects not regularly appertaining to the jurisdiction of the admiralty, viz: of *seizures under the laws of imposts;* subjects belonging to a class which was in England peculiarly cognizable in the court of exchequer, and under the authority and process of the common law.

The conclusion, then, from the eleventh section of the judiciary act, is inevitably this: that the power thereby vested with respect to *seizures*, is not an *admiralty* power—was never conferred by the investment of admiralty power in accordance with the Constitution; but is in its character distinct therefrom, and is peculiar and limited in its extent. Such appears to have been the opinion of two distinguished commentators upon the admiralty jurisdiction of the courts of the United States, Chancellor Kent and Mr. Dane; the former of whom, in the 1st vol. of his Commentaries, p. 376, holds this language: "Congress had a right, in their discretion, to make all seizures and forfeitures cognizable in the District Courts; but it may be a question whether they had any right to declare them to be cases of admiralty jurisdiction, if they were not so by the law of the land when the Constitution was made. The Constitution secures to the citizen trial by jury in all criminal prosecutions, and in all civil suits at common law where the value in controversy exceeds twenty dollars. These prosecutions for forfeitures of large and valuable portions of property, under the revenue laws, are highly penal in their consequences; and the Government and its officers are always parties, and deeply concerned in the conviction and forfeiture. And if, by act of Congress or by judicial decisions, the prosecution can be turned over to the admiralty side of the District Court, as being neither a criminal prosecution nor a suit at common law, the trial of the cause is then transferred from a jury of the country to

the breast of a single judge. It is probable, however, that the judiciary act did not intend to do more than to declare the jurisdiction of the District Courts over these cases; and that all the prosecutions for penalties and forfeitures upon seizures under laws of imposts, navigation, and trade, were not to be considered of admiralty jurisdiction when the case admitted of a prosecution at common law; for the act saves to *suitors in all cases* the right to a common-law remedy, where the common law was competent to give it. We have seen that it is competent to give it; because, under the vigorous system of the English law, such prosecutions *in rem* are in the exchequer, according to the course of the common law; and it may be doubted whether the case of La Vengeance, on which all subsequent decisions of the Supreme Court have rested, was sufficiently considered. The vice-admiralty courts in this country when we were colonies, and also in the West Indies, obtained jurisdiction in *revenue causes* to an extent totally unknown to the jurisdiction of the English admiralty, and with powers as enlarged as those claimed at the present day. But this extension, *by statute*, of the jurisdiction of the American vice-admiralty courts beyond their ancient limits to revenue cases and penalties, was much discussed and complained of at the commencement of the Revolution." Judge Conkling also, in his Treatise on the Admiralty, vol. 2, p. 391, says: "In England, all revenue seizures are cognizable *exclusively* in the *exchequer;* and such of them as are cognizable on the admiralty side of the District Courts of the United States are made so *only by force of a legislative act.*"

From the above exposition of the jurisdiction of the vice-admiralty courts in the British colonies, it is manifest that neither by custom nor practice, nor by positive enactment, has there ever been created in those courts any power or jurisdiction appertaining to their character and constitution strictly as courts of admiralty, which they did not derive regularly by their commission from the Lord High Admiral. Brown, in his Civil and Admiralty Law, vol. 2, p. 490, says of these courts, "that all powers of the vice-admiralty courts within His Majesty's dominions are derived from the High Admiral, or the Commissioners of Admiralty in England, as inherent and incident to that office. Accordingly, by virtue of their commission, the Lords of the Admiralty are authorized to erect vice-admiralty courts *in North America*, the West Indies, and the settlements of the East India Company; and in case any person be aggrieved by sentence, or interlocutory decree having the force of a sentence, he may appeal to the High Court of Admiralty." So, too, Blackstone, vol. 3, p. 68, says: "Appeals from the

vice-admiralty courts *in America*, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the Admiral's jurisdiction."

It may here be pertinently asked, how, with this exposition of the law, can be reconciled the assertion that at the time of the American Revolution, and down to the adoption of the Constitution of the United States, there were vested in the colonial courts of England, and were appropriate to them as courts of admiralty, powers which never were vested in their superior, by whom they were created, and by whom they were to be supervised and controlled? With perfect respect, it would seem to imply an incongruity, if not an absurdity, to ascribe to any tribunal an appellate or revisory power with reference to matters beyond its legitimate jurisdiction, and which confessedly belonged to a different authority. Yet is this assertion of jurisdiction in admiralty in the colonial courts beyond that of their creator and superior, constantly renewed *arguendo*, whilst, in reply to repeated challenges of authority by which the assumption may be sustained, not one adjudication in point has been adduced. Again, it may be asked whether, in the history of jurisprudence, another instance can be found in which it is alleged that a *system*, *a corpus juris*, has grown up and been established, and yet not an ingredient, not a fragment of any such *system* can be discovered? But there have been decisions which were made in this country—decisions cotemporaneous with the event of the separation from the mother country; but these decisions, respectable for their learning and ability, so far from sustaining the *obiter* assertion above mentioned, divest it of even plausibility; for they affirm and maintain a complete conformity and subordination of the admiralty jurisdiction in the colonies, to that which had prevailed in England from the time of the statutes of Richard, and from the days of Owen, Brownlow, Hobart, Fortescue, and Coke. I refer to the case of Clinton *v.* The Brig Hannah, decided by Judge Hopkinson, of Pennsylvania, in 1781, and the case of Shrewsbury *v.* The Sloop Two Friends, decided by Judge Bee, of South Carolina, in 1786. And, indeed, the phrase "admiralty jurisdiction," except in the acceptation received by us from the English courts, is without intelligible or definite meaning, for under no other system of jurisprudence is the law of the marine known to be administered under the same organization.

Let us now take a view of the claims advanced for the admiralty power, in its constant attempts at encroachment upon the principles and genius of the common law, and of our republican and peculiar institutions, at least from the decision in the

case of the Thomas Jefferson, in the 10th of Wheaton, p. 428, to that of the Genesee Chief *v.* Fitzhugh, in the 12th of Howard, 443, inclusive; this last a case, to my apprehension, more remarkable and more startling as an assumption of judicial power than any which the judicial history of the country has hitherto disclosed, prior to the case now under consideration.

By the statute of 13th Richard II, cap. 15th, it is enacted, that "the Admirals and their deputies shall meddle with nothing done *within the realm*, but only with things done upon the *sea;*" and by the 15th of Richard II, cap. 3d, "that in all contracts, pleas, and quarrels, and other things done within the bodies of counties, *by land or water*, the Admiral shall have no cognizance, but they shall be tried by the law of the land." The language of these provisions is truly remarkable. By that of the first is denounced the exclusion, utterly, of the Admiral's power from the entire realm; by that of the second, is as explicitly denied to him all cognizance of things done *in the bodies of the counties, either by land or by water.* And the statute of Henry IV, cap. 11, by way of insuring a sanction of these exclusions, provides, "that he who finds himself aggrieved against the form of the statutes of Richard, shall have his action grounded upon the case against him who so pursues in the admiralty, and recover double damages." Lord Hale, in his History of the Common Law, speaking of the court of admiralty, says, (p. 51:) "This court is not bottomed or founded upon the authority of the civil law, but hath both its powers and jurisdiction by the law and custom of the realm in such matters as are proper for its cognizance." And again, in an enumeration of matters not within the cognizance of the admiralty, he continues: "So also of damages in *navigable rivers within the bodies of counties*, things done upon the shore at low-water mark, wreck of the sea, &c.; these things belong not to the Admiral's jurisdiction." And the cause, the only cause assigned as the foundation of that jurisdiction, is the peculiar locality of each instance, viz: its being neither within the body of any county or vicinage, nor *infra fauces terræ*, so that the *venue or pays* can be summoned for its trial. No one pretends to doubt that thus stood the admiralty law of the realm of England at the period of separation from the American colonies, and perhaps in the particulars above mentioned it may remain the unchanged law of that country to the present moment, as it is a fact recorded in history, that for a departure from that law, one of the most learned and brilliant of her admiralty judges (Sir William Scott, afterwards Lord Stowell) was condemned in a very heavy verdict. Such, I say, was the law of the realm of England, and I think that the fallacy or pretence of any change in

the admiralty law proper of that realm, in its application to the colonies, has been clearly demonstrated.

The admiralty law of England, according to every accurate test, was the admiralty law of the United States at the period of the adoption of the Constitution. It is pertinent in this place to remark, that the jurisdiction of the admiralty having been, both by the common law and by the language of the statutes of Richard II and Henry IV, excluded not only from the body of the counties, both on the land and on the water, and even from the *realm*, it followed, *ex consequenti*, that the locality of that jurisdiction was (and necessarily so) within the ebb and flow of the tide. Hence, it is more than probable, arose the adoption and use of the phrase as a portion of the description of the locus of that jurisdiction, viz: that it was *maritime*, i. e., connected with or was upon the sea, and was neither upon the land nor within the *fauces terræ*, nor upon any navigable water within a county, and was within the ebb and flow of the tide.

Under such a state of the admiralty law, conceded to be the law of England, and as I contend, the law of the United States, came before this court for decision the case of the Thomas Jefferson, in the 10th of Wheaton, p. 428. In this case, not a single ingredient required by the English cases to give jurisdiction existed. It could by no possibility or by any propriety of language be styled *maritime*, as every fact it presented occurred at the distance of a thousand miles from the ocean, and it could not be shown that there ever existed a tide in the water-course on which the occurrences that produced the suit originated. Yet, in the absence of these essential ingredients of admiralty jurisdiction, the court, with that greed for power by which courts are so often impelled beyond the line of strict propriety, makes a query, whether, under the show of *regulating commerce*, Congress might not assert a distinctive and original authority, viz: the power of the admiralty. The court, however, felt itself constrained to concede the necessity of a locality within the ebb and flow of the tide, and for the want of that requisite to deny the jurisdiction.

In the case of Peroux *v.* Howard, 7 Pet., 524, the necessity for the ebb and flow of the tide to give jurisdiction is equally conceded; but the court, in order to maintain its power, deems itself authorized to appeal *virtute officii*, not to the attraction of the moon, the received philosophic explanation of this phenomenon, but to the current of the Mississippi, which, in precipitating itself upon the waters of the Gulf, occasions, they say, by conflict with the latter, some changes in the rise and fall of the river at New Orleans. This *judicial* theory of the

tides possesses at least the characteristic of novelty. Whether it will be accepted, and find a place in the annals of scientific discovery, may admit of some doubt.

Next follows in order of time the case of the Steamboat New Orleans *v.* Phœbus et al., 11 Pet., p. 175. In this case, as in that of Peroux *v.* Howard, the vessel libelled was in the same city of New Orleans, one of the termini of her trading voyages, and adjudged by the case last mentioned to be within the ebb and flow of the tide. It was contended by the counsel for the claimants of the steamboat New Orleans, a gentleman now upon this bench, that the situation of the steamboat libelled in each case, as conferring jurisdiction by reason of locality, was identical; and it surpasses any acumen I possess, to perceive any real distinction between the cases. The court, however, speaking through the late Justice Story, (whom none could ever suspect of any leaning against the admiralty,) insisting with consistent pertinacity on the requisite of *the ebb and flow of the tide*, said: "The case is not one of a steamboat engaged in maritime trade and navigation. Though in her voyages she may have touched at one terminus of them in *tide-waters*, her employment has been substantially on other waters. The admiralty has not any jurisdiction over vessels employed on such voyages in cases of disputes between part owners. The *true test* of its jurisdiction in all cases of this sort is, whether the vessel be engaged substantially in maritime navigation, or in interior navigation and trade *not on tide-waters*. In the latter case, there is no jurisdiction. So that, in this view, the District Court had no jurisdiction over the steamboat involved in the present controversy, as she was wholly engaged in voyages on such *interior* waters."

In the case of Waring et al. *v.* Clark, in the 5th of How., 441, and in that of the New Jersey Steam Navigation Company *v.* The Merchants' Bank, in the 6th of How., 344, anomalous as these cases appear to me, and wholly unsustained either, as I deem them, by English precedent or by that construction of the Federal Constitution which is warranted, nay demanded, by the language of the Constitution, by history, or precedent, yet they both concur in establishing the *ebb and flow of the tide* as the test of jurisdiction in the admiralty. As, for example, in the former of these last-mentioned cases, the court announces the conclusion at which it had arrived, and which it proposed to demonstrate by argument and authority, in the following terms, viz: "It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers, *where the tide ebbs and flows*, is within the admiralty jurisdiction of the courts of the United States if the locality

be, in the sense in which it is used by the common-law judges in England, *infra corpus comitatus*. It is this point that we are now about to decide, and it is our wish that nothing which may be said in the course of our remarks shall be extended to embrace any other case of contested admiralty jurisdiction." Thus, too, in the second of these cases, Nelson, J., as the organ of the majority of the court, p. 392, propounds these propositions: "On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved or came under observation, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the *sea, or upon waters within the ebb and flow of the tide.*" And again: "The exclusive jurisdiction in admiralty was conferred on the National Government, as closely connected with the grant of the commercial power. It is a *maritime* court, instituted for the purpose of administering *the law of the seas.* There seems to be ground, therefore, for restraining its jurisdiction in some measure within the grant of the commercial power, which would confine it in cases of contracts to those concerning the navigation and trade of the country, *upon the high seas and tide-waters*, with foreign countries, and amongst the several States. Contracts growing out of the purely internal commerce of the State, *as well as commerce beyond tide-waters*, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the Federal courts."

These several decisions, founded, as they are believed to have been, in error, and upon a misconstruction of the law, of the Constitution, and the history of the country, in so far as they sought to permit invasions of the territorial, municipal, and political rights of the States, are, nevertheless, not entirely without their value. By the limit they prescribed to the admiralty, viz: the ebb and flow of the tide, they at least rejected the ambitious claim to undefined and undefinable judicial discretion over the Constitution and the law, (and the indispensable territorial rights of the States,) and so far fortified the foundations of a Government, based, in theory at any rate, upon restricted and exactly-defined delegations of power only. It was under the stress of the aforegoing decisions, and, as is well known, upon an application of a portion of this court, that the act of Congress of February 26, 1845, cap. 22, was passed, with the sole view of extending the admiralty jurisdiction to cases arising upon the lakes, and upon the rivers con-

necting the said lakes, on which there were no tides, and which (*i. e., the lakes*) were within no State limits. Here, then, we have the exception, the solitary exception, fortifying the general rule as to the admiralty jurisdiction, which jurisdiction is again described and defined in this provision of the statute above quoted, as existing upon the *high seas* or upon the *tide-waters* of the United States only.

This interference by the legislative department of the Government, elicited, too, by the judiciary department, whether within the competency of the former, under the Constitution, or not, must be received by every reasonable rule of induction as a concession, by both, that there existed a propriety or necessity for the enlargement of the admiralty jurisdiction over the lakes, and the rivers which connected them, in which there were no tides, and that whatever extension was either called for or made must be the result of legislative action, and not of mere judicial discretion. The repeated and explicit decisions of this court already cited, and the act of Congress of 1845, might, it is supposed, have been regarded as some earnest of uniformity and certainty in defining the admiralty jurisprudence of the United States, at least upon the points adjudged, and as to the provisions of the statute; but, in this age of *progress*, such anticipations are held to be amongst the wildest fallacies. It is now discovered that the principles asserted by the admiralty courts in England, or said to have been propounded by the mysterious, unedited, and unproduced proceedings of the colonial vice-admiralty courts, so often avouched here in argument; the decisions of this court and the provisions of the act of 1845, are all to be thrown aside, as wholly erroneous. That the admiralty power is not to be restricted by its effect upon the territorial, political, or municipal rights and institutions upon which it may be brought to bear, nor by any checks from the authority of the common law. That there is but one rule by which its extent is to be computed, and that is the rule which measures it by miles or leagues; that the scale for its admeasurement can be applied only as the discretion of the judiciary may determine, upon its necessity or policy, irrespective of the Constitution, the statute, or the character of the element on which it is to be exerted, or the adjudications of this court on this last point. That the admiralty of the fixed and limited realm of England, and as known to the framers of the Constitution, cannot be the admiralty of this day; and, of course, the admiralty of our time and of our present day must be changed according to the judgment or discretion of the courts, in the event of further acquisitions of territory.

Such are the conclusions regularly deducible from the opin-

ion of this court in the case of the Genesee Chief—conclusions, in my deliberate judgment, the most startling and dangerous innovations, anterior to that decision, ever attempted upon the powers and rights of internal government appertaining to the States. Speaking of the case of Waring *v.* Clark, the court say, p. 456 of 12 How.: "The majority of the court thought there was sufficient proof of *tide* there, and consequently it was not necessary to consider whether the admiralty power extended higher. But that case showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction of the admiralty by the *tide*." It may, I think, be here pertinently inquired, whether the natural and appropriate limit of a jurisdiction, admitted by all to be *maritime*, can be the more reasonably measured by the element on which alone that jurisdiction is authorized to act, for which alone existence has been given it, or by an indefinite, arbitrary, and mutable mathematical or geographical extension? Again, it is said by the court, (p. 457,) speaking of the limitation resulting from the character of the river: "If such be the construction, then a line drawn across the river Mississippi would limit the jurisdiction, although there were ports of entry above it, and water as deep and navigable, and the commerce as rich and exposed to the same hazards and incidents as the commerce below." If the experience of a pretty long official life had not familiarized me with instances, unhappily not a few, in which the meaning and objects of the Constitution and the just influence of the actually surrounding condition of the country when that instrument was framed have been lost sight of or made to yield to some prevailing vogue of the times, I confess that some surprise would have been felt at the seeming forgetfulness of the court in giving utterance to the expressions above quoted, of the facts, that when the Constitution was adopted, there was no such navigation as that on the Mississippi then known—no such river was then possessed by the United States; that the Constitution was formed by, and for, a coexisting political and civil association; was designed to be adapted to that state of things; and was in itself complete, and fully adapted to the ends and subjects to which it was intended to be applied. And but for the reason or the examples above referred to, the greater surprise would have been awakened by the disregard manifested, in the reasoning of the court, to this great fundamental principle of republican government, that if the Constitution was, at the period of its adoption, or has since, by the mutations of time and events, become inadequate to accomplish the objects of its creation, it belongs exclusively to those who formed it, and in whom resides the right to alter or abolish it,

to remedy its defects. No such power can exist with those who are the creatures of the Constitution, clothed with the humbler office of executing the provisions of that instrument. Suppose, at the time of its adoption, the Constitution was universally believed to be defective, in many respects essentially defective, would such a conviction have rendered it less the Constitution? Would it have lessened in any degree the obligation of obedience to it, or changed the power whence a remedy for its defects was to be derived? Could the judiciary, without usurpation, have essayed such a remedy? It is conceded by the court, that at the time of forming the Constitution the admiralty jurisprudence of England was the only system known and practiced in this country; it is admitted, also, that the English system was limited in theory and practice to the ebb and flow of the tide. It is further admitted, that at the time the Constitution was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England *was equally proper here.* These admissions form a virtual surrender of anything like a foundation on which the decision of the court could be rested, either in the case of the Genesee Chief or in this case depending on that alone. For, if it be admitted that at the time of the adoption of the Constitution the admiralty rule in England limited the jurisdiction to *tide-waters*, and that the same rule was adopted and was *proper here*, it follows, by inevitable induction, that the jurisdiction intended to be created by the Constitution was that which was the only one then known, and which, in the language of this court, was *then proper here*, (as the Constitution cannot be supposed to establish anything unauthorized or improper,) and necessarily was complete, and adapted to the existing state of things. And this inquiry, therefore, forces itself upon us, viz: if the system was thus limited, and was known to be so by the framers of the Constitution, and if this instrument was designed to be applicable to the existing state of things, and was complete in itself, in all its delegations of and restrictions upon power, where is to be sought the right or power to enlarge or to diminish the effect or meaning of the instrument to make it commensurate with a predicament or state of things not merely *not existing* when the Constitution was framed, but which was not even within the contemplation of those by whom it was created? Such a power could not exist in the legislature, the only branch of the Government on which anything like a faculty to originate measures was conferred; much less could it be claimed by functionaries who have not, and rightfully cannot have, any creative faculties, but whose capacities and duties are restricted to an interpretation of the

Constitution and laws as they should have been fairly expounded at the times of their enactment.

But the court, after having declared the correctness of the English rule and its adoption here, go on to say, nevertheless, "that a definition which would *at this day* limit public rivers to *tide-water rivers* is wholly inadmissible." And why? Because the Constitution, either by express language or by necessary implication, recognises or looks to any change or enlargement in the principles or the extent of admiralty jurisdiction? Oh, no! For no such reason as this. "But we have *now* (say the court) thousands of miles of public navigable water, including lakes and rivers, in which there is no tide." Such is the argument of the court, and, correctly interpreted, it amounts to this: The Constitution, which at its adoption suited perfectly well the situation of the country, and which *then* was unquestionably of supreme authority, we now adjudge to have become unequal to the exigencies of the times; it must therefore be substituted by something more efficient; and as the people, and the States, and the Federal Legislature, are tardy or delinquent in making this substitution, the duty or the credit of this beneficent work must be devolved upon the judiciary. It is said by the court, "that there is certainly no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public waters used for commercial purposes." Let this proposition be admitted literally, it would fall infinitely short of a demonstration, that because the Constitution, adequate to every exigency when created, did not comprise predicaments not then in existence or in contemplation, it can be stretched, by any application of judicial torture, to cover any such exigency, either real or supposed. This argument forcibly revives the recollection of the interpretation of the phrase "*necessary and proper*," once ingeniously and strenuously wielded to prove that a bank, incorporated with every faculty and attribute of such an institution, was not in reality, nor was designed to be, a *bank;* but was essentially an agent, an indispensable agent, in the administration of the Federal Government. And with reference to this doctrine of necessity, or propriety, or convenience, it may here be remarked, that it is as gratuitous and as much out of place with respect to the admiralty jurisdiction, as it was with respect to the Bank of the United States—perhaps still more so; as it is certain, and obvious to every well-informed individual, that, with the exception of some of the lakes, there is not a watercourse in the country, situated above the ebb and flow of the tide, which is not bounded on one or on both its margins by some county. And in the case before us, it is alleged expressly

in the pleading, and admitted throughout, that every fact in reference thereto transpired upon an inland water of the State of Alabama, two hundred miles above the tide, and within the county of Wilcox, in that State. And by adhering to what is an essential test of the admiralty jurisdiction in England, and formerly adopted and practiced upon in this country, there will be obtained a standard as to that jurisdiction, far more uniform and rational than that furnished by the tides. I allude to the rule which repels the pretensions of the admiralty whenever it attempts to intrude them *infra corpus comitatus*. This is the true rule as to jurisdiction, as it is susceptible of certainty, and concedes and secures to each system of jurisprudence, that of the admiralty and of the common law, its legitimate and appropriate powers. For this plain and rational test, this court now attempts to substitute one in its nature vague and arbitrary, and tending inevitably to confusion and conflict. It is now affirmed, that the jurisdiction and powers of the admiralty extend to all waters that are *navigable* within or without the territory of a State. In quest of certainty, under this new doctrine, the inquiry is naturally suggested, what are navigable waters? Will it be proper to adopt, in the interpretation of this phrase, an etymological derivation from *navis*, and to designate, as navigable waters, those only on whose bosoms ships and navies can be floated? Shall it embrace waters on which sloops and shallops, or what are generally termed river craft, can swim; or shall it be extended to any water on which a batteau or a pirogue can be floated? These are all, at any rate, *practicable* waters, navigable in a certain sense. If any point between the extremes just mentioned is to be taken, there is at once opened a prolific source of uncertainty, of contestation and expense. And if the last of these extremes be adopted, then there is scarcely an internal water-course, whether in its natural condition, or as improved under the authority and with the resources of the States, or a canal, or a mill-pond, some of which are known to cover many acres of land, (and, as this court can convert rivers without tides into *seas*, may be metamorphosed into small lakes,) which would not by this doctrine be brought within the grasp of the admiralty. Some of our canals are navigated by steam, and some of them by sails; some of them are adjuncts to rivers, and form continuous communications with the ocean; all of them are fed by, and therefore are made portions of, rivers. Under this new regime, the hand of Federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these water-courses, which is not liable to be arrested on its way to the next

market town by the *high admiralty power*, with all its parade of appendages; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles.

A citizen of any State of this Confederacy, bound as he is by habit, by affection, and fealty, to the soil and the institutions of his fathers, upon whom this magnificent machinery is brought to bear, (especially when recollecting by whom, and for whose sole benefit, this Confederacy was created,) may, as I have often done when contemplating the ceaseless march of central encroachment, be led to a tone of reflection like the following:

> "Urbem quam Romam dicunt putavi,
> Stultus ego, huic nostrae similem,
> Verum hæc tantum, alias inter caput extulit urbes,
> Quantum lenta solent inter viburna cupressi."

Few, comparatively, of the attributes of sovereignty and equality, presupposed to have existed in those by whom the Federal Government was created, have remained perfectly intact and exempt from aggression by their own creature; and by no conceivable agency could they be more fearfully assailed than by this indefinite and indefinable pretension to admiralty power, which, spurning the restraints prescribed to it by the wise caution of our own ancestors, challenges, as occasion suits, the opinions and practices of all nations, people, and tongues, however diverse or incongruous with the genius of our own institutions.

Not the least curious circumstance marking this course, is the assertion, that it produces equality amongst all the citizens of the United States. Equality it may be, but it is equality of subjection to an unknown and unlimited discretion, in lieu of allegiance to defined and legitimate authority.

In truth, the extravagance of these claims to an all-controlling central power, their utter incongruity with any just proportion or equipoise of the different parts of our system, would exhibit them as positively ludicrous, were it not for the serious mischiefs to which, if tolerated, they must inevitably lead—mischiefs which should characterize those pretensions as fatal to the inherent and necessary powers of self-preservation and internal government in the States; as at war with the inter-

ests, the habits and feelings of the people, and therefore to be reprobated and wholly rejected. For myself, I can only say, that to whatsoever point they may, under approbation here or elsewhere, have culminated, they never can offer themselves for my acceptation, but they must encounter my solemn rebuke.

Mr. Justice CAMPBELL dissenting:

I dissent from the judgment of the court in this cause, and from the opinion delivered by the judges composing a majority of the court.

The judgment of the District Court affirms that the court had no jurisdiction as a court of admiralty, under the Constitution and laws of the United States, in a cause of collision arising in Wilcox county, in the State of Alabama, between steamboats navigating the Alabama river. The Alabama river flows entirely within the State, and discharges itself into the Mobile river, and through that and the Mobile bay connects with the Gulf of Mexico. The collision occurred two hundred miles above the ebb and flow of the tide, and on a river upon which no port of entry or delivery before that time had been established. This court decides that the judgment shall be reversed, and that the District Court shall take cognizance of the cause, against its own sense of obligation and duty.

It is my opinion that this court claims a power for the District Court not delegated to the Federal Government in the Constitution of the United States, and that Congress, in organizing the judiciary department, have not conferred upon any court of the United States. That this court has assumed a jurisdiction over a case only cognizable at the common law, and triable by a jury; and that its opinion and judgment contravene the authority and doctrine of a large number of decisions pronounced by this court, and by the Circuit Courts, after elaborate arguments and mature deliberation, and which for a long period have formed a rule of decision to the court, and of opinion to the legal profession; and that no other judgment of this court affords a sanction to this. (10 Wheat., 428; 7 Pet., 324; 11 Pet., 175; 12 Pet., 72; 5 How., 441; 6 How., 344; 4 Dall., 426; 2 Gall., 398; The Anne, 1 Mas., 109; 1 Bald., 544.)

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, or which shall be made, under their authority—to all cases of admiralty and maritime jurisdiction. Whatever other jurisdiction is allowed to the judiciary department is particular in its nature, depending upon the character or status of the persons or communities

who are parties to the controversy, and not upon the subject-matter. This classification of the cases to which the judicial power of the United States should extend among courts of law, equity, and of admiralty and maritime jurisdiction, refers to a division recognised in the jurisprudence of all the States that were parties to the Federal compact, and is intimately related to the constitutional history of the colonies and of the mother country. Neither at the Declaration of Independence by the Colonies, nor when the Federal Constitution was adopted, was there a body of municipal law common to the States, nor a uniform system of judicial procedure in use in their courts. Until the Constitution was framed, the States preserved their sovereignty, freedom, and independence, and every power, jurisdiction, and right, which had not been expressly delegated to the United States in Congress assembled.

Whatever reference is made in the Federal Constitution to any existing system of law, or any modes of judicial proceeding, as the basis of a distribution of power and authority, relates to the system thus recognised as existing in the several States as it was received from England.

A portion of that judicial system was esteemed of such vital importance to the liberty of the citizen, that it was incorporated into the Constitution of the United States, and placed above the reach of the authority of any department of the Federal Government. The sections of the Constitution, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the grand jury; that, in all criminal prosecutions, the accused shall enjoy the right of trial by an impartial jury of the State and district wherein the crime shall have been committed," and "be informed of the nature and cause of his accusation;" "that in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved;" "that no person shall be deprived of life, liberty, or property, without due process of law;" and others of a like kind, identify the men of the Revolution as the descendants of ancestors who had maintained for many centuries a persevering and magnanimous struggle for a constitutional Government, in which the people should directly participate, and which would secure to their posterity the blessing of liberty. The supremacy of those courts of justice that acknowledged the right of the people to share in their administration, and directed their administration according to the course of the common law, in all the material subjects of litigation—of that common law which sprung from the people themselves, and is legitimate by that highest of all sanctions, the consent of those

who are submitted to it—of that common law, which resulted from the habitual thoughts, usages, conduct, and legislation, of a practical, brave, and self-relying race—was established in England and in the United States only by their persevering and heroic exertions and sacrifices. Magna Charta, from which a portion of this Constitution was extracted, was, according to Lord Brougham, "a declaration of existing and violated rights." It was renewed thirty times. To preserve its authority, it was read in churches, published four times a year in the county courts, sustained by force of arms, and when violated, the commons vindicated it by the infliction of exemplary punishment upon the guilty authors. A delinquent King at one time was required to imprecate the wrath of Heaven on those who transgressed it. The archbishop and bishops, apparelled in their official robes, with candles burning, "did excommunicate, accurse, and from the threshold of the church cut off all those who, by any art or device, shall violate, break, lessen, or change, secretly or openly, by deed, word, or counsel, against it, in any article whatsoever, and all those that against it shall make statutes, or observe them being made, or shall bring in customs, or keep them when they be brought in, and the writers of such statutes, and also the counsellors and executioners of them, and all those that shall presume to judge according to them."

The old historian, who describes this solemn ceremony, says, "that when this imprecation was uttered, and when the candles extinguished had been hurled upon the ground, and the fumes and stench rose offensive to the nostrils and eyes of those who observed it, the archbishop cried, "Even so let the damned souls be extinguished, smoke, and stink, of all who violate this charter or unrighteously interpret it."

The reign of Richard II was an epoch to be remembered with interest, and studied with care, by those concerned in administering the constitutional law of England or the United States. A formal complaint was made by the Commons of defects in the administration, as well about the King's person and his household as in his courts of justice, and redress was demanded. Measures were taken for placing the judicial institutions of England upon a solid constitutional foundation, and to exclude from the realm the odious systems of the continent. The first of the enactments was directed against the usurpations of the great military officers, who administered justice by virtue of their seignoral powers—the Lords' Constable and the Earl Marshal. The acts of 8th and 13th Richard II provide that, "because the Commons do make a grievous complaint that the court of the Constable and Marshal have ac

croached to them, and do daily accroach, contracts, covenants, trespasses, debts, detinues, and many other actions pleadable at the common law, in great prejudice to the King, and to the great grievance and oppression of the people," therefore they were prohibited, and their jurisdiction confined "to contracts and deeds of arms without the realm," and "things that touch more within the realm which cannot be determined and discussed by the common law."

The Lord High Admiral received a similar rebuke. The preamble of the act of 13 Richard II recites, "that complaints had arisen because Admirals and their deputies hold their sessions within divers places of the realm, accroaching to them greater authority than belonged to their office, to the prejudice of the King, &c." It was declared that the Admiral should not meddle with anything done within the realm, but only with things done upon the sea, as had been used in the time of Edward III. But this did not suffice to restrain the accroaching spirit of that feudal lord and his deputies.

Two years after, the Parliament enacted, "that the court of admiralty hath no manner of cognizance, power, nor jurisdiction of any manner of contract, plea, or quarrel, or of any other thing done or rising within the bodies of counties, either by land or water, and also with wreck of the sea; but all such manner of contracts, pleas, and quarrels, and all other things rising within the bodies of counties, as well by land as by water as aforesaid, and also wreck of the sea, shall be tried, termined, discussed, and remedied by the laws of the land, and not before, nor by the Admiral or his lieutenant, in no manner. Nevertheless, of the death of a man and of a mayhem done in great ships, being and hovering in the main stream of the great rivers, beneath the points of the same rivers, and in no other place of the same rivers, the Admiral shall have cognizance."

In the sixteenth year of the reign of Richard II, the rule of the Roman chancery, like that of the Lords' Constable, Marshal, and Admiral, was banished from England. In that year it was enacted that, "Both those who shall pursue or cause to be pursued, in the court of Rome or *elsewhere*, any processes, or instruments, or other things whatsoever, which touch the King, against his crown and regality, or his realm, shall be outlawed and placed out of the King's protection." In the following reign the accroaching spirit of the courts of admiralty received a further rebuke.

Upon the prayer of the Commons, the statutes of Richard II were confirmed, and a penalty was inflicted upon such as should maintain suits in the admiralty, contrary to their spirit.

This body of statute law served in a great degree to check

the usurping tendencies of these anomalous jurisdictions, and to prevent in a measure the removal of suits triable at the common law *ad aliud examen*, and to be discussed *per aliam legem*. It placed upon an eminence the common law of the realm, and enabled the Commons to plead with authority against other encroachments and usurpations upon the general liberty. But, though a foreign law and despotism were not allowed to enter the kingdom through the courts martial, ecclesiastical, or admiral, the perversion of judiciary powers to purposes of oppression was not effectually prevented. The courts of the Star Chamber and of High Commission, originally limited to specific objects, "assumed power to intermeddle in civil causes and matters only of private interest between party and party, and adventured to determine the estates and liberties of the subject, contrary to the law of the land and the rights and privileges of the subject," and "had been by experience found to be an intolerable burden, and the means to introduce an arbitrary power and government." Among the cases of jurisdiction claimed by the Star Chamber were those between merchant strangers and Englishmen, or between strangers, and for the restitution of ships and goods unlawfully taken, or other deceits practiced on merchants.

One of the most practiced proctors of this court has left his testimony: "That since the great Roman Senate, so famous in all ages and nations as that they might be called *jure mirum orbis*, there hath no court come so near them, in state, honor, and adjudication, as this." But, by the 16th of Charles I, it was enacted, both in respect of this and the High Commission Court, "that from henceforth no court, council, or place of judicature, shall be erected, ordained, constituted, or appointed, which shall have, use, or exercise the same or like jurisdiction as is or hath been used, practiced, or exercised," in those courts.

But the statute did not terminate with this. The patriot leaders of that time, reviewing in the preamble to the act the various parliamentary enactments in regard to the legal institutions of England, and reciting those declarations of the public liberties which had extended over a period of four hundred years, proceeded to add another. It was solemnly enacted, "that neither his Majesty, nor his Privy Council, have, or ought to have, any jurisdiction, power, or authority, by English bill, petition, articles, libel, or any other arbitrary whatsoever, to examine or draw in question, determine, or dispose of the lands, tenements, hereditaments, goods, and chattels, of any of the subjects of this realm, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law."

This selection of a few sections from various English statutes, and the historical facts I have mentioned, is designed to illustrate the intensity and duration of the contest which resulted in placing the judiciary institutions of England on their existing foundation. In the midst of that contest, the settlements were formed in America in which those institutions were successfully planted.

They have been incorporated into the Constitution of the United States, and prevail from the Atlantic Ocean to the Pacific, and from the Lakes to the Gulf of Mexico. These statutes show how the courts martial, ecclesiastical, admiral, and courts proceeding from an arbitrary royal authority, were either limited or suppressed.

The inquiry arises, how would a case like that before this court have been decided in England, either at the period of the Declaration of Independence, or at the adoption of the Constitution of the United States, in the court of admiralty?

In 1832 a question arose in that court, whether a cause of collision, arising between steam vessels navigating the river Humber, a short distance from the sea, within the ebb and flow of the tide, within the port of Hull, below the first bridges, when the tide was three-fourths flood, was cognizable by the court. The judge of the admiralty, an exact and conscientious judge, answered: "Since the statutes of Richard II and of Henry IV, *it has been strictly held* that the court of admiralty cannot exercise jurisdiction in civil causes arising *infra corpus comitatus.*" I cite this opinion not simply as evidence of the law in 1832, but also as affording authentic evidence of the historical fact it enunciates. (The Public Opinion, 2 Hagg., 399.)

I proceed now to inquire of the admiralty jurisdiction as exercised by the courts of vice-admiralty in the colonies and in the United States before the adoption of the Constitution.

The jurisdiction included four subjects, and a separate examination of each title of jurisdiction will shed light upon the discussion. These are—prize; breaches of the acts of navigation, revenue, and trade; crimes and misdemeanors on the high seas; and cases of civil and maritime jurisdiction.

The prize jurisdiction originated in a special commission from the King, and is usually conferred at the commencement of hostilities, upon the Admiral and his subordinates. It is a part of the ancient jurisdiction of the court, as thus derived. Congress, by the Articles of Confederation, were authorized to appoint courts of appeal to determine finally upon cases of that kind, and no doubt has ever been expressed that this branch of jurisdiction, under the Constitution and acts of Congress

since the adoption of the Constitution, is vested in the District Courts of the United States. (The Hunter, 1 Dod., 483; Le Coux *v.* Eden, 2 Doug., 613; 13 How., 498; 2 Gall., 325; ib., 20.)

The admiralty court of Great Britain and the vice-admiralty courts of the colonies were vested with jurisdiction over cases for the violation of a series of statutes for the regulation of trade and revenue in the colonies. The origin and extent of this jurisdiction are explained in the case of the Columbus, decided in the British admiralty in 1789, on an appeal from the vice-admiralty court of Barbados. The learned judge of that court said: "The court of admiralty derives no jurisdiction in causes of revenue from the patent of the judge, or from the ancient customary and inherent jurisdiction of the prerogative of the Crown, in the person of its Lord High Admiral, and exercised by his lieutenant. Not a word is mentioned of the King's revenue, which seems to have been entirely appropriated to the Court of Exchequer, which is both a court of law and equity. If, therefore, there is any inherent prerogative right of judging of seizures upon the sea, for the rights and dues of the Crown, whether of peace or of war, as in the right of prize and reprisal, that prerogative jurisdiction is put in motion by special commission or by act of Parliament. The first statute which places judgment of revenue in the plantations with the courts of admiralty, is the 12th of Charles II, ch. 18, sec. 1, which act has been followed by subsequent statutes." This lucid opinion has not been cited in any previous discussion of the subject in this court, from the fact that it is not published in the regular series of the admiralty reports. (2 Coll. Jur., 82; 2 Dod. Adm. R., 352.)

By an act of the 22d and 23d Charles II, to regulate the trade of the plantations, suits were authorized for breaches of its enactments "in the court of the High Admiral of England, or of any of his vice-admirals," or in any court of record. The acts of 7th and 8th of William III, 6th George II, 4th, 5th, 6th, 7th, and 8th, of George III, confer plenary jurisdiction upon the same courts, in cases of navigation, trade, and revenue, in the colonies, and the later statutes extend their authority to seizures upon the land as well as water. The reason for this jurisdiction, as given in the acts themselves, and as repeated by British writers, is not creditable to the colonists; but, as Justice Chase has assigned in this court a similar reason for the acts of Congress on the same subject, no offence can be taken for repeating the British opinion. Reeves, in his History of Navigation and Shipping, says: "The laws of navigation were nowhere disobeyed and contemned so openly as in New Eng-

land;" "that, in minds tempered as theirs were, obedience and disobedience were much the same thing to the interests of the mother country;" "that the contraband trade was carried on with skill and courage;" "that the exclusion of all but native subjects of Great Britain from serving on juries afforded no corrective;" "that for the purpose of securing the execution of the acts of trade and navigation, the Government proceeded to institute courts of admiralty, and to appoint persons to the office of attorney general in those plantations where such courts and such offices had never before been known; and from this time there seems to have been a more general obedience to the acts of trade and navigation." (Reeves's Hist., 79, 90; Stokes's Const. Col., 360, 361.)

The first of these acts was passed when the colonial settlements in New England and Virginia were in their infancy, and before those in the remaining colonies had been fairly commenced. The jurisdiction was familiar to the colonists, and these acts explain the origin of the clause of the judiciary act of 1789 on the same subject. The judiciary act confers on the District Courts "cognizance of all civil causes of civil and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade, of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." It is difficult to comprehend on what principle the court can construe the grant of jurisdiction in this act over cases of seizure under the law of impost and trade upon navigable waters, to an extension of the civil jurisdiction of the admiralty to the same localities. The admiralty jurisdiction, in cases of seizure, is a special jurisdiction, not belonging to the original constitution of the courts of admiralty, and this act treats it as such. And so this court, until the revolution in its doctrines in these latter years, uniformly treated it. The long and painful discussions from Delovio *v.* Boit to the New Jersey Navigation Case, are without meaning on any other hypothesis. If the jurisdiction in both classes of cases had been supposed to rest on the same foundation, the whole controversy would have been settled by the case of "La Vengeance," reported in 3 Dall., 297.

The civil and maritime jurisdiction of the vice-admiralty courts extended to the same subjects and was exercised under the same limitations in the colonies as in Great Britain. "Upon the establishment of colonial Governments," says a learned judge of one of those courts, "it was deemed proper to invest the Governors with the same civil and maritime jurisdiction; and therefore it became usual for the Lord High Admiral or the

Lords Commissioners to grant a commission of vice-admiral to them." The office thus conferred on the Governor was precisely the same with that of the vice-admirals in England, and was confined to that civil and maritime jurisdiction which was the original branch of his authority. (Stewart's V. Ad. R., 394, 405.) These courts were subordinate to the admiralty court of England, and, until the late reign of William IV, it received appeals from them. (1 Dod. Adm. R., 381.) The incompatibility of the criminal jurisdiction of the Admiral on the high seas with the legal constitution of England, was declared and corrected by the 28 H. VIII, ch. 15.

Hawkins, in his Pleas, says that, it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers or the common law of this land, that act was passed. (1 Hawk. Pl., 251.) And the same principle is embodied in the Constitution of the United States, with much enlargement; for the extension of the admiralty jurisdiction under the laws, professedly of navigation and trade, for the punishment of offences and misdemeanors, in the reign of George III, was a prominent cause of the American Revolution. In 1768, John Adams, the Coke of the Revolution, prepared for the citizens of Boston instructions to their representatives, Otis, Cushing, Samuel Adams, and Hancock. The citizens said to their representatives, that, "next to the revenue itself, the late extensions of the jurisdiction of the admiralty are our greatest grievance. The American courts of admiralty seem to be forming by degrees into a system that is to overturn our constitution, and to deprive us of our best inheritance, the laws of the land. It would be thought in England a dangerous innovation, if the trial of any matter on land was given to the admiralty." They refer to the statutes passed in the reign of George III, and declare that they violate Magna Charta; and they conclude by an earnest recommendation to their representatives, "*by every legal measure to endeavor that the power of these courts may be confined to their proper element, according the ancient English statutes;* and that they petition and remonstrate against the late extensions of their jurisdictions, and they doubt not that the other colonies and provinces, who suffer with them, will cheerfully harmonize with them in any justifiable measures of redress." Other testimony of the same kind might be adduced, to show what the opinions of the colonists were, as to the legitimate extent of the admiralty jurisdiction in the colonies. The journals of the First Congress (1774) render this unnecessary. They are replete with proof of the pervading sentiment in the British colonies.

That Congress declare that "the respective colonies are entitled to the common law of England, and to the benefit of such English statutes as existed at the time of the colonization, which had been found suitable to their situation." In their address setting forth the cause and necessity for their taking up of arms, they allege that statutes have been passed for extending the jurisdiction of courts of admiralty beyond their ancient limits. In the several addresses to the inhabitants of Great Britain, to the people of the colonies, to the people of Ireland, and to the King, the enlarged authority of those courts, their interference with the common-law right of trial by jury, and their offensive use of the laws and course of proceeding adopted from Roman tyrants, are distinctly reprehended. (1 Jour. Congr., 16, 28, 32, 47, 101.)

There can be no room for doubt that the statesmen and jurists who composed the Congress of 1774 regarded the limits of the courts of admiralty as settled by the statutes of Richard II, Henry IV, Henry VIII, and the early acts of navigation and trade, and that the enlargement of this jurisdiction was such a wrong as to justify a resort to arms. Their declarations bear no other interpretation; and the admiralty system of the States before the Constitution was administered upon this opinion. (Bee's Adm. R., 419, 433; 1 Dall., 33.)

Before examining the constitutional history and Constitution of the United States, it will not be irrelevant to ascertain the origin of the courts of admiralty in France, and their jurisdiction at the period of the adoption of the Constitution. The Admiral was, in France, as in England, a great feudatory, with the seignoral privilege of administering justice by judges of his appointment. There were there, as in England, contests with other officers in regard to jurisdiction, and the royal authority was interposed to settle them. In 1627, the office, with its dignity and privileges, was abolished; in 1668, it was revived by Louis XIV, and conferred upon a member of the royal family; in 1791, it was suppressed, and its judicial establishment disappeared from history, other courts and authorities being established to perform their functions. The ordinances of Louis XIV enlarged and defined the jurisdiction of the courts of the Admiral, to promote the convenience of commerce, to determine the unsettled jurisprudence concerning maritime contracts, to define the duties of seamen, the powers of the officers, and to provide an adequate police for the ports, harbors, and the coasts of the sea.

Their jurisdiction extended to a number of cases of contract specified in the ordinance, and conferred the ancient jurisdiction over piracies and thefts at sea, the desertion of crews, and

generally of all crimes, offences, and trespasses, committed on the sea, in ports, roadsteads, and havens, and the shores within the ebb and flow of the tide.

The police and navigation of the rivers of France were not placed under the admiralty, but were regulated by other officers under other ordinances. Without supposing that the ordinances of Louis XIV have any authority on this subject, it is yet certain that a cause of collision arising upon one of the rivers of France above the ebb and flow of the tide was not cognizable before the admiralty of France, in 1789, or for centuries previously.

The judicial power of the United States was organized to comprehend all cases that might properly arise under the Constitution, laws, and treaties of the United States, and, in addition, cases of which, from the character of the parties, the decision might involve the peace and harmony of the Union. This principle was accepted without dissent among the framers of the Constitution. The clause "all cases of admiralty and maritime jurisdiction" appears in the draught of the Constitution imputed to Charles Pinckney, and submitted at a very early stage of the session of the Convention. It was reported by the committee of detail in their first report, and was adopted without debate. In one of the sittings, in an incidental discussion, Mr. Wilson, of Pennsylvania, remarked: "*That the admiralty jurisdiction ought to be given wholly to the National Government, as it related to cases not within the jurisdiction of a particular State*, and to a SCENE *in which controversy with foreigners would be most likely to happen.*" (2 Mad. De., 799.) No other observation in the Convention illustrates this clause.

The judiciary clause is expounded in the numbers of the Federalist, by Alexander Hamilton.

He says, the judicial power extends—1st, to all those cases which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the Articles of Union; 3d, to all those in which the United States are a party; 4th, to all those which involve the peace of the Confederacy, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and, lastly, to all those in which the State tribunals cannot be supposed to be unbiassed and impartial.

In regard to the 5th class, he says: "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime

causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations relative to the public peace. The most important of them are, by the present Confederation, submitted to Federal jurisdiction."

Similar remarks are to be found in the debates in various of the Conventions of the States which adopted the Constitution, as incidentally occurring. In none of the Conventions was the judiciary clause of the Constitution considerately examined, except in Virginia; and in the Convention of Virginia no objection was made to this clause. Gov. Randolph said there, that "cases of admiralty and maritime jurisdiction cannot with propriety be vested in particular State courts. As our national tranquillity, reputation, and intercourse with foreign nations, may be affected by admiralty decisions, as they ought therefore to be uniform, and as there can be no uniformity if there be thirteen distinct independent jurisdictions, the jurisdiction ought to be in the Federal judiciary." Mr. Madison, in a luminous exposition of the article, expressed a similar opinion. He said: "The same reasons supported the grant of admiralty jurisdiction as existed in the grant of cognizance of causes affecting ambassadors and foreign ministers." "As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform." In the same speech, this statesman affirmed, *that all controversies directly between citizen and citizen will still remain with the local courts.* And after the Constitution was adopted, we find Chief Justice Jay, in analyzing the judicial power of the United States, and assigning reasons for the grant, says of this portion of it, "because, as the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to a national jurisdiction." The instance jurisdiction of the court, now the object of such ambition and interest, and involving questions so threatening, was hardly referred to by the friends of the Constitution, and not an alarm was expressed by any of its vigilant and jealous opponents. The prize jurisdiction of the court—that which concerned the foreign relations of the Union in war or in peace, and which is so intimately related to the honor and dignity of the country—was in the minds of all those statesmen who referred to the subject.

It did not enter the imagination of any opponent of the Constitution to conceive that a jurisdiction which for centuries had been sternly repelled from the body of any county could, by any authority, artifice, or device, assume a jurisdiction through the whole extent of every lake and water-course within the

limits of the United States. The collision described in the libel of the appellants occurred at a place which in 1789 formed a part of the State of Georgia. Had a similar cause then arisen, I can affirm with perfect safety that not an individual member of any Convention, whether State or Federal, who was concerned in the making or the ratifying of the Constitution, would have admitted the existence of an admiralty jurisdiction over the case. Such being the facts, I affirm that no change in the opinion of men, nor in the condition of the country, nor any apparent expediency, can render that constitutional which those who made the Constitution did not design to be so.

"If any of the provisions of the Constitution are deemed unjust," said the Chief Justice, in Scott *v.* Sandford, 19 How., 393, "there is a mode prescribed in the instrument itself by which it may be amended; but, while it remains unaltered, it must be construed as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning with which it spake when it came from the hands of its framers, and was voted on and adopted by the people of the United States.

That the framers of the Constitution designed to secure to the Federal Government a plenary control over all *maritime* questions arising in their intercourse with foreign nations, whether of peace or war, which assumed a juridical form through courts of its own appointment, is more than probable from the instrument and the contemporary expositions I have quoted. This was the primary and designed object of the authors of the Constitution in granting this jurisdiction. It is likewise probable that the jurisdiction which had been exercised from the infancy of the colonies to the reign of George III, by courts of admiralty, under laws of navigation, trade, and revenue, was considered as forming a legitimate branch of the admiralty jurisdiction. Such was the opinion of the First Congress under the Constitution, and it has been confirmed in this court. (3 Dall., 397; 2 Cr., 405; 4 Cr., 443; 2 H., 210.) If the instance jurisdiction of the court was at all remembered, the reminiscence was not of a nature to create alarm. The cases for its employment were few and defined. Those did not depend upon any purely municipal code, nor affect any question of public or political interest. They related for the most part to transactions at a distance, which did not involve the interests nor attract the observation of any considerable class of persons. No one could imagine that this jurisdiction,

by the interpretation of those who were to exercise it, could penetrate wherever a vessel of ten tons might enter within any of the States.

The question arises, what are the power and jurisdiction claimed for the courts of the United States by this reversal of the judgment of the District Court of Alabama?

The Supreme Court requires that court to take cognizance of cases of admiralty and maritime jurisdiction that arise on lakes and on rivers, as if they were high seas. Dunlap, defining the constitutional jurisdiction in 1835, said, that "it comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, whensoever they may be made and executed, or whatever may be the form of the stipulation which relates to the navigation, business, or commerce of the sea." (Dunlap's Pr., 43.)

This was the broad pretension for the admiralty set up by Mr. Justice Story, in Delovio *v.* Boit, in 1815, under which the legal profession and this court staggered for thirty years before being able to maintain it. The definition to be deduced from the present decision deprives that of any significance. That affords no description of the subject.

The definition under this decree, if carried to its logical extent, will run thus: "That the admiralty and maritime jurisdiction of the courts of the United States extends to all cases of contracts, torts, and injuries, which arise in or concern the navigation, commerce, or business of citizens of the United States, or persons commorant therein, on any of the navigable waters of the world."

I proceed now to examine the jurisprudence of the courts of the United States, to ascertain the various stages in the progress to the goal which has been to-day attained. The tendency of opinion in the first years of the existence of the Union was to limit the admiralty jurisdiction according the constitution of the British court of admiralty. Justice Washington so declared in 1806; United States *v.* McGill, 4 Dall., 395; and his learned successor maintained the same doctrine. (Bald. R., 544.)

This opinion was assailed by Justice Story in Delovio *v.* Boit, 2 Gall., 395, in the year 1815.

The question of jurisdiction arose on a libel founded on a policy of insurance, and the jurisdiction of the court was sustained. I believe I express a general, if not universal, opinion of the legal profession, in saying that this judgment was erroneous. I understand Justice Curtis to intimate the existence of such an opinion in the Gloucester Insurance Company *v.* Younger, 2 Curt. R., 322.

The opinion of Justice Story, in the cause of Delovio *v.* Boit, is celebrated for its research, and remarkable, in my opinion, for its boldness in asserting novel conclusions, and the facility with which authentic historical evidence that contradicted them is disposed of. The examination of the English authorities resulted in the following conclusions.

In the construction of the statutes of Richard II and Henry IV, "the admiralty has *uniformly* and *without hesitation*," he says, "maintained that they were never intended to abridge or restrain the rightful jurisdiction of the court; that they meant to take away any pretence of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs; and upon torts or injuries which, though arising in ports, were not done within the ebb and flow of the tide; and that the language of these statutes, as well as the manifest object thereof, as stated in the preambles, and in the petitions on which they were founded, is fully satisfied by this exposition. So that, consistently with the statutes, the admiralty may still exercise jurisdiction: 1. Over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2. Over all maritime contracts arising at home or abroad; 3. Over matters of prize and its incidents." In regard to the conclusions of the courts of common law he says:

That the common-law interpretation of these statutes abridges the jurisdiction to things wholly done on the sea. 2. That the common-law interpretation of these statutes is indefensible upon principle, and the decisions founded upon it are inconsistent and unsatisfactory. 3. That the interpretation of the same statutes does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts, torts, injuries, and offences upon the high seas, and in ports as far as the ebb and flow of the tide. 4. That this is the true limit of the admiralty jurisdiction, on principle. In regard to the case of the collision between ships and steamboats, we have the authoritative declaration of the judge of the admiralty. I have cited it to show that this statement of the English law is not accurate. And Sir John Nicholl, in the same court, in 3 Hagg., 257, 283, differs materially from other portions of the same statement. It may be true that the English court of admiralty, with the approbation of the King, took cognizance of causes arising within the limits of England, in despite of the prohibition by Parliament. But the great charter, and other statutes of importance to the liberties of the realm, were also violated by the same authority. It is also true that the twelve judges of England, and the attorney gen-

eral, in the presence of the King and the Privy Council, after solemn debate, in 1632, signed an agreement to concede to the admiralty a larger jurisdiction. But such an act was illegal, and by the judges extra-judicial. Ten of those judges, four years later, presided in the case against Hampden for ship money; the attorney general was the inventor of the writ for its levy; the Privy Council was that which Strafford and Laud had organized to rule England without a Parliament, and which was made hateful by its arbitrary and violent proceedings. And the contract itself was denounced as unconstitutional by Lord Coke, who, but a few years before, had prepared the Petition of Right in which the legal constitution of England was embodied. For all contracts, pleas, and quarrels, made and done upon a river, haven, or creek, within the realm of England, he said, "the Admiral, without question, hath not jurisdiction, for then he should hold plea of things done within the body of the county, which are triable by verdict of twelve men, and merely determinable by the common law, and not within the admiralty and by the civil law; for that were to change and alter the law in such cases." (4 Co. Inst., 135.) And finally, in 1640, to close the door upon all such attempts of the King and his Privy Council, the fifth section of the act "For the regulating of the Privy Council, and for taking away the court commonly called the Star Chamber," which I have already quoted, was adopted.

The great and controlling question of contest in this long period of contest was as to the supremacy of the Parliament, and a very important form of that question related to its organization of the courts and its regulation of their jurisdiction. When the supremacy of Parliament had been established by the Revolution, its enactments which had defined the constitutional limits of the courts of judicature were no longer opposed or contradicted. The error of the opinion in Delovio *v.* Boit, on this subject, in my judgment, consists in its adoption of the harsh and acrimonious censures of discarded and discomfited civilians on the conduct of the great patriots of England, whose courage, sagacity, and patriotism, secured the rights of her people, as any evidence of historical facts.

But the royal ordinances of Louis XIV unquestionably afford that support to the decision and opinion in that case which cannot be found in the English law. The policy of insurance is enumerated among the contracts submitted to the French courts of admiralty, and the formulary in which the jurisdiction as to torts and offences is expressed in the opinion is a free translation from the French ordinances. I refer to the opinion in the case of Delovio *v.* Boit, as the first and most complete

exposition of the system which its author afterwards introduced as the doctrine of the court, in the Thomas Jefferson, in 1825; Orleans *v.* Phœbus, in 1837; and Coombs's case, in 1838; and which was more fully sanctioned in the opinions of the court in subsequent cases; and because he defends in that opinion the jurisdiction of the admiralty upon grounds which are not to be reconciled with the opinion of the court in the present cause.

In the Steamboat Orleans *v.* Phœbus, 11 Pet., 173, decided in 1835, the court say: "The true test of jurisdiction is, whether the vessel be engaged substantially in maritime navigation, or in interior navigation and trade, not on tide-waters. In the latter case there is no jurisdiction." In the United States *v.* Coombs, 12 Pet., 73, the direct question arose as to the limits of this jurisdiction. The court answers, as in former cases, "That in cases purely dependent upon the locality of the act done, it is limited to the sea and to tide-waters as far as the tide flows; and that it does not reach beyond high-water mark. It is the doctrine repeatedly asserted by this court, and we see no reason to depart from it." In Waring *v.* Clark, 5 How., 441, the same question was again considered by the court. The claimants of the largest extent of jurisdiction for the court expressed their opinion through Mr. Justice Wayne. He cited the former decisions with approbation, and said that the question was no longer open in the court; "that it was *res judicata* in this court." Again, in 1848, Mr. Justice Nelson, expressing the views of the four judges who concurred with Justice Wayne in the former case, (New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 How., 344,) disclaimed jurisdiction over "contracts growing out of the purely internal commerce of the State, as well as commerce beyond tide-waters," stating that "they are generally domestic in their origin and operation, and could hardly have been intended to be drawn within the cognizance of the Federal courts." I think it is manifest, that had the case before the court been produced before it ten years ago, it would have been unanimously dismissed for the want of jurisdiction. From the decision in the Thomas Jefferson, in 1825, to that of the New Jersey Navigation Company *v.* the Merchants' Bank, in 1848, two generations of judges have agreed to doctrines wholly irreconcilable with the judgment now given.

In 1851, the case of the Genesee Chief *v.* Fitzhugh, 12 How., 443, came before the court. It was a cause of collision between steamboats navigating Lake Ontario, and engaged in the commerce of different States. The District Court exercised jurisdiction under the act of February, 1845, (5 Stat. at L., 726,)

which provided for such cases on the lakes, and navigable waters connected with them, in the same manner as if the same vessels had been employed in navigating the high seas or on tide-waters within the admiralty jurisdiction, with a proviso that all the issues of fact might be tried by a jury.

The court decided that the act was not a regulation of commerce between the States, and that the jurisdiction conferred on the District Court could not be sustained as a regulation of commerce among the States, and that the judicial power of the United States could not be extended by such legislation. The court, after this sound constitutional argument, proceed to say: "If the meaning of these terms in the Constitution was now for the first time brought before this court, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other; a great and growing commerce between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered in them, and prizes have been made; and every reason which exists for the grant of admiralty jurisdiction to the General Government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance power, and for the prize power of the admiralty court to administer admiralty law; and if the one cannot be established, neither can be the other."

All the considerations mentioned in this argument applied to the Mississippi river in 1789, and some of them do at this time.

I have stated the entire argument of the court upon the precise question, whether the court had jurisdiction of the cause for damage in that locality. The court say, "the only objection made to the jurisdiction is, that there is no tide in the lakes, or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide." The Chief Justice combats this objection to the jurisdiction of the court in that cause, and pronounces for the court that *tide* does not form the criterion of jurisdiction. In my opinion, the argument of the court in favor of jurisdiction is imposing; and also that the objection taken by the appellants, as reported in the opinion, does not embody the strength of the objection to the jurisdiction. To ascertain the scope of the opinion, it is necessary to examine the argument of the court, and the worth of the objection taken to the jurisdiction and combated.

The lakes are certainly not seas according to the signification of that word in the law of nations or the Admiral's commission. They are not common highways for all nations, open to the ships of all, and exempted from the municipal regulation and control of any. The sovereignty over them belongs to the riparian proprietors, in the same manner as over the Rhine or Rio Grande rivers; and the American States and British Queen have respectively courts to administer their laws within the limits of their several titles, to the middle of the lakes, against those who may offend against them. The jurisdiction of the court of admiralty cannot be supported upon the lakes as seas. But the lakes form an external maritime boundary of the United States, and are a commercial highway, which by treaty is common to the inhabitants of the two maritime and commercial countries whose possessions border them. The commerce of these countries is great and growing, and exposed to depredation; and in the absence of a navy, and without defined boundaries, the police of the States on this exposed frontier may be inefficient for the protection of the interests of the Union. I shall not inquire whether these considerations, or those among them which are applicable to the river Mississippi, authorized the decisions in the Genesee Chief *v.* Fitzhugh, 12 How.; and Fritz *v.* Bull, 12 How., 466; Walsh *v.* Rogers, 13 How., 283. I have yielded to the principle of *stare decisis*, and have applied the decisions as I found them when I came into this court. But not one of these considerations has any application to the case before this court. The Alabama river is not an inland sea. Its navigation was not open to a single foreign vessel when this collision took place. No port had been established on it by the authority of Congress. The commerce that passes over it consists mainly of the products of the State, and the objects received in exchange, at the only seaport of the State. For its whole length it is subject to the same State Government, and its police does not involve a necessity for a navy.

The objection noticed in the opinion of the court in the Genesee Chief, as opposed in the argument against the jurisdiction of the court, I have said does not meet the force of the adversary opinion. In France, the domain of the Admiral was limited to the sea, its coasts, ports, havens, and shores to the high-water mark, and his seignoral right to dispense justice was confined to his domain. The contest there was as to the extent of rival seignories. But in Great Britain the contest had a more profound significance than is to be found in a controversy merely between rival feudatories.

The Admiral's jurisdiction there had no relation to the salt-

ness or freshness of the waters, nor whether the rivers were public or private, navigable or floatable. The question was, whether Englishmen should be governed by English laws, or "whether contracts, pleas, and quarrels, should be drawn *ad aliud examen*, and be sentenced *per aliam legem*." The English Commons abhorred the summary jurisdiction of the courts of civil law, their private examination of witnesses, their rejection of a jury of the vicinage, the discretion they allowed to the judge, and their foreign code. They erected a barrier of penal statutes to exclude them from the body of any county, either on land or water.

The people of the several States have retained the popular element of the judicial administration of England, and the attachment of her people to the institutions of local self-government. In Alabama, the "trial by jury is preserved inviolate," that being regarded as "an essential principle of liberty and free government." In the court of admiralty the people have no place as jurors. A single judge, deriving his appointment from an independent Government, administers in that court a code which a Federal judge has described as "resting upon the general principles of maritime law, and that it is not competent to the States, by any local legislation, to enlarge, or limit, or narrow it." (2 Story R., 456.)

If the principle of this decree is carried to its logical extent, all cases arising in the transportation of property or persons from the towns and landing-places of the different States, to other towns and landing-places, whether in or out of the State; all cases of tort or damage arising in the navigation of the internal waters, whether involving the security of persons or title to property, in either; all cases of supply to those engaged in the navigation, not to enumerate others, will be cognizable in the District Courts of the United States. If the dogma of judges in regard to the system of laws to be administered prevails, then this whole class of cases may be drawn *ad aliud examen*, and placed under the dominion of a foreign code, *whether they arise among citizens or others.* The States are deprived of the power to mould their own laws in respect of persons and things within their limits, and which are appropriately subject to their sovereignty. The right of the people to self-government is thus abridged—abridged to the precise extent, that a judge appointed by another Government may impose a law, not sanctioned by the representatives or agents of the people, upon the citizens of the State. Thus the contest here assumes the same significance as in Great Britain, and, in its last analysis, involves the question of the right of the people to determine their own laws and legal institutions. And surely this objec-

tion to the decree is independent of any consideration whether the river is subject to tides, or is navigable from the sea.

This decree derives no strength from the legislation of Congress, but a strong argument is to be deduced from the act of 1845 in opposition to it. The learned author of the opinion in Delovio *v.* Boit, and in the case of the Thomas Jefferson, (Justice Story,) has the reputation of being the author of the act. He proposed to bring under the judicial administration of the United States, cases that did not belong to the jurisdiction of the admiralty under the authoritative exposition of the Constitution by this court. The first suggestion of the feasibility of such a law is to be found in the opinion given in the case of the Thomas Jefferson, in 1825, and is enough to relieve this court from the imputation of having decided that case without a proper appreciation of the magnitude of the question.

The act of 1845 involves the admission, that cases arising on waters within the limits of the United States other than tide-waters were cases at common law, and that a jury, under the seventh amendment of the Constitution, must be preserved. It was framed on the hypothesis that Congress might increase the judicial power of the United States, so as to comprise all cases arising on, or which related to, any subject to which its legislation extended. It is apparent that this court in 1847, and afterwards in 1848, when the suits of Waring *v.* Clark, and the New Jersey Navigation Co. *v.* The Merchants' Bank, were so elaborately discussed, were wholly unconscious of the fact that this act contained a recognition of any jurisdiction in admiralty, additional to what had been previously exercised.

The only inference that can be drawn properly from the act of 1845, in my opinion, is, that Congress recognised the limit that the decisions in the earlier cases in this court had established for the admiralty and maritime jurisdiction, and its own incapacity to confer a more enlarged jurisdiction of that kind.

I have performed my duty, in my opinion, in expressing at large my convictions on the subject of the powers of the courts of the United States under the clause of the Constitution I have considered.

There have been cases, since I came into this court, involving the jurisdiction of the court on the seas and their tide-waters, the lakes, and the Mississippi river. I have applied the law as settled in previous decisions, in deference to the principle of *stare decisis*, without opposing any objection—though in a portion of those decisions the reasons of the court did not satisfy my own judgment. I consider that the present case carries the jurisdiction to an incalculable extent beyond any other, and all others, that have heretofore been pronounced,

and that it must create a revolution in the admiralty administration of the courts of the United States; that the change will produce heart-burning and discontent, and involve collisions with State Legislatures and State jurisdictions. And, finally, it is a violation of the rights reserved in the Constitution of the United States to the States and the people.

TIMOTHY S. GOODMAN, PLAINTIFF IN ERROR, *v.* JOHN SIMONDS.

Where an accepted and endorsed bill of exchange was placed by the drawer as collateral security for his own debt in the hands of his creditor, and when the creditor came to sue the acceptor, the court instructed the jury, "that if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that the drawer had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts," then the jury would find for the defendant—this instruction was erroneous.

The facts of the case examined, to ascertain whether or not there was sufficient evidence to go to the jury upon these points.

This court again says, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity.

Where a party is in possession of a negotiable instrument, the presumption is that he holds it for value, and the burden of proof is upon him who disputes it; an exception being where the defect appears on the face of the instrument.

It is a question of fact for the jury, whether or not the holder had knowledge of defects existing antecedently to the transfer to him.

The English and American cases examined.

Surrendering collateral securities previously given, and affording increased indulgence as to time, furnish a sufficient consideration for the transfer of new collaterals.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

Goodman was a citizen of Ohio, and Simonds of Missouri.

The suit was brought by Goodman, upon the following bill of exchange:

EXCHANGE FOR $5,000.

CINCINNATI, O., *Sept.* 12, 1847.

Four months after date of this, my first of exchange, (second unpaid,) pay to the order of John Sigerson five thousand dollars, value received, and charge the same to account.

Your ob't serv't, WALLACE SIGERSON.

Mr. John Simonds, St. Louis, Mo.

Upon the face of the bill was written, "Accepted, John Simonds;" and endorsed upon the same was the following:

"Pay to T. S. Goodman & Co., or order; John Sigerson."
"Pay W. Nesbit & Co., or order; T. S. Goodman & Co."
"Pay Timothy S. Goodman, without recourse to W. Nesbit & Co."

Two of these parties, viz: John Sigerson and Simonds, lived in St. Louis, and the other two, viz: Goodman and Wallace Sigerson, in Cincinnati. The bill of exchange was sent from St. Louis to Wallace Sigerson, at Cincinnati, endorsed by John Sigerson, and accepted by Simonds, but without date, and without the signature of the drawer.

The narrative of the transactions which led to the possession of the bill by Goodman is given in the opinion of the court.

Upon the trial, there were several rulings of the court, but the one upon which the case came up to this court was the following, viz:

The defendant asked the court to give the following instruction to the jury:

"The defendant moves the court to instruct: If the jury find, from the evidence in the cause, that Wallace Sigerson never had any interest in the bill sued on, nor in the proceeds thereof, nor any authority to use the same for his own benefit, and did dispose of the same for his own benefit to T. S. Goodman & Co., and the plaintiff was at the time one of said firm, and when the bill was so transferred to said firm such facts and circumstances were known to the said Goodman as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that said Wallace had no interest in the bill, and no authority to use the same for his own benefit."

To the giving of which by the court the plaintiff objected, and the court gave to the jury that instruction amended so as to read as follows:

Same instruction, as amended by the court:

"And by ordinary diligence he could have ascertained that said Wallace Sigerson had no interest in said bill, and no authority to use the same for his own benefit, then they will find for the defendant."

To the giving of which, as thus amended, the plaintiff objected, and excepted then and there to the giving of the same to the jury.

Under this instruction, the jury found a verdict for the defendant, and the plaintiff brought the case up to this court.

It was argued by *Mr. Pugh* for the plaintiff in error, and by *Mr. Geyer* for the defendant.

Mr. Pugh made the following points:

I. The title of a holder of negotiable paper, acquired before it was due, for valuable consideration, is not affected by the fraud of a prior party, in the absence of actual notice, without proof of bad faith on the part of the holder.

1. This was the original rule declared in England. (Miller *v.* Race, 1 Bur. R., 452; Price *v.* Neal, 3 Bur. R., 1355; S. C., 1 Blackstone, 390; Grant *v.* Vaughan, 3 Bur. R., 1516; S. C., 1 Blackstone, 485; Anonymous, 1 Ld. Raymond, 738; Peacock *v.* Rhodes, 2 Douglas, 633; Lawson *v.* Weston, 4 Espinasse, 56; Morris *v.* Lee, 2 Raymond, 1396; S. C., 1 Strange, 629.)

2. This rule was afterwards varied, and it was declared that the title of the holder of negotiable paper would not be protected, where it had been acquired under circumstances which ought to have excited the suspicions of a prudent and careful man. (Gill *v.* Cubitt, 3 Barn. and Cress., 466; Down *v.* Halling, 4 Barn. and Cress., 330; Snow *v.* Peacock, 2 Car. and Payne, 215; Beckwith *v.* Corral, 2 Car. and Payne, 261; Snow *v.* Leathem, 2 Car. and Payne, 314; Slater *v.* West, 3 Car. and Payne, 325; Strange *v.* Wigney, 6 Bing., 677.)

3. The rule was again modified, and it was held that the want of care, necessary to impeach the title of the holder of negotiable paper, must have been *gross.* (Crook *v.* Jadis, 5 Barn. and Adolphus, 909; Backhouse *v.* Harrison, 5 Barn. and Adolphus, 1098.)

4. Finally, the original rule was restored, and it was decided that his title would be good, unless the holder was guilty of *bad faith.* Lord Denman said, "We have shaken off the last remnant of the contrary doctrine." (Goodman *v.* Harvey, 4 Adolphus and Ellis, 870; Uther *v.* Rich, 10 Adolphus and Ellis, 784; Arbouin *v.* Anderson, 1 Adolphus and Ellis, N. S., 498; Stephens *v.* Foster, 1 Cromp., Mees., and Roscoe, 849; Palmer *v.* Richards, 1 Eng. Law and Eq. R., 529; Marston *v.* Allen, 8 Mees. and Wels., 494; Raphael *v.* Bank of England, 33 Eng. Law and Eq. R., 276.)

5. The rule is understood in this country according to the latest cases in England. (Story on Bills of Exchange, 194, 416; Hull *v.* Wilson, 16 Barbour S. C. R., 550; Saltmarsh *v.* Tuthill, 13 Ala. R., 390.)

Mr. Geyer made the following points:

The decision of the Circuit Court in overruling the motion of the plaintiff for a new trial not being the subject of review on a writ of error, the only questions for the consideration of this court arise on the instructions given to the jury; and these, the defendant submits, were quite as favorable to the plaintiff as the law would allow.

I. It having been established, by the evidence at the trial, that Wallace Sigerson, the drawer, had no interest in the bill sued on, and no authority to use, transfer, or otherwise dispose of it for his own benefit; that he transferred it to the plaintiff fraudulently, in violation of a special trust, the burden devolved upon him to prove that he acquired the bill in good faith, for a valuable consideration, in the usual course of trade; failing in that, he was not entitled to recover. (Baily *v.* Bidwell, 13 Mees. and W., 73; Harvey *v.* Towers, 6 Welsby, H. and G., p. 656; Monroe *v.* Cooper, 5 Pick., 412; Bissell *v.* Morgan, 11 Cushing, 198; Sanford *v.* Norton, 14 Vermont R., 228; Bertrand *v.* Barkman, 13 Ark., 150: Thompson *v.* Armstrong, 7 Ala. R., 256; Snyder *v.* Riley, 6 Barr. Pa. R., 664; McKeeson *v.* Stansbury, 3 Ohio N. S., 156; Ware *v.* Boydell, 3 M. and S., 148; Beltzhoover *v.* Blackstock, 3 Watts, 26; Vallet *v.* Parker, 6 Wend., 615; Catlin *v.* Hanson, 1 Duer N. Y. R., 322.)

II. The bill was not transferred absolutely and unconditionally, in the usual course of trade, for a valuable consideration. It was delivered to the plaintiff, and received by him, merely as collateral security for an antecedent debt, the general property remaining in the drawer, not in the plaintiff; there was no money, goods, or credit given, or liability incurred; no security or valuable right relinquished by the plaintiff, nor any new and distinct consideration of any kind for the transfer of the bill. Therefore the plaintiff was not a *bona fide* holder for value as against the defendant, so as to exclude the defences which he had against the drawer. (Jenness *v.* Bean, 10 N. H. R., 266; Williams *v.* Little, 11 ib., 66; Coddington *v.* Bay, 20 Johns. R., 637; Wardell *v.* Howell, 9 Wend., 170; Clark *v.* Eli, 2 Sandf. Ch. R., 166; White *v.* Springfield Bank, 1 Barb. S. C. R., 225; Stalker *v.* McDonald, 6 Hill N. Y. R., 93; Petrie *v.* Clark, 11 Sergt. and R., 388; Jackson *v.* Pollock, 2 Miles Pa. R., 362; Evans *v.* Smith, 4 Binney, 366; Napier *v.* Elam, 6 Yerg., 108; Nichol et al. *v.* Bate, 10 Yerg., 429; Kimbro *v.* Lyttle, 417; Van Wyck *v.* Norvell, 2 Humph. R., 192; Prentice *v.* Weisinger et al., 2 Gratton, 262; Bank of Mobile *v.* Hall, 6 Ala. R., 639; Andrews *v.* Brothers & McCoy, 8 ib., 920; Bertrand *v.* Barkman, 13 Ark. R., 150; Anderson *v.* Long, 1 Mo. R., 365; Goodman *v.* Simonds, 19 Mo. R., 106.)

III. It was fully proved, and found by the jury, that the drawer (Sigerson) never had any interest in the bill or its proceeds, and no authority to dispose of it for his own benefit; that, at the time of the transfer, facts and circumstances were known to the plaintiff which caused him to suspect, or would have caused a person of ordinary prudence to suspect, the defect of the title and authority of the drawer, and that by ordi-

nary diligence he might have ascertained that the drawer had no interest in the bill, or authority to use it for his own benefit. The plaintiff must therefore be held to have taken the bill subject to all the defences which the defendant had against the drawer. (Peacock *v.* Rhodes, Douglass, 633; Down *v.* Halling, 4 B. and C., 330; 2 Car. and P., 11; Snow *v.* Peacock, 3 Bing., 406; 2 C. and P., 215; Slater *v.* West, 3 Car. and P., 325; Solomans *v.* Bank of England, 13 East, 135; Gill *v.* Cubitt, 4 Barn. and C., 466; De La Chaumette *v.* Bank of England, 9 Barn. and C., 208; Haynes *v.* Foster, 4th Tyrw., 65; Hatch *v.* Searles, 31 Eng. L. and E. R., 219; Ayer *v.* Hutchins, 4 Mass., 370; Cone *v.* Baldwin, 12 Pick., 545; Hall *v.* Hale, 8 Con., 336; Beltzhoover *v.* Blackstock, 3 Watts, 25; McKeeson *v.* Stansbury, 3 Ohio N. S.; Russell *v.* Haddock, 3 Gil. Ills., 233; Nicholson *v.* Patton, 13 La. R., 216; Lapice *v.* Clifton, 17 ib., 152; L'Anfear *v.* Blosman, 1 La. An. R., 156; La. State Bank *v.* N. O. Nav. Co., 3 La. An., 294; Fowler *v.* Brantly, 14 Pet., 318; Andrews *v.* Pond, 13 Pet., 79.)

Mr. Geyer then proceeded to review the cases and elementary authorities in an elaborate argument, which would doubtless be interesting to the profession, if the reporter had room to insert it. But he can only find space for the concluding part, which was as follows:

This review of the adjudged cases in England exhibits the concurrent authority of all the decisions in bank in support of the doctrine that the holder of a negotiable instrument, who has taken it without reasonable caution, and under circumstances which ought to have excited the suspicion of a prudent and careful man that it was not good, is not protected against the defences of prior parties. It is claimed, however, that this doctrine has been overruled by more recent decisions. (Crook *v.* Jadis, 5 Bar. and Ad., 909; Backhouse *v.* Harrison, ib., 1098; and Goodman *v.* Harvey, 4 Ad. and E., 870.) And it must be conceded that they do in terms repudiate that doctrine, so long and so firmly established; but it may well be questioned whether they are of sufficient authority to overturn it and change the law in England, or induce the American courts to abandon it.

The case of Crook *v.* Jadis was an action by an endorsee against the drawer of an accommodation bill; it was tried at the Middlesex sittings, after Michaelmas term, 1833, before Denman, Ch. J., who told the jury to find for the plaintiff, if they thought he had not been guilty of *gross negligence* in taking the bill under the circumstances given in evidence. The jury having found for the plaintiff, the counsel for the defendant moved for a new trial, citing Down *v.* Halling. The motion

was disposed of in a very summary way by the court in bank. Denman, Ch. J., said: "I used the expression *gross negligence* advisedly, because I *thought* nothing less ought to have prevented the plaintiff recovering on the bill." Littledale, J., who had approved the existing doctrine in Rothschild *v.* Corney et al., 9 B. and C., 388, said: "There must be gross negligence *at least, in a case like the present,* to deprive the party of his right to recover on a bill of exchange." Taunton, J., said: I think the case was properly submitted to the jury. *I cannot estimate the degree of care which a prudent man should take.* The question put by the Lord Chief Justice, whether the plaintiff was guilty of *gross negligence,* was more definite and appropriate." Patteson, J., said: "I *never could understand* what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man." In Backhouse *v.* Harrison, decided at the same term, the same doctrine was held, on the authority of Crook *v.* Jadis; no additional reasons are given for the opinion, except that Patteson, J., had "*no hesitation* in saying that the doctrine first laid down in Gill *v.* Cubitt, and acted upon in other cases, has gone too far, and ought to be restricted." In Goodman *v.* Harvey, decided in 1836, a non-suit was taken, and the case came before the court in bank, on a rule *nisi* for a new trial. The only opinion reported was by Lord Denman, Ch. J., who said: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides,* but it is not the same thing. We have *shaken off* the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

The ruling in the last case is at variance with the decisions in the two preceding, made by the same court only two years before, and is coincident with the doctrine urged by Mr. Denman, as counsel in Down *v.* Halling, without success. In all of them it is assumed that the holder is not affected by constructive notice of the defect or infirmity in the title. In neither of them is the decision placed upon principle or authority, or sustained by any intelligible judicial reasoning. Decisions so arbitrary and inconsistent cannot be regarded as of sufficient authority to overturn the doctrine established by an uninterrupted series of decisions by the Courts of King's Bench, Common Pleas, and Exchequer, and founded on principle as well as authority.

The more recent cases cited in support of the doctrine of Lord Denman are, Stevens *v.* Foster, 1 Crom. Mer. and R., 849; Uther *v.* Rich, 10 Ad. and E., 784; Arbouin *v.* Anderson, 1 Ad. and E., N. S., 498; and Masters *v.* Ibberson, 1 Com. and B., 100. In the first of these cases, the question was not made, but the case was considered by the court in bank, together with Foster *v.* Pearson, arising out of the same transaction; and it was in reference to the direction given to the jury at the trial of the latter case, (as in Gill *v.* Cubitt,) that Baron Park, in delivering the judgment of the court, expressed a doubt of its propriety, especially since the decisions of the King's Bench, in Crook *v.* Jadis, and Backhouse *v.* Harrison, but said it was unnecessary to decide the question then, and, assuming the direction to be correct, decided the case on other grounds.

In the other cases, the questions arose on the pleadings, under the new rules. In Uther *v.* Rich, decided in 1839, the sole question was, whether *mala fides* is alleged by an averment in a plea that the plaintiff was not a *bona fide* holder of the bill. Lord Denman said: "That the court adhered to the decision in Goodman *v.* Harvey, from which it followed that in pleading, *mala fides* must be distinctly averred." In Arbouin *v.* Anderson, decided in 1841, Lord Denman took occasion to say that, "acting upon the case of Goodman *v.* Harvey, which gives the law now prevailing on the subject, we must hold that the owner of a bill is entitled to recover upon it, *if he has come by it honestly*, and that the fact is implied by possession; and that, to meet the inference so raised, fraud, felony, or some such matter, must be proved." In Masters *v.* Ibberson, decided in 1849, (an action by the second endorsee against the maker of a note,) the defendant pleaded that the note was obtained from him by a person—not a party—and others in collusion with him, by fraud, and that there never was any value or consideration for either of the endorsements. This plea was held bad on special demurrer, because it did not allege that the payee was a party to the fraud, or had given no consideration for the note.

It does not appear that the doctrine in the case of Goodman *v.* Harvey has been held by any court except the King's Bench; and in the case of Hatch *v.* Searles, decided in 1854, (31 Eng. Law and Eq. Rep., 219,) the doctrine repudiated by the King's Bench was distinctly asserted. In a suit for the administration of the estate of a deceased person, a claim was made by the holder of a bill of exchange to be admitted as creditor; but it being proved that the holder, who was endorsee of the bill, was aware of the fact of the acceptance being in blank, it was held that he must be taken to have had as full knowledge

of the circumstances of the origin of the bill as he might have acquired if he had made proper inquiry; that is, the facts and circumstances known to the holder at the time of the transfer amount to constructive notice of the defect or infirmity of the title, and this is no doubt the true ground. It is agreed on all sides that express notice is not indispensable, and constructive notice will have the same effect, and the facts and circumstances which will amount to actual or constructive notice may not be sufficient to prove fraud or *mala fides* in the holder.

The American courts do not appear to have had much difficulty at any time in determining what facts and circumstances would amount to actual or constructive notice of any defect or infirmity in a bill. In every case in which the question was presented, (with the exception of one in Georgia,) the language of the judges as to the necessity of caution on the part of the holder, and of inquiry when he had cause to suspect the title to a bill, has been explicit. Before the decision of the case of Gill *v.* Cubitt, the doctrine it recognises had been held in two of the States, by courts of as high authority on questions of commercial law as any of the courts of England or any other country.

As early as 1808, the Supreme Court of Massachusetts held, in Ayer *v.* Hutchins, (4 Mass. R., 470,) that "where the endorsee receives the note under circumstances which might reasonably excite suspicion, he ought, before he takes it, to inquire into its validity, and if he does not, he takes it subject to any legal defence that could defeat a recovery by the payee. In 1815, the Supreme Court of New York, in Wiggin *v.* Bush, (12 John. R., 305,) where the note sued on was dated 24th May, and it appeared by an endorsement that it was in fact made 22d April, held that by the endorsement on the note of the real date, the plaintiff (endorsee) had information which ought to have led to inquiry into the manner in which the note had been obtained by the payee; the past dating a note which was endorsed, was an extraordinary circumstance, and ought to have excited suspicion, and that their neglect to make the inquiry subjected them to all the consequences of the transaction between the immediate parties.

In the next case in order of time, Brown *v.* Tabor, (5 Wend., 566,) decided in 1830 by the Supreme Court of New York, the defendant was an endorser for the accommodation of the maker of a note of sixty days, with a view to obtain a discount at the bank, which being refused, the maker passed the note, with the bank marks upon it, to the plaintiff, for lottery tickets; held that the circumstances combined were sufficient to put the plaintiff upon the inquiry, and that he was chargeable with

notice of the misapplication of the note, and that the endorser was not liable. In Hall *v.* Hale, (8 Conn., 336,) decided by the Supreme Court of Connecticut in 1831, the actual good faith of the plaintiff was not impeached, and the case turned upon the question whether he had exercised due caution in receiving the transfer. Hosmer, Chief Justice, delivering the opinion of the court, said: "That the law was well settled, that if an indorsee take a bill without due caution, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker, acceptor, or prior endorser, may be let into his defence;" and he cited Gill *v.* Cubitt, among other cases, as authority. The verdict, however, was set aside, because the judge at the trial had misled the jury by requiring the utmost possible caution. In Cone *v.* Baldwin, (12 Pick., 545,) the court upon the whole case gave judgment for plaintiff, endorsee, against the maker of the note. But Wilde, J., delivering the opinion of the court, said: "It is not necessary for the defendant, in order to set up his defence, to prove that the plaintiff had full knowledge of the want or failure of consideration. If the circumstances attending the transfer are such as to put him upon his guard, he is bound to make inquiry, and if he does not, he purchases at his peril."

The Supreme Court of Tennessee, in Hunt *v.* Sanford, (6 Yerg., 387,) held that the endorsee or purchaser of a bill or promissory note must exercise due caution; and if he takes it under circumstances which might reasonably create suspicion that it was not good, he takes it at his peril; therefore, where a note of a solvent maker is sold at a very great discount, with an agreement on the part of the purchaser to pay a further sum if the note is collected without suit, the purchaser is subject to the same defence as the party from whom he purchased. In Beltzhoover *v.* Blackstock, (3 Watts Pa. R., 25,) Sergeant, J., said: "I concur in the position, that if an endorsee take a note heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or prior endorsee may be let in to his defence." In Nicholson *v.* Patton, (13 La. R., 216,) the Supreme Court of Louisiana, (in 1839,) three years after the decision in Goodman *v.* Harvey, took the rule in Gill *v.* Cubitt as their guide, and held that where a note is taken by a broker, under circumstances affording reasonable ground of suspicion, questions must be asked and inquiries made, whether the party from whom it is received came by it honestly; and if he take it without such inquiry, with a view to profit, it is at his own risk. The same doctrine was held in Lapice *v.* Clifton, (17 La. R., 152.)

In Andrews *v.* Pond et al., (13 Pet., 65,) an action on a bill

of exchange by the third endorsee against the first endorsers, the bill had been protested for non-acceptance while in the hands of the second endorsee, and that fact appeared on the face of the bill when received by the plaintiff. In delivering the judgment of the court, Chief Justice Taney said: "A person who takes a bill which upon the face of it was dishonored cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. There can be no distinction between a bill transferred after it is dishonored for non-acceptance, and one transferred after it is dishonored for non-payment." In Fowler *v.* Brantly, 14 Pet., 318, the note sued on was in a peculiar form prescribed by the Branch Bank at Mobile, when desired to be discounted for accommodation, made payable to the cashier or bearer, signed by the defendants, with a written order, also signed by them, to credit a person who was their factor, and to whom the note was sent to be offered for discount. The bank refused to discount it, and the figures "169" were written in pencil on its face, according to the usage of the bank in such cases. The factor sold the note, and applied the proceeds to his own use, and it was received by the plaintiff from a subsequent holder, in part payment of a precedent debt. Held, that "the note carried on its face circumstances of suspicion so palpable as to put those dealing for it before its maturity on their guard, and as to require at their hands such inquiry into the title of those through whose hands it had passed. Failing to be thus diligent, they must abide the consequences their negligence imposed, and could not recover, though they had not, *in fact*, knowledge of the fraud."

In Sanford *v.* Norton, 14 Vermont R., 228, A. D. 1842, Redfield, Judge, delivering the judgment of the court, said: "When it is shown that a note or bill was without consideration, or void in its inception, being obtained by force or fraud, or had been lost, this does so far impeach the title of the holder as to impose upon him the obligation of showing that he paid value, and in many cases that he was guilty of no want of ordinary care in taking it. Gill *v.* Cubitt, which has reference to lost notes, turns upon the point of their being taken without due caution. Some of the later cases, in regard to this particular point, seem to have receded a little from this case; but the doctrine of Gill *v.* Cubitt is in the main adhered to, and we do not well see how any other rule could consist with any tolerable regard to justice." The Supreme Court of Illinois, in McConnell *v.* Hodson, 2 Gilm., 640, and Russell *v.* Haddock,

3 Gilm., 233, A. D. 1846, held, that where a party is about to receive a bill or note, and there are any suspicious circumstances accompanying the transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder or the consideration of the paper, he will be bound to make such inquiry; and if he neglects so to do, he takes the paper subject to any defences of the prior parties.

The case of Mathews *v.* Poythess, 4 Georgia R., 287, A. D. 1848, is the next in the order of time. It is the first and only reported case in which an American court has held the late doctrine of the King's Bench. The conclusion of the court in that case is, that the title of the purchaser is not defeated by the want of such caution on his part as a careful or prudent man would take in his own affairs, nor by gross negligence; that it may be defeated by proof of *mala fides* in the purchaser; that *mala fides* is *notice actual or constructive of the fact* that the security is not the property of the person who offers it, *and a privity with or participation in the fraud* upon the true owner; and that the want of proper caution, or any fact that legitimately goes to show such *notice*, *privity*, or *participation*, may be submitted to the jury, subject to the direction of the court." The extreme doctrine of this case, if established, would be very acceptable, no doubt, to those dealers whose usual business is ordinarily conducted behind a screen, who, if allowed to keep their own secrets, will take the risk of proof of notice *and* privity with or participation in the fraud or robbery, by which the paper was obtained, and, if it should happen in any case that such proof could be made, he could and would bring his suit in the name of some confederate against whom the proof could not be made. Fair dealers need no concealment, and the experience of half a century in this country has demonstrated that the rule first laid down in Ayer *v.* Hutchins, 4 Mass. R., 470, while it has led to greater caution in receiving bills and notes, has not restrained the circulation of negotiable paper among fair dealers. It has promoted the administration of justice, without prejudice to the interests of commerce.

In the same year, (1848,) the subject was again under consideration of the Supreme Court of Louisiana, in the case of the Louisiana State Bank *v.* The New Orleans Navigation Co., 3 La. An. R., 294, when it was held that express notice is not necessary to charge the holder with what the law considers to be notice of any defect or infirmity in a note or bill, so as to let in a defence against a holder for value; it is sufficient if the attending circumstances are of such a positive and pointed character as to cast a shade upon the transaction, to put the holder upon inquiry. In Ohio, in 1853, it was held in McKeeson *v.* Stans-

bury, 3 Ohio R., N. S., 156, that although a *bona fide* holder of negotiable paper, received before due for a valuable consideration, shall be protected against the defences which the maker might have against the payee, yet in this case, as in every other, it is the duty of every person to use ordinary care and prudence in his transactions, to prevent their operating to the prejudice of the rights of others; and where the transfer is fraudulent, the holder, claiming under such a transaction, is bound to show that he acted honestly and without knowledge of the fraud.

In the case of Holbrook et al. *v.* Mix, 1 E. D. Smith R., 152, New York Court of Common Pleas, 1851, the defendant endorsed the note sued on for the accommodation of the makers, from whom it was obtained by false and fraudulent representations, by one Beach, who, being indebted to the plaintiffs, enclosed the note to them in a letter, requesting them to pass the note to his credit, saying, that as he understood it would be contested, he did not endorse it. The plaintiffs passed the note to his credit, less the interest. It was held that the plaintiffs had not received the note in due course of trade, and that the circumstances under which it was received deprived the plaintiffs of all claim to be regarded as *bona fide* holders for value, without notice of the fraud.

It is a well-established principle, that whatever is notice enough to excite attention, and put a party on its guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed to have notice of it. (Kennedy *v.* Green, 3 Mylne and K., 719; Sugden V. and P., 1052.)

"The principle of the doctrine of constructive notice is, that when a person is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry into the facts is a moral duty, and diligence, an act of justice. Hence, he proceeds at his peril when he omits to inquire, and is chargeable with a knowledge of all the facts that by a proper inquiry he might have ascertained. This neglect is followed by all the consequences of bad faith, and he loses the protection to which his ignorance, had it not proceeded from neglect, would have entitled him." (Per Duer, J., in Pringle *v.* Phillips, 5 Sand. R., 157.)

"Nor is constructive notice an arbitrary doctrine, or an unwise attempt to enforce by law a rule of morality. It is founded upon a deep knowledge of human nature, and is justified by the soundest reasons of public policy. It will rarely happen that a knowledge of the fraud, or other fatal vice, by which

the title he received was infected, can be brought home to the purchaser by positive evidence; yet to release him in all cases from the obligation to inquire, is to determine that, in all cases, such evidence shall be given. On the other hand, when it is manifest to the minds of a jury that just grounds of suspicion existed, we may be certain, as a general rule, that the suspicion was felt by the purchaser, and that he chose not to inquire, because he was resolved not to know. Constructive notice may doubtless operate, in some cases, to defeat the title of deceived and innocent purchasers, but its general effect is to reach those who meant, by their voluntary ignorance, to cover their fraudulent intent; and it is in truth so essential to the protection of deceived and innocent owners, that to abolish it would be to encourage, if not by the promise, yet by the certain hope of impunity, dishonesty, collusion, and fraud." (Ibid.)

The decisions which have been cited of all the courts of England in bank prior to 1834, and of the American courts at all times, with a single exception, are but the application of the general principles to particular cases. That principle applied to this case is decisive against the plaintiff, as well upon the undisputed facts proved at the trial as those found by the jury.

It was proved beyond controversy that the plaintiff took the bill with a full knowledge of several facts and circumstances, each one of which has been held sufficient to charge a holder of negotiable paper with notice of defects or infirmities in the title. He took the bill which he had refused to discount, from his debtor, known to be insolvent, merely as a pledge to secure a desperate debt. (See Eagan *v.* Threlf et al., 5 Dowl. and R., 326; Bay *v.* Coddington, 5 J. C. R., 54.) He received it with a knowledge that it had been a long time in the hands of his debtor in blank, while he was in pecuniary difficulties. (Hatch *v.* Searles, 31 English Law and Eq. R., 219.) He not only knew the bill to be falsely dated, but he himself filled the blank with the false date it bore. (Wiggin *v.* Bush, 12 John. R., 305.) He attempted to pass it off, not only without the endorsement of his firm or his own, (Holbrook *v.* Mix, 1 E. D. Smith R., 112,) but gave a false reason for refusing to endorse. Neither the plaintiff nor his firm had authority to sell the bill for another; on the contrary, they had stipulated not to dispose of it, nor put it into circulation before the maturity of the notes of their debtor; the demand by the debtor of such a stipulation was alone sufficient to put the plaintiff and his firm on their guard. Under these circumstances, the plaintiff cannot complain if he is held to have taken the bill subject to the defences of the defrauded acceptor.

The facts found by the jury admit of no other conclusion

than that the plaintiff either had actual notice that the drawer had no title or interest in the bill, and no authority to dispose of it for his own use, or that he had a suspicion of the fact, and abstained from inquiry for the purpose of avoiding notice; which would be sufficient to establish a charge of guilty knowledge, even in a criminal case. If it appeared that a party charged with receiving stolen property of any kind, knowing it to be stolen, had received it "with a knowledge of facts and circumstances which caused him to suspect, or would have caused a person of ordinary prudence to suspect, that it was stolen, and that he could have ascertained the fact by the use of ordinary diligence," he could not have escaped conviction on the plea that he had taken it to secure a debt which had become desperate by insolvency of the debtor, and "was not bound to take care of the interest of third persons." The same state of facts appearing in a transaction requiring good faith and due diligence on the part of the holder, by the commercial law which he invokes, cannot be less than proof of notice of everything which might have been ascertained by the use of ordinary diligence.

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a writ of error to the Circuit Court of the United States for the district of Missouri.

Timothy S. Goodman, a citizen of the State of Ohio, complained in the court below of John Simonds, a citizen of the State of Missouri, in a plea of trespass on the case upon promises. The declaration was filed on the first day of March, 1854. It contained two counts—one upon a bill of exchange, and the other upon an account stated. At the April term following, the defendant appeared and pleaded the general issue, which was joined, and several special pleas in bar of the action. The special pleas were held bad on demurrer, and at the October term, 1855, the parties went to trial on the general issue. Robert M. Nesbit, a witness called for the plaintiff, testified that he was a notary public of the county of St. Louis; and that, as such, on the fifteenth day of January, 1848, he presented the bill in suit for payment to John Simonds, the acceptor, who refused to pay it, and that he afterwards gave due notice of the presentment and refusal to both endorsers. And the witness further testified, that he was well acquainted with the signatures of all the parties to the bill, except that of the drawer, and that they were genuine. Whereupon the plaintiff read in evidence the bill of exchange described in the first count of the declaration, together with the endorsements thereon, as they appear in the record. W. Nesbit & Co. were merely nominal hold-

ers of the bill, never having had any interest in it, and only endorsed it to the plaintiff for the greater convenience in bringing the suit. Evidence was then introduced on the part of the defendant, exhibiting substantially the following state of facts: On the twenty-first day of June, 1847, the defendant addressed a letter to Wallace Sigerson, who resided at Cincinnati, informing him that he wished to avail himself of banking facilities in that place, to carry on certain business, in which he and John Sigerson had determined to engage, and asking his assistance, as a correspondent, to negotiate discounts, enclosing at the same time his letter of credit for ten thousand dollars, and two bills of exchange, each for the sum of five thousand dollars, and suggesting in the same letter that they should require some twenty to twenty-five thousand dollars during the next four or five months, in sums of about five thousand dollars, as the same could be used from time to time. In the same letter also he instructed his correspondent to negotiate five thousand dollars immediately, authorizing him to use for that purpose either the letter of credit or the bills of exchange. When those bills were transmitted to Cincinnati, they were in all respects perfect bills of exchange, except that the name of the drawer was wanting, and they were without date. They were both made payable to the order of John Sigerson, and by him endorsed in blank, and were accepted by the defendant. Soon after their receipt, Wallace Sigerson, as drawer, procured one of the bills to be discounted according to his instructions, and remitted the proceeds, or a part thereof, to the defendant; and it also appeared that, during that season, he procured other bills of the same kind, to be discounted for the same parties, to the amount of twenty-five thousand dollars. The other bill forwarded at that time is the one now in suit. Wallace Sigerson had also large transactions of his own, the same season, amounting to four hundred thousand dollars. Many of his own transactions were with his brother, John Sigerson, who was the payee and endorser of this bill, and was jointly engaged in the same business with the defendant. He and his brother interchanged accommodation paper, and some of their acceptances were regularly discounted in bank, and it did not appear that any complaint was made, either by the acceptor or endorser, that this bill had not been accounted for or returned. There were dealings, also, the same season, between T. S. Goodman & Co. and Wallace Sigerson. They made a settlement on the twelfth day of October, 1847, when it was ascertained that the amount due to T. S. Goodman & Co. was about five thousand six hundred dollars, arising principally from notes discounted, secured by bills of exchange as collaterals, on which nothing

had been realized. At the settlement, the debt was divided into two notes, one having sixty and the other seventy-five days to run; and Wallace Sigerson testified that he gave his two notes in payment of the debt, and left this bill as collateral security to the notes, fixing the dates so that the notes would mature twelve or fifteen days before the bill. Two drafts on Ravisess, Bulock, & Co., previously held as collaterals, were embraced in the settlement, and formed a part of the indebtedness for which the notes were given; and McDonald, who was the book-keeper of the plaintiff's firm, and a witness for the defendant, testified he knew of no other collateral security than this bill, which the firm held for those notes. It would seem, therefore, that all the prior collaterals were surrendered to the defendant at the settlement. There is some confusion, and perhaps uncertainty, in the evidence reported, respecting the history of the bill from the time it went into the possession of Wallace Sigerson till it was thus placed in the hands of T. S. Goodman & Co., as collateral security to the above-mentioned notes. It may, however, be gathered from the testimony of Wallace Sigerson, that he first offered it for discount to the Ohio Life and Trust Company, and shortly afterward to the plaintiff, for the same purpose, and that the plaintiff declined to discount it, but soon after took it as collateral security for temporary loans. How long the bill remained in the possession of the plaintiff as collateral security for temporary loans does not appear, nor for whose benefit the money was obtained. When the settlement took place, Wallace Sigerson told the plaintiff that he had a right to use the bill, and the plaintiff agreed that it should not be sent to St. Louis for collection till after the maturity of the notes to which it was collateral. Nothing of the kind was agreed when it was left as collateral security for temporary loans. Wallace Sigerson became the drawer of this bill, as he had previously done with respect to the other, which was sent him at the same time, and filled up the date, but whether at the time of the settlement, or previously, was not entirely certain. He failed in business in November, 1847, and on the twentieth day of the same month, T. S. Goodman & Co. addressed a letter to C. W. Clark & Brothers, enclosing this bill, and requesting them to pass it at the least rate, not exceeding twelve per cent. interest, saying, "We do not endorse it, as we are selling it for another; and when L. C. Clark, one of that firm, a few days afterward offered the bill for sale to the defendant, "he said it was a forgery of his name; that Wallace Sigerson had no authority to use it." At the trial, the court, on the prayer of the plaintiff, instructed the jury to the effect, that if the plaintiff acquired the bill of Wallace Sigerson as

collateral security without notice of his want of authority to transfer it, that the plaintiff was unaffected by such abuse of trust, and that the defendant was precluded from setting it up as a defence in this suit, to which no exceptions were taken. We pass over the first instruction given to the jury on the prayer of the defendant, for the same reason that it was not excepted to, and proceed to examine the second, as amended by the court, which presents the principal subject of controversy at the present time. It was to the effect, that "if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that Wallace Sigerson had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts, then the jury will find for the defendant."

I. The general question which the bill of exceptions presents, arising upon that instruction, is certainly one of very considerable importance, especially to the mercantile community, as it affects the transfer and free circulation of bills of exchange and promissory notes, which, by virtue of their negotiable quality, constitute the principal medium for the transaction of their business affairs. There is, however, some reason to doubt whether the evidence at the trial furnished any proper basis for the application of the instruction in this case, even supposing the principle announced to be correct as an abstract proposition; and this gives rise to a preliminary question, which will be first considered, whether the instruction ought not to be regarded as objectionable on that account. When a prayer for instruction is presented to the court, and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule, if it is given under such circumstances, it will be error in the court, for the reason that its tendency may be and often is to mislead the jury, by withdrawing their attention from the legitimate points of inquiry involved in the issue. All that was shown at the trial, in addition to the description of the bill, was the refusal of the plaintiff to discount it when it was offered for that purpose, his possession and control of it shortly after, as a pledge for temporary loans, and the subsequent transfer of the bill to him as collateral security at the settlement, together with the circumstances of that transaction, and what appeared in the letter of T. S. Goodman & Co., transmitting the bill to St. Louis for sale. Other circumstances are adverted to in the printed argument for the defendant; but as they do not appear to be sustained by the evidence in the case, they are omitted. Nothing transpired when the bill was offered for discount, more than

what occurs on similar occasions in the daily transactions among business men. It was offered and declined, and that was the whole transaction, so far as it was disclosed in the evidence. No reasons were assigned by the plaintiff for declining, and none were asked for by the holder, who offered the bill. Mere speculative inferences are never allowable, and cannot be regarded as evidence. The refusal to discount the bill might have been for the reason supposed in the instruction; and so also it might have been for a very different reason, such as a prior obligation to other customers, want of available funds, or from a desire for farther information as to the pecuniary standing of the parties to this bill; and whether it was for any one of the reasons suggested, or some other, in the absence of any explanation, was a mere naked conjecture. Another answer may also be given to this suggestion, which is equally decisive, and that is the subsequent conduct of the plaintiff in taking the bill as a pledge for temporary loans, which seems to negative the supposition altogether that the previous refusal to discount it was on account of any suspicion he entertained, either as to the genuineness of the paper or of the authority of the holder to pass it. Some time elapsed, after the bill was offered for discount, before it was finally transferred to the plaintiff, and that fact undoubtedly was well known to the plaintiff at the time of the transfer; and so also was the more important one in this investigation, that during all that time the bill remained in the custody or under the control of Wallace Sigerson, as the ostensible owner, and that he claimed and exercised over it all the rights of a holder for value. If these circumstances are taken in connection with each other, as they unquestionably should be, there can be no doubt they were far better suited to inspire confidence in the title of the holder than to excite suspicion in regard to his authority to pass the bill; and if they had that effect, it was plainly the fault of the defendant in executing and forwarding the bill to his correspondent, and in intrusting it to his control, and suffering it to remain in his custody without inquiry or complaint. The want of date to the bill at the time it was offered for discount, under the circumstances disclosed in the evidence, was entirely an immaterial consideration. When the defendant sent the bill to Wallace Sigerson, endorsed in blank and without date, and intrusted it to his care and discretion, to be used for his own benefit, he thereby empowered him to fill the blank, as a necessary incident to the trust conferred, just as effectually as if the authority had been expressly delegated by the terms of the letter in which it was sent. Nor was it of any consequence that it was antedated, as compared with the time

when it was passed to the plaintiff, inasmuch as it was filled up by his own correspondent, before he parted with its possession and control, and was actually made to bear date subsequent to the time when it was received from the defendant. In filling it up, he but carried into effect one of the purposes for which it had been forwarded, as is plainly indicated from the general scope and design of the letter. He was authorized to use the bill to raise money for the benefit of the defendant; and in order to use the bill for that purpose, it must have been expected that he would become the drawer, and fill up the date at his discretion. Independently, however, of the terms of the letter, it may be asserted, as a general principle, that where a party to a negotiable bill of exchange or promissory note intrusts it to the custody of another, when it is without date, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such bill or note carries on its face an implied authority to fill up the blank; and, as between such party to the bill or note and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such bill or note to his custody, and as acting under his authority, and with his approbation. (Mitchel *v.* Carver, 10 Wend., 336 and note.)

The general doctrine on this subject, and the reasons on which it is founded, are stated by Shaw, C. J., in Androscoggin Bank *v.* Kimball, (10 Cush., 373,) as follows: "The rule is very clear, that if one party, intending to accommodate another, signs his name to a blank paper, he authorizes the other to whom he delivers it, and for whose accommodation it was made, to fill up the blank; and the filling up, being done by his authority, is his act, and he is bound by it; and we concur in the principle, and think it applies with even more force when it was done for his own benefit, as in this case." (Violet *v.* Patton, 5 Cran., 142; Russell *v.* Langstaffe, 2 Doug., 514; Collis *v.* Emmet, 1 H. Back, 313; Montague *v.* Perkins, 22 Eng. L. and Eq., 516.)

The circumstances thus far considered we think afforded no ground of inference whatever to support the theory of fact assumed in the instruction. But it is more difficult to dispose of those that follow in the same way, on account of the extremely indefinite nature of the inquiry arising under the instruction. One man is more readily influenced to suspect fraud in matters of business than another, and the same individual may be differently impressed by similar transactions occurring at different times under *precisely* similar circumstances; so that in some cases, where the evidences to excite suspicion were

slight, it might be impossible to determine whether they were or were not of a character to be regarded as tending to support an issue like the one presented under the first branch of the instruction, without first ascertaining the general characteristics of the mind of the individual who was the subject of the inquiry, and his usual habit in conducting his business affairs. A striking illustration of the difficulty attending the investigation is to be found in the instruction itself, assuming for the present that it must be understood according to the usual import of the language employed. Under its first branch it was necessary, in order to relieve the defendant, that the jury should find that such facts and circumstances were known to the plaintiff as caused *him* to suspect the title or authority of the holder to transfer the bill. But the jury might come to the conclusion that the plaintiff was thoughtless, confiding, or inattentive on the occasion, and that he in fact took the bill without any such suspicion; and to guard against the effect of such a finding, the second branch of the instruction was framed, and under that it was of no consequence whether the plaintiff himself suspected the title of the holder or not, as the defendant was nevertheless to be fully exonerated if the jury found that such facts and circumstances were known to him as would have caused one of ordinary prudence to suspect, and by ordinary diligence he could have ascertained, the true state of the title. Here was an attempt to prescribe a standard in the investigation, by which the degree of suspicion intended to be required to defeat the claim of the plaintiff could be ascertained and measured by the jury; but under the first branch of the instruction no such attempt was made, and no other criterion was furnished to guide the jury in their deliberations, than mere naked suspicion; and consequently, if the jury believed, from the evidence in the case, that the plaintiff at the time of the transfer suspected the title or authority of the holder to pass the bill, no matter how slight his suspicions were, they were directed to return their verdict for the defendant. With this explanation as to the nature of the present inquiry, we will proceed to notice the remaining circumstances relied on as evidence in the case to support the instruction. They consist of the knowledge that the plaintiff is supposed to have acquired at the settlement, that Wallace Sigerson was embarrassed in his business affairs, and of the subsequent conduct of his firm, in forwarding the bill to St. Louis before the maturity of the notes, and the remark in their letter that they did not endorse the bill, as they were selling it for another. These circumstances are consistent with the proposition of fact assumed in the instruction; and though they are susceptible of an entirely

different explanation, yet perhaps it would be going too far to say, as matter of law, that they afforded no ground of inference in the direction supposed by the defendant. We think, therefore, that the judgment ought not to be reversed on the ground that there was no evidence in the case to authorize the instruction. We say so, however, in reference to the peculiar issue arising under that instruction, and the form of the questions submitted to the jury, and not in respect to any different issue which may properly arise hereafter in cases of this description. There is a wide difference between suspicion and knowledge in respect to the subject-matter under consideration, and even as between the evidences of suspicion, and such as would show gross negligence on the part of a banker or business man when discounting or purchasing negotiable paper transferable by delivery. A person may often suspect in matters of business what in fact he does not believe, and experience teaches that he will sometimes suspect what he has no reason to believe, and that too when the evidences to excite suspicion are so slight that he himself would scorn to acknowledge them as the basis of his action in the premises. Evidence merely tending to show, as in this case, that a party, in acquiring a negotiable bill of exchange or promissory note, suspected the title of the holder at the time of the delivery, would clearly be insufficient to authorize the conclusion that he was guilty of gross negligence when the transfer was made, and it would hardly constitute an approach towards proof that he had knowledge that such holder, who was known to be dealing in such paper, and claimed the right to use it, was guilty of any breach of trust in passing it.

II. The more important question, whether the instruction was correct, remains to be considered; and in approaching that question it becomes necessary, in the first place, to ascertain what the instruction was, and to deduce from it the principle of commercial law which was applied to the case. It was somewhat peculiar in its language, and, in fact, contained two distinct propositions, differing essentially in certain aspects, and not entirely reconcilable with each other; and yet we cannot doubt that the Circuit Court, in giving the instruction to the jury, intended to apply the doctrine to the case, that the title of the holder of a negotiable bill of exchange acquired before maturity is not protected against prior equities of the antecedent parties to the bill, where it was taken without inquiry, and under circumstances which ought to have excited the suspicions of a prudent and careful man. Such was certainly the general scope of the instruction, especially its second proposition; and such, it may be presumed, was the general

principle intended to be embodied in the questions submitted to the jury. They have been so treated here in the oral argument for the plaintiff, and were treated in the same way in the printed argument filed for the defendant. Whether either or both of the questions, in the form in which they were submitted, were objectionable as involving a departure from the doctrine intended to be applied, it will not become necessary to inquire. One thing is certain—if the general principle cannot be sustained, there is nothing in the features of the departure from it, or the particular phraseology of the questions submitted, to benefit the defendant. Undoubtedly the same general idea pervaded the instruction, though the questions were submitted to the jury in different forms, in order to meet the different aspects of the evidence in the case. It was to the effect, that if the plaintiff had acquired the bill under the circumstances described in either branch of the instruction, then he had acted without due caution, and was not entitled to recover. All the other grounds of defence had been provided for in other prayers for instruction. This one was obviously prepared to raise the single question, whether the plaintiff had acted with due caution in acquiring the bill, and consequently assumed all the other requisites of a good title in favor of the plaintiff. The only question, therefore, arising under the instruction, is, whether the rule of commercial law applied to the case was correct. Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by endorsement; or when endorsed in blank, or made payable to bearer, they are transferable by mere delivery. The law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well-defined and correct exposition of the rights of a *bona fide* holder of a negotiable instrument was given by this court in Swift *v.* Tyson, (16 Pet., p. 1,) as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we

now repeat, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect. Such being the settled law in this court, it would seem to follow as a necessary consequence from the proposition as stated, that if a bill of exchange endorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and that he would be entitled to recover the amount. The law was thus framed, and has been so administered, in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes, which pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities, and are believed to correspond with the general understanding of those engaged in mercantile pursuits. The word notice, as used by this court on the occasion referred to, we think must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not, is in general a question of construction, and must be determined by the court as matter of law; and so it was understood by this court in Andrews *v.* Pond et al., (13 Pet., 65,) where it is said that

"a person who takes a bill which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." And the same doctrine was adopted and enforced in Fowler *v.* Brantly, (14 Pet., 318,) where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, this court held that all those dealing in paper "with such marks on its face, must be *presumed* to have *knowledge* of what it imported." (See Brown *v.* Davis, 3 Term., 80.)

Other cases of like character, where the defect appears on the face of the instrument, are referred to in the printed argument for the defendant as affording a support to the instruction under consideration; but it is so obvious that they can have no such tendency, that we forbear to pursue the subject. (Ayer *v.* Hutchins, 4 Mass., 270; Wiggin *v.* Bush, 12 John., 305; Cone *v.* Baldwin, 12 Pick., 545; Brown *v.* Tabor, 5 Wend., 566.)

But it is a very different matter when it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defence; else the proposition as stated is not true, that a party who acquires commercial paper in the usual course of business, for value and without notice of any defect in the title, may hold it free of all equities between the antecedent parties to the instrument. Admit the proposition, and the conclusion follows. And the question whether the party had such knowledge or not, is a question of fact for the jury, and, like other disputed questions of *scienter*, must be submitted to their determination, under the instructions of the court; and the proper inquiry is, did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? and if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen. Every one must conduct himself honestly in respect to the antecedent parties, when he takes ne-

gotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke, in May *v.* Chapman, 16 Mee. and Wels., 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the facts and circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is, by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived.

The leading case, among the more modern decisions in that country, is that of Goodman *v.* Harvey, 4 Ad. and Ell., 870. That was a case in bank, on a rule *nisi*, which was made absolute. Lord Denman, in delivering judgment, said: "We are all of opinion that gross negligence *only* would not be a sufficient answer, where a party has given consideration for the bill; gross negligence may be evidence of *mala fides*, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of *bad faith* in him, there is no objection to his title." That case was followed by Uther *v.* Rich, 10 Ad. and Ell., 784, which was also argued before a full court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that *he had notice of it*, leaving the circumstances by which that notice was to be proved, directly or indirectly, to be established in evidence; and he further held, that an averment that the plaintiff was not a *bona fide* holder was not equivalent. According to the rule laid down in Goodman *v.* Harvey, which indubitably is the settled law in all the English courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill, ought not to defeat his right to recover; and if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld. Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would

not, unless attended by bad faith—it cannot require any farther reasoning to demonstrate that the instruction was erroneous. Several cases have been decided in England upon the same subject, and to the same effect, and the rule laid down in Goodman *v.* Harvey is now adopted and sanctioned by the most approved elementary treatises upon commercial law. (Raphael *v.* The Bank of England, 33 Eng. L. and Eq., 276; Stephens *v.* Foster, 1 Cromp., Mee., and Wels., 849; Palmer *v.* Richards, 1 Eng. L. and Eq., 529; Arbouin *v.* Anderson, 1 Ad. and Ell., N. S., 498; May *v.* Chapman, 16 Mee. and Wels., 355; Chitty on Bills, 12th ed., 257; Story on Bills, 3d ed., sec. 416; Byles on Bills, 4th Am. ed., 121 to 126; Smith's Mer. Law, ed. 1857, 255; Edwards on Bills, 309; 1 Saun. Plea. and Ev., 591; Wheeler *v.* Guild, 20 Pick., 545; Brush *v.* Scribner, 11 Conn., 368; Backhouse *v.* Harrison, 5 Barn. and Ad., 1098; Gwynn *v.* Lee, 9 Gill., 138.)

These cases, beyond controversy, confirm the rule laid down by this court in Swift *v.* Tyson, and they also furnish the fullest evidence, by their harmony each with the other, as well as by their entire consistency with the principal case, that the law has been uniform since the decision in Goodman *v.* Harvey, which was decided in 1836; and we think it will appear, upon an examination, that it has always been the same, at least from a very early period in the history of English jurisprudence down to the present time, except for an interval of about twelve years, while the doctrine prevailed which is now invoked in support of the instruction in this case. That doctrine had its origin in Gill *v.* Cubitt, 3 Barn. and Cress., 466, and it was followed by the other cases referred to in the printed argument for defendant. It was decided in 1824, and it is true, as the cases cited abundantly show, that it was *acquiesced in* for a time, as a correct exposition of the commercial law upon the subject under consideration. At the same time, it is proper to remark, that there is not wanting respectable authority that it had been much disapproved of before it was directly questioned; and it is certain, that nearly two years before it was finally overruled, Parke, Baron, in delivering judgment in Foster *v.* Pearson, regarded it as mere "dicta, rather than the decision of the judges of the King's Bench." (See Raphael *v.* The Bank of England, per Cresswell.) The reasons assigned for that departure from the long-established rule upon the subject are as remarkable and unsatisfactory as the change was sudden and radical, and yet their particular examination at this time is unnecessary. It is a sufficient answer to the case to say, that it has been distinctly overruled in the tribunal where it was decided, and has not been considered an authority in that court

for more than twenty years. The doctrine, says Mr. Chitty in his treatise on bills, is now completely exploded, and the old rule of law that the holder of bills of exchange, endorsed in blank and transferable by delivery, can give a title which he does not possess, to a person taking them *bona fide* for value, is again re-established in its fullest extent. It was not, however, accomplished at a single blow, but the error, so to speak, was literally broken up and destroyed by instalments. The foundation of the superstructure was severely shaken in Crook *v.* Jadis, 5 Barn. and Ad., 909, when the full bench first came to the conclusion that want of due care and caution were insufficient to constitute a defence, and that gross negligence, *at least*, must be shown, to defeat a recovery. But it was left to the case of Goodman *v.* Harvey to announce a complete correction of the error, when Lord Denman declared, we have shaken off the last remnant of the contrary doctrine.

A brief reference to some of the earlier cases will be sufficient to show that the decision in Gill *v.* Cubitt was a departure from the well-known and long-established rule upon the subject under consideration. One of the earliest cases usually referred to is that of Hinton's case, reported in 2 Show, 247. It was an action of the case against the drawer upon a bill of exchange payable to bearer. The court ruled that the holder must entitle himself to it on a consideration; "for if he come to be bearer by *casualty* or *knavery*, he shall not have the benefit of it;" and so in anonymous, 1 Salk., 126, where a bank note payable to A, or bearer, was lost, and found by a stranger, and by him transferred to C, for value. Holt, Ch. J., held that "A might have trover against the stranger, for he had no title to it, but not against C, by reason of the course of trade, which creates a property in the bearer." And again in Miller *v.* Race, 1 Burr, 462, where an inn-keeper received a bank note from his lodger in the course of business, and paid the balance, Lord Mansfield held he might retain it, as he came by it *fairly* and *bona fide*, and for value, and *without knowledge* that it had been stolen. And on a second occasion, in Grant *v.* Vaughan, 3 Burr, 1516, where a bill payable to bearer was lost, and the finder passed it to the plaintiff, the same court left it to the jury to find whether he came to the possession *fairly* and *bona fide*. But a still stronger case is that of Peacock *v.* Rhodes, 2 Doug., 633, where a bill of exchange, endorsed in blank, was stolen and passed to the plaintiff by a man not known. It was argued for the defendant, that a holder should not *in prudence* take a bill unless he knew the person. Lord Mansfield answered, "that the law is well settled, that a holder coming *fairly* by a bill has nothing to do with the transaction between

the original parties. * * * The question of *mala fides* was for the consideration of the jury." And lastly, and to the same effect, is Lawson *v.* Weston et al., 4 Esp. R., 56, where a bill of exchange for £500 was lost or stolen, and was discounted by plaintiff for a stranger. It was insisted for the defendant, that "a banker or any other person should not discount a bill for one unknown, without *using diligence* to inquire into the circumstances." Lord Kenyon replied, that "to adopt the principles of the defence would be to paralyze the circulation of all the paper in the country, and with it all its commerce; that the circumstance of the bill having been lost, might have been material, *if they could bring knowledge of that fact home to the plaintiff.*" The cases cited, commencing in 1694 and ending in 1801, are sufficient to show what the state of the law was in 1824, when Gill *v.* Cubitt was decided, especially as the judges of the King's Bench, in giving their opinions on that occasion, did not pretend that there were any later decisions in which it had been modified.

III. But, assuming that the instruction was erroneous, it is still insisted, by the course of the argument for the defendant, that it was immaterial; and the argument proceeds upon the ground that the case, as made in the bill of exceptions, shows that the plaintiff was not the holder of the bill for a valuable consideration, in the usual course of business. On the contrary, it is insisted that he held it merely as a collateral security for a pre-existing debt, without any present consideration at the time of the transfer, and that a party who takes negotiable paper under such circumstances does not acquire it in the usual course of business, and consequently takes it subject to prior equities. Whatever may be our impressions in a case like the one supposed, we think the question does not arise in the present record, assuming the facts to be as they are exhibited in the bill of exceptions; and the answer to the argument will be based entirely upon that assumption, without prejudice to what may hereafter appear. When the settlement was made, the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitively fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already over-due, and a forbearance to enforce remedies for its recovery; and the implication is very strong, that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and

has always been considered a sufficient and valid consideration. (Elting *v.* Vanderlyn, 4 John., 237; Morton *v.* Burn, 7 Ad. and El., 19; Baker *v.* Walker, 14 Mee. and Wels., 465; Jennison *v.* Stafford, 1 Cush., 168; Walton *v.* Mascall, 13 Mee. and Wels., 453; Com. Dig., action assumpsit, B. 1; Wheeler *v.* Slocum, 16 Pick., 62; Story on Prom. Notes, sec. 186, and cases cited.) The surrender of other instruments, although held as collateral security, is also a good consideration; and this, as well as the former proposition, is now generally admitted, and is not open to dispute. (Dupeau *v.* Waddington, 6 Whar., 220; Hornblower *v.* Proud, 2 Barn. and Ald., 327; Rideout *v.* Bristow, 1 Cromp. and Jer., 231; Bank of Salina *v.* Babcock, 21 Wend., 499; Youngs *v.* Lee, 2 Ker., 551.) It seems now to be agreed, that if there was a present consideration at the time of the transfer, independent of the previous indebtedness, that a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt, for which it is held as collateral. (White *v.* Springfield Bank, 3 Sand. S. C., 222; New York M. Iron Works *v.* Smith, 4 Duer, 362.) And the better opinion seems to be, in respect to parol contracts, as a general rule, that there is but one measure of the sufficiency of a consideration, and, consequently, whatever would have given validity to the bill as between the original parties is sufficient to uphold a transfer like the one in this case. We are not aware that the principle, as thus limited and qualified, is now the subject of serious dispute anywhere, and that is amply sufficient for the decision of this cause. Whether the same conclusion ought to follow where the transfer was without any other consideration than what flows from the nature of the contract at the time of the delivery, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt, is still the subject of earnest discussion, and has given rise to no small diversity of judicial decision. It seems it is regarded as sufficient in England, according to a recent case. (Poirier *v.* Morris, 20 Eng. L. and Eq., 103; Byles on Bills, pp. 96 and 127.) A contrary rule prevails in New York, as appears by several decisions. (Coddington *v.* Bay, 20 John., 637; Stalker *v.* McDonald, 6 Hill, 93; and also in Tennessee, Napier *v.* Elam, 5 Yerg., 108.) It is settled that it is a sufficient consideration in Massachusetts, Vermont, and New Jersey, and such was the opinion of the late Justice Story, as appears from his remarks

in Swift *v.* Tyson, and in his valuable treatise on Bills of Exchange. (Stoddard *v.* Kimball, 6 Cush., 469; Story on Bills, sec. 192; Chicopee Bank *v.* Chapin, 8 Met., 40; Blanchard *v.* Stevens, 3 Cush., 162; Atkinson *v.* Brooks, 26 Ver., 569; Allaire *v.* Hartshorne, 1 Zab., 665.) We think, however, that the point does not arise in this case, for the reasons before stated, and, consequently, forbear to express any opinion upon the subject. The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, with directions to issue a new venire.

CHARLES W. GAZZAM, PLAINTIFF IN ERROR, *v.* LESSEE OF ELAM PHILLIPS AND MARY HIS WIFE, AND ASHBEY W. ETHERIDGE.

The decision of this court in the case of Brown *v.* Clements (3 How., 650) reviewed and controlled.

The quantity of land granted to a patentee in pursuance of a pre-emption right under the act of 29th May, 1830, must, in an action at law, be ascertained from the description in the patent, and cannot be controlled by any supposed original equity to the whole of a quarter section to which a claim might have been made before the register and receiver.

Some latitude of discretion is allowed to the surveyor general under the act of 24th April, 1820, and the instructions of the land office, in the subdivision of fractional sections containing more than one hundred and sixty acres; and he is not obliged, absolutely, and under all circumstances, to lay off a full quarter or half quarter section, though the fraction is capable of such a subdivision.

THIS case was brought up, by writ of error, from the Supreme Court of the State of Alabama.

The parties claimed under the same titles which were before this court in the case of Brown *v.* Clements, reported in 3 How., 650. A diagram is there given, explanatory of the mode in which the fractional section was divided between Stone and Etheridge.

The present suit was an ejectment brought in 1850, by Phillips and Etheridge, who claimed under Etheridge's title against Gazzam, who claimed under that of Stone.

The suit was brought in the Circuit Court of the county of Mobile, (State court,) where the verdict and judgment were for the plaintiffs, in 1855. The charge of the judge to the jury was in conformity with the opinion of this court in the case of Brown *v.* Clements, accompanied with the remark that such would not have been his charge, if it had not been for the decision of this court in that case.

In March, 1856, the Supreme Court of Alabama affirmed this judgment, and Gazzam sued out a writ of error to bring the case to this court.

The case of Brown *v.* Clements was argued and decided in

this court at the term which commenced in December term, 1844. In the 24th vol. of Alabama Rep., new series, p. 354, containing the decisions of the Supreme Court at January term, 1854, there is the following opinion delivered by Chief Justice Chilton:

"Doe *ex dem* Brown and wife *v.* Clements and Hunt, Chilton, C. J. This court having rendered a judgment of affirmance in this cause, it was taken by the plaintiff in error to the Supreme Court of the United States, where the judgment of this court was reversed, and the cause ordered to be remanded for further proceedings. The judgment of reversal was rendered in December, 1844, but the mandate or certificate of reversal did not reach this court until recently, when the cause was ordered to be placed upon the docket, &c., &c.

"It is the duty of the clerk of the Supreme Court of the United States to forward to this court the evidence of the reversal of the judgment, in order that the same may be disposed of in conformity to the decision of that court, &c., &c.

"That the failure of the clerks to do their duty, in not placing causes on the docket, shall work no prejudice to the parties, &c., &c."

Upon this matter, the Reporter has received from the clerk of this court a communication, which will be found in a note.*

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* *Supreme Court United States, December Term,* 1844.

WILLIAM L. BROWN AND WIFE *v.* CLEMENTS AND HUNT. } *In error to the Supreme Court of Alabama*

1845, January 21. Judgment reversed, with costs.

1845, May 9. The clerk sent fee bill due by plaintiffs in error to their counsel, (Mr. Sherman,) and requested him to remit amount per draft.

1845, June 10. The clerk received a letter from Mr. Sherman, remitting a draft for the amount due by plaintiffs in error, and requesting the clerk to send the mandate "immediately forward, as the Supreme Court of this State is now in session at Tuskaloosa," &c.

1845, June 10. The clerk sent the mandate per mail, addressed to "Charles E. Sherman, Esq., or Clerk of the Supreme Court of Alabama," Tuskaloosa, Alabama.

1858, April 20. Mr. Sherman has this date obtained a certificate from Hon. J. Marron, Third Assistant Postmaster General, stating that on the 12th June, 1845, there was mailed at Washington city a letter containing a mandate of the Supreme Court United States, addressed as above, that the same was returned as a *dead letter*, and was sent to the Washington city post office on the 23d April, 1853, and that on the 25th of said month it was delivered to Mr. Sherman.

The clerk of the Supreme Court of the United States does not understand that it has ever been considered his official duty to transmit the mandates of this court to the courts below. It certainly has never been the practice. But, on the contrary, it has always been the practice for the counsel to attend to the remission of their cases to the courts whence they came, just in the same manner and to the same extent that they attend to bring them up here.

The case was argued in this court by *Mr. J. Little Smith* for the plaintiff in error, and *Mr. Sherman* for the defendants.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Alabama.

The suit was brought in the court below to recover the possession of some four acres of land in the city of Mobile.

The lessors of the plaintiff claimed title to the lot in dispute as heirs of James Etheridge, and gave in evidence a patent from the United States to their ancestor, dated 30th May, 1833, "for the southwest quarter section twenty-two, in township four south, of range one west, in the district of land subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general; which said tract has been purchased by the said James Etheridge." The above is a literal extract from the description of the parcel of land in the patent granted to Etheridge.

The defendant claimed under William D. Stone, and gave in evidence a patent to him from the United States, dated the 17th December, 1832, "for the south subdivision of fractional section twenty-two, same township and range, containing one hundred and ten acres and fifty-one hundredths of an acre, according to the official plat of survey of the said lands returned to the General Land Office by the surveyor general; which said tract has been purchased by the said William D. Stone." Etheridge gave notice to the register and receiver of his claim under the act of 29th May, 1830, on the 28th January, 1831, and produced his proofs. Stone gave notice of his claim to the same section, 25th March, 1831, and furnished his proofs. The claim and proofs in each case were received and filed, but no money was paid, nor certificates given, as the official plat of the survey of the township had not then been received at the office. This plat was returned and filed in March, 1832. There were private claims surveyed and laid down on the plat to this section, so that the portion open to the two pre-emption claims in question was confined to a fractional part of the section. This fractional part was divided according to the plat by a line running north and south through it, laying off in the west subdivision ninety-two and sixty-seven hundredths acres, and in the east one hundred and ten and fifty hundredths acres. Etheridge purchased the west and Stone the east subdivision.

The certificates of purchase were given to both claimants 30th April, 1832. The one to Etheridge is for the southwest

quarter of section twenty-two, containing ninety-two and sixty-seven hundredths acres, the quantity in the west subdivision, at the rate of one dollar twenty-five cents per acre, amounting to $115.43; the other to Stone is for the southeast subdivision of fractional section twenty-two, containing one hundred and ten and fifty-one hundredths acres, the quantity in the east subdivision, at the rate of one dollar twenty-five cents per acre, amounting to $138.13.

The sales in each case were made in conformity with the subdivisions, as marked upon the plat of the surveyor general then on file in the office, and to which all purchasers of the public land had access, and which constituted the guide of the register and receiver in making the sales.

The lessors of plaintiff also gave evidence showing that the premises in question were within the southwest quarter section twenty-two, computing the same according to the usual measurement of quarter sections, and that a full quarter might have been laid off from the fraction, and claimed that the whole of the southwest quarter had been appropriated to their ancestor, Etheridge, under the pre-emption act of 1830, which position was assented to by the court. The court also ruled that the purchase and patent of Stone, under whom the defendant claims, must be restrained to the fraction in the west part of the southeast quarter of section twenty-two, and that it gave him no right to the land in the southwest quarter.

The effect of this ruling, when applied to the case, gave to the heirs of Etheridge one hundred and sixty acres of the fractional section, in disregard of the official survey, the purchase, and patent for only the ninety-two acres, and reduced the one hundred and ten which Stone purchased, and had a patent for, to some forty-three acres.

The court is of opinion this ruling cannot be maintained. For, conceding for the sake of the argument that the plat by the surveyor general of this section was made contrary to law, the ground upon which the decision is sought to be maintained, and that Etheridge, under the pre-emption act of 1830, was entitled to purchase the whole of the southwest quarter, and to have it surveyed and patented to him, yet it was not so surveyed, nor did he purchase, nor has he obtained a patent for the same. On the contrary, he purchased and paid for the west subdivision only of this fractional section, containing ninety-two acres, and took out a patent for the subdivision. And in addition to this, Stone, at the same time, purchased the east subdivision, as laid down on the official plat, and has received a patent for the same, and which includes the premises in question.

The patent to Etheridge, as we have seen, describes the land granted as the southwest quarter, &c., containing ninety-two and sixty-seven hundreths acres, according to the official plat of the survey of said lands returned to the General Land Office. And the patent to Stone is equally specific in the description of the parcel granted to him. The title, therefore, to the premises in question, was never in the ancestor of the lessors of the plaintiff, but has been in Stone, and those holding under him, since the 17th December, 1832, the date of his patent.

The case of the claim of Etheridge to the whole of this southwest quarter, some years after the issuing of the patent to him and Stone, was presented to the Commissioner of the Land Office for correction. It was there elaborately examined by the counsel for the applicant, and by the Commissioner of the Land Office, and ultimately disposed of by the Secretary of the Treasury, on the opinion of the Attorney General; that officer maintaining the regularity of the survey, and of course confixing the grants to the subdivisions as laid down on the plat referred to in the patents. But, as we have already said, whether this view of the law be sound or not, it cannot control the question before us. The inquiry here is in respect to the legal title, whether it was in Etheridge or Stone, under the descriptions of the land in their respective patents. Unless we can hold that it passed to Etheridge under his patent, the plaintiff must fail. And we have seen that, without disregarding the plainest terms used in the description of the tract, it is impossible to arrive at any such conclusion. We deny, altogether, the right of the court in this action to go beyond these terms, thus explicit and specific, and, under a supposed equity in favor of Etheridge, arising out of the pre-emption laws, to the whole of the southwest quarter, enlarge the description in the grant, or, more accurately speaking, determine the tract and quantity of the land granted by this supposed equity instead of by the description in the patent.

But, independently of the above view, which we think conclusive against the plaintiff, we are not satisfied that there was any want of power in the surveyor general in making the subdivisions of this section according to the plat, and in conformity with which the sales of the land in dispute were made.

The first section of the act of 24th April, 1820, (3 U. S. St., p. 566,) after referring to the act of 1805, provides, "that fractional sections containing one hundred and sixty acres or upwards shall, in like manner, as nearly as practicable, be subdivided into half-quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury,

but fractional sections containing less than one hundred and sixty acres shall not be divided, but shall be sold entire."

The Secretary of the Treasury issued his regulations to the surveyor general, through the Commissioner of the Land Office, on the 10th June following, in which he directed that fractional sections containing more than one hundred and sixty acres should be divided into half-quarter sections by north and south or east and west lines, so as to preserve the most compact and convenient forms. The fractional section in question was divided by a north and south line, according to these instructions. Under them, some latitude of discretion has been exercised by the surveyor general in the division of fractional sections exceeding the quantity mentioned, regard being had to convenient forms, and to avoid the subdivision of the public domain into ill-shaped and unsaleable fractions. The question, as we have already seen, came again before the Secretary of the Treasury in the case of Etheridge, before us in 1837, and the construction first given, and also the practice of the surveyor general under it, confirmed. The surveys of the public lands under this regulation had then been in operation for some seventeen years, and has since been continued. Attorney General Butler, upon whose authority the Secretary of the Treasury confirmed the survey of the fractional section in question, in a well-considered opinion, observed, that "if Congress had intended that fractional sections should, at all events, be divided into half-quarter sections, when their shape admits the formation of any such subdivision, I think they would have said so in explicit terms, and that the discretionary power intrusted to the Secretary would have been plainly confined to the residuary parts of the section; and further, that the clause in the first section of the act of 1820, concerning fractional sections containing less than one hundred and sixty acres, (which are not to be divided at all, but sold entire,) is decisive to show that Congress, which passed the act, did not deem it indispensable that regular half-quarter sections should, in all practicable cases, be formed by the surveyors; on the contrary, it shows that they preferred a single tract, though containing more than eighty acres, and though capable of forming a regular half-quarter, to small inconvenient fractions." We entirely concur in this construction of the act.

The only difficulty we have had in this case arises from the circumstance that a different opinion was expressed by a majority of this court in the case of Brown's Lessee *v.* Clements, (3 Howard, p. 650.) That opinion differed from the construction of the act of 1820, given by the head of the land department, and disapproved of the practice that had grown up under

it in making the public surveys; and also from the opinion, subsequently confirming this construction and practice, by the Secretary of the Treasury and Attorney General, as late as the year 1837. The decision in Brown *v.* Clements was made in the December term, 1844.

It is possible that some rights may be disturbed by refusing to follow the opinion expressed in that case; but we are satisfied that far less inconvenience will result from this dissent, than by adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land, running through a period of some twenty-eight years. Any one familiar with the vast tracts of the public domain surveyed and sold, and tracts surveyed and yet unsold, within the period mentioned, can form some idea of the extent of the disturbance and confusion that must inevitably flow from an adherence to any such principle. We cannot, therefore, adopt that decision or apply its principles in rendering the judgment of the court in this case.

The judgment of the court below is reversed, and the proceedings remitted to the court, to award a venire, &c.

HORACE C. SILSBY, WASHBURN RACE, ABEL DOWNS, HENRY HENION, AND EDWARD MYNDERSE, APPELLANTS, *v.* ELISHA FOOTE.

Foote's patent declared good, for the combination of machinery used in "the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove, in which such rod shall be acted upon directly by the heat of the stove or the fire which it contains."

The award by the Circuit Court of damages for an infringement of the patent affirmed, by an equal division of this court; but the allowance of interest overruled.

Where a patentee claims more than he is entitled to, his patent may still be good for what is really his own, provided he enters a disclaimer for the surplus without any unreasonable delay. In this case, the patentee was allowed to recover damages for an infringement, but not to recover costs, agreeably to the provisions of the act of Congress of the 3d March, 1837.

THIS was an appeal from the Circuit Court of the United States for the northern district of New York, sitting as a court of equity.

In May, 1842, Foote obtained a patent for an improvement in regulating the draught or heat of stoves. The claim which he made was this:

What I claim as my invention, and desire to secure by letters patent, is the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue.

I also claim as my invention the mode above described of letting the heat of a stove, at any requisite degree by which different degrees of expansion are required, to open or close the damper.

I also claim the combination above described, by which the regulation of the heat of a stove or other structure in which it may be used, is effected; and I also claim as my invention the mode above described of connecting the action of the metallic rods with the damper, so that the same may be disconnected when the damper shall have closed, and the heat shall continue to rise, &c. ELISHA FOOTE, Jr.

Afterwards, in March, 1847, he filed the following disclaimer:

To the Commissioner of Patents:

The petition of Elisha Foote, of Seneca Falls, in the county of Seneca and State of New York, respectfully represents, that your petitioner obtained letters patent of the United States for an improvement in regulating the draught of stoves, which letters patent are dated on the 26th day of May, 1842; that he has reason to believe that through inadvertence and mistake the claim made in the specification of said letters patent in the following words, to wit: "What I claim as my invention, and desire to secure by letters patent, is the application of the expansive and contracting power of a metallic rod by different degrees of heat to open and close a damper, which governs the admission of air into a stove or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue," is too broad, including that of which your petitioner was not the first inventor.

Your petitioner, therefore, hereby enters his disclaimer to so much of said claim as extends the application of the expansive and contracting power of a metallic rod by different degrees of heat to any other use or purpose than that of regulating the heat of a stove, in which such rod shall be acted upon directly by the heat of the stove, or the fire which it contains; which disclaimer is to operate to the extent of the interest in said letters patent vested in your petitioner, who has paid ten

dollars into the treasury of the United States, agreeably to the requirements of the act of Congress in that case made and provided.

This did not apply to the whole of his claim, but only to a part of it.

In 14 How., 218, will be found the report of a suit which Foote instituted against some of the present appellants. The judgment of the court below being affirmed by this court, that suit was brought to an end.

On the 9th of October, 1848, Foote filed his bill on the equity side of the Circuit Court against the present appellants, complaining that they continued their infringement upon his patent, praying for an injunction, an account, &c., &c. After other proceedings were had in the case, Mr. Justice Nelson (in vacation, viz: September, 1850) ordered an issue to be made up at law upon the first and third points of the claim, the second and fourth not being drawn into controversy. In June, 1851, the trial at law took place, which resulted in a verdict for the defendants.

Afterwards, the cause came before the court, on a hearing of the pleadings and proofs, and case made upon the trial of the feigned issues; and after hearing of counsel for the respective parties, the court, on the 29th day of August, 1853, directed the following order to be entered:

In Equity.

This cause having been heard on argument by counsel for the respective parties on the pleadings and proofs, and upon the case made since the trial of the feigned issue therein, and the court having considered the same, and being of the opinion that the complainant was the first and original inventor of the application of the expansion and contraction of the inflexible metallic rod to the regulation of the heat of stoves, as described and claimed in his patent, adjudge and decree that the defendants have infringed the said patent in making and vending the regulators of stoves, as charged in the said bill of complaint, and that the said complainant is entitled to have a perpetual injunction to restrain said defendants, their agents, servants, and all claiming or holding under or through them, from making, vending, or using, or in any manner disposing of any regulator or regulators of stoves, embracing the invention or improvements described in said letters patent, namely, any regulator in which the expansive and contracting power of an inflexible metallic rod, which expansion and contraction, if produced by changes in the heat of the stove regulated, shall

be applied to the damper to regulate the heat thereof, and this notwithstanding the verdict of the jury upon the feigned issue, heretofore rendered on the trial of the same.

And it is further adjudged and decreed, that the cause be referred to Augustus A. Boyce, Esq., the clerk of this court, to ascertain and report the number of regulators for stoves embracing the principle aforesaid that have been made, and also the number sold by the said defendants, or either of them, since the 23d day of March, 1847, and the damages complainant has sustained, or use and profits the defendants, or either of them, have derived by reason of such infringement, since the time last aforesaid; and, upon the coming in and confirmation of the said report, that said complainant have a decree and execution for the amount found due to him, and also for the costs in this suit, to be taxed.

It appeared from the record that the court, on the trial of the feigned issues, instructed the jury that the first claim of the patentee was disproved by the prior construction of the Saxton stove, and that the patent must rest for its validity upon the other claims.

In June, 1854, the master made his report, which was very voluminous, and to which both parties filed numerous exceptions, some of which were overruled and others allowed by the court. The result of some of the rulings made a further reference to the master necessary, when both parties expressed a desire that the court should make the examination itself. This was accordingly done, when the following decree was passed, viz:

This court having accordingly made such examination and determination, it is further ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth further order, adjudge, determine, and decree, that the said defendants are respectively liable to the said complainant for the sums of money hereinafter set forth, in the manner hereinafter particularly mentioned, for their profits of the use by the said defendants, or such of them as are hereinafter particularly declared liable therefor, of the said invention of the complainant, described and secured to him by letters patent granted to the said complainant, as set forth in the bill of complaint in this cause, which use was unauthorized and an infringement and violation of the rights of the said complainant, under the said patent; that is to say, that the said defendant, Horace C. Silsby, either severally or jointly with others of said defendants, is liable for and chargeable with the sum of twenty-

three thousand six hundred and forty-four dollars and twenty-two cents ($23,644.22;) that of the said last-mentioned sum the said defendant, Washburn Race, is in like manner liable for the sum of eighteen thousand one hundred and eighty-two dollars and six cents ($18,182.06;) that of the said first-mentioned sum the said defendant, Edward Mynderse, is in like manner liable for and chargeable with the sum of fifteen thousand nine hundred and sixteen dollars and twelve cents; and that of the said first-mentioned sum the said defendant, Henry Henion, is liable for and chargeable with the sum of three thousand one hundred and fifty-four dollars and eighty-five cents; and that of the said first-mentioned sum the said defendant, Abel Downs, is liable for and chargeable with the sum of three thousand two hundred and sixty-seven dollars and thirty-seven cents.

And it is further ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge, and decree, that each of the said defendants pay to the said complainant the sum which such defendant is above declared and decreed to be liable for and chargeable with, and interest thereon, until such payment, or so much thereof as shall be necessary, together with the sums previously paid by the other defendants, to pay off and discharge the first-mentioned sum of twenty-three thousand six hundred and forty-four dollars and twenty-two cents, and interest thereon, from the entry of this decree; and the evidence in this cause not enabling the court now to determine with precision the rights of such defendants as between themselves, in respect to the sums for which each of such defendants is liable to contribute to the other, it is further ordered and decreed, that the sums paid by or collected from the property of each defendant, under this decree, shall be first applied in payment and discharge of the amount, if any, for which said defendant is solely liable, and next to the payment and discharge of such amount, if any, as the said defendant and the least number of the other defendants is liable, in such manner as to give to the said complainant his just and full rights against each and all said defendants; and if any controversy or question shall arise in respect to the proper application of any moneys so paid or collected, either defendant or party may apply to this court, upon affidavit and due notice to the adverse party in interest, for instructions in respect to the application thereof, or the stay of further executions against any single defendant, or any portion of such defendants, on the ground that the whole sum for which he is hereby made liable has been paid by himself and other defendants jointly liable therefor.

And it is further ordered, adjudged, and decreed, that the said defendants pay to the said complainant his costs in this suit, to be taxed, with interest thereon from the taxation and allowance thereof until paid, and that he have executions for such costs, and for the sums above decreed to be paid him as aforesaid; but such execution against the defendants other than the said defendant, Horace C. Silsby, shall be only for such costs, and the amount for which such defendants are hereinbefore respectively declared to be liable.

S. NELSON.
N. K. HALL.

From this decree the complainant and respondents both appealed; but as the case of the respondents' appeal came on first for argument, it only is noticed. Both cases were decided together.

The case was argued in this court by *Mr. Keller* and *Mr. Blatchford* for the appellants, and by *Mr. Foote* in proper person for the appellee.

The counsel for the appellants directed their attention exclusively to the first claim of the patent, which was in fact the only one involved in the controversy. They denied—

1. The validity of the patent.
2. Its novelty.
3. Its utility.
4. The infringement and the liability of the defendants below.

The principal objection to the validity of the patent was the nature of the subject, which, it was contended, was exactly similar in its general character to the eighth claim of Morse, which this court decided to be invalid. (O'Reilly *v.* Morse, 15 How., 62.)

On the subject of the novelty of the invention, the counsel contended that the Saxton stove and Arnott improved stove were both prior in point of time, and in both of them the principle of the expansion and contraction of a metallic rod was applied to regulate a damper, by causing it to open and close according to the heat of the stove. But it is in vain to attempt to follow the counsel for the appellants in the various branches of their argument, which occupied nearly fifty pages of a printed brief.

Mr. Foote argued his own case, and thus explained his invention:

The complainant's invention consisted in the application of the expansive and contracting power of an inflexible metallic rod to regulate the heat of stoves. The great difficulty, in making this application, arose from the indispensable necessity of providing a detaching process. In the complainant's apparatus, after an increase of heat has entirely closed the damper, should the temperature from any cause continue to rise, the levers which communicate the action of the rod to the dampers disconnect themselves from it, and are free to move on to any extent to which the stove may be heated; and on the heat's returning to the same point, they will reconnect themselves with the damper and resume their appropriate functions. In like manner, should the fuel burn out and the heat continue to fall, after the damper has been fully opened, the levers will become detached, until the temperature shall have been again restored to the desired degree.

The office of a regulator is to produce an uniform heat; and to attain this object, it is necessary to give such increase of motion to the action of the rod, that a small change of heat—say from five to ten degrees—shall be sufficient to open or close the damper. Then, slight variations from the desired point, operating upon the damper, keep very nearly a uniform temperature, sufficiently so for all practical purposes. Were it constructed otherwise, it might be a thermometer, to show the degree of heat, but would not be a regulator, to control it. But the variations of temperature in a common stove exceed one thousand degrees. And unless provision was made for excessive changes, the apparatus would destroy itself. It could not be used for a *stove* regulator.

Several attempts had been made, previous to the complainant's invention, to apply the inflexible rod as a regulator to some other purposes, where it was subjected to such changes only as take place in water, or atmospheric air, and where a detaching process was not deemed to be essential. But we have no evidence that such attempts were ever successful, or were anywhere in practical use, or had ever been known beyond the books in which they are described. But to the stove, with its excessive variations, it does not appear that any one ever attempted its application.

The efforts previously made to produce a stove regulator were in a different direction. When two thin, flexible, and elastic slips of metal, of unequal expansibilities, are soldered, or otherwise attached together, a change of heat, affecting one more than the other, produces a flexure or curvature of the instrument. And as its elasticity enabled it to yield to any excessive change, and obviated the necessity of a detaching

process, its application to a stove was easy and apparent. But an insuperable difficulty was found in its use. When an elastic piece of metal is bent and heated, it takes a new form, or, as it is termed, "sets" into that position. The effect is gradual at moderate temperatures, and instantaneous at high. The instrument, besides, was necessarily made slight, in order to have the requisite flexibility. And although very useful for some purposes, its application to stoves was but a series of unsuccessful experiments.

All the difficulties were overcome in the complainant's application of the inflexible rod, and a really practical and effectual stove regulator was, for the first time, produced.

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 northern district of New York.

The bill was filed in the court below by Foote against the defendants for an alleged infringement of a patent for an improvement in regulating the draught or heat of stoves. The bill, among other things, set out a trial at law between the parties upon the patent, and a verdict for the plaintiff; that the defendants since the trial and verdict continued their infringement, and had even increased the business of making and vending the complainant's stove regulators.

The complainant prayed for an account, and that the defendants be restrained by injunction from further infringements.

The defendants put in an answer, to which there was a replication. Afterwards feigned issues were ordered by the court, to try the questions whether or not the patentee was the first and original inventor of the application of the expansive and contracting power of the metallic rod, by different degrees of heat, to open and close the damper which governs the admission of air into a stove; and, also, whether or not he was the first and original inventor of the combination described in his patent, by which the regulation of the heat of a stove in which it might be used was effected.

The jury, after hearing the proofs upon these issues, returned a verdict in the negative. Afterwards the cause came before the court upon the pleadings and proofs, and the case made upon the trial of the feigned issues; and after hearing the arguments of counsel for the respective parties, held, that the patent was valid, notwithstanding the verdict of the jury on the feigned issues, and also that the defendants had been guilty of an infringement, and referred the cause to a master, to ascertain and report the profits which the defendants had derived by reason of said infringement. A most voluminous record

of testimony was taken before the master, and on the 17th June, 1854, he reported profits made by the defendants to the amount of $2,650. Thirty exceptions were filed to the report by the counsel for the complainant, and eighteen by the defendants, and were argued before the court. The view the court has taken of the case here renders it unimportant to refer particularly or specially to the decision of the court below upon each of these exceptions. After disposing of them, the court, agreeably to an earnest request of the counsel that the cause should not be again sent down to the master, but that the court, upon the evidence before it, should ascertain the amount of profits to which the complainant was entitled, entered upon the inquiry, and, after a laborious and minute examination of a record of some six hundred closely printed octavo pages of proofs, found an aggregate of profits to the amount of $17,980.40, and an aggregate of interest, averaged, of $5,663.82, making a total of $23,644.22. And on the 28th of August, 1856, a final decree was entered for the complainant against the defendants for this amount, with the costs to be taxed.

The cause is now before this court on appeal.

The difference of opinion among the judges of this court in respect to the amount of profits that should be allowed to the complainant, precludes the delivery of any written opinion on this branch of the case. The decree of the court below as to the amount, with the exception of the interest, is affirmed by a divided court. A majority of the court are of opinion that there was error in the allowance of interest on the profits found for the complainant. That amount, therefore, which is $5,663.82, must be deducted.

This court is also of opinion that the court below erred in awarding costs of the complainant against the defendants.

The first claim of the patentee in his patent was disproved by the prior construction and use of what is called in the case the Saxton stove, and no disclaimer was entered according to the requirements of the act of Congress 3d March, 1837. By the ninth section of that act it is provided, that when a patentee by mistake shall have claimed to be the inventor of more than he is entitled to, the patent shall still be good for what shall be truly and *bona fide* his own, and he shall be entitled to maintain a suit in law or equity for an infringement of this part of the invention, notwithstanding the specification claims too much. But in such case, if judgment or decree be rendered for the plaintiff, he shall not recover costs against the defendant, unless he shall have entered a disclaimer in the Patent Office of the thing patented, to which he has no right, prior to the commencement of the suit. There is also another

condition, namely, that the plaintiff shall not be entitled to the benefits of the section, if he has unreasonably neglected or delayed to enter the disclaimer.

The Saxton stove was produced on the trial of the feigned issues, after this suit had been commenced, and the question has been in controversy from thence to the present time, whether or not the arrangement, construction, and use of that stove, had the effect to disprove the first claim in the complainant's patent. It would be going too far, therefore, under these circumstances, to hold that the delay in entering the disclaimer was unreasonable within the meaning of the statute. A majority of the court is of opinion the delay has not been unreasonable within the meaning of the act, so as to defeat the recovery.

According to our conclusions, the decree of the court below is reversed as to the $5,663.82 interest, and also as to the costs allowed the complainant, and affirmed as to the residue, without costs to either party in this court; and that the case be remitted to the court below to enter a decree for the complainant against the defendants in conformity to this opinion, and proceed to the execution of the same.

Mr. Justice DANIEL and Mr. Justice GRIER dissented.

Mr. Justice DANIEL:

I concur entirely in the views expressed by my brother GRIER in this cause. I have always regarded the patent of the complainant void upon its face. I moreover consider the decree of the Circuit Court inconsistent with the claim of the complainant, unwarranted by any evidence in the cause, and most unjust and oppressive in its operation.

Mr. Justice GRIER dissenting:

Although I may occasionally differ in opinion with the majority of my brethren, my usual custom has been to submit to their better judgment, without remark. But in this case I feel constrained to protest against a decree which, in my opinion, does great and manifest injustice to the appellants. In doing so, it is proper that I thus state my reasons as briefly as possible, without an attempt at their full vindication by a tedious argument.

I. I believe the patent of complainant to be void on its face.

The first claim is for the application of the "expansive and contracting power of a metallic rod, by different degrees of heat, to open and close a damper which governs the admission of air into a stove."

Now, this claim is false in fact. The patentee was not the first to make this application of the different degrees of expansion of metals to open and close a damper to a stove. The evidence is clear, explicit, and uncontradicted. Moreover, a jury has so found in an issue ordered in this case, and which verdict does not appear to have been set aside, although it was disregarded in the decision of the case.

This claim, even if it were true in fact, is clearly void in law, unless we agree to reverse the doctrine laid down by this court in the case of O'Reilly *v.* Morse, with regard to the eighth claim of Morse's patent. Besides, at the trial at law, the Circuit Court decided, in 1848, that this first claim could not be sustained. Yet, with ten years' judicial notice of this defect in his patent, the patentee has never amended it, entered a disclaimer, or attempted to avail himself of the privilege offered to him by the statute to rescue it from this charge, so destructive to its validity.

At common law, a patent having this infirmity was absolutely void. The patent act of 1836, section 13, provides a remedy, "where a patent is inoperative and void, by reason of a patentee's claiming in his specification as his invention more than he had a right to claim, and when the error has arisen through inadvertence or mistake."

In such a case, the patentee is permitted to surrender his patent, and, on payment of a further sum, have his patent reissued as corrected. But he was not permitted to recover any damage for infringement which occurred before the date of the reissued patent.

The patent act of 1837, section 7, gives a further privilege to the patentee of escaping the consequences of such a defect, "where his patent is too broad," by permitting him to enter a disclaimer, to be taken and considered as part of the original specification. It does not subject him to the costs of a new patent, nor to the forfeiture of antecedent damages, where the disclaimer is made during the pendency of a suit, but gives the defendant a right to object to its validity on account of unreasonable neglect and delay in filing it.

The ninth section of the same act provides for the case where "the patentee, in his specification, has claimed to be the inventor of any material or substantial part of the thing patented, of which he was not the first inventor, and provided it be distinguishable from other parts claimed in his patent. He is permitted to sustain his action for such part as is *bona fide* his own invention, forfeiting his right to costs where he has not filed a disclaimer before suit brought. But no person, bringing any such suit, shall be entitled to the benefits of this sec-

tion, who shall have unreasonably neglected or delayed to enter at the Patent Office a disclaimer, as aforesaid."

Now, the first claim of this patent does not come within the category of the ninth section. It is not for "a material and substantial part of the thing, distinguishable from other parts," but it is the case embraced in the seventh section, where the claim is void, because it is too broad.

Here the claim is for a monopoly of the expansive power of metals when applied to a stove, and this expansive power is a necessary agent in every claim for a combination in the patent.

The seventh section gives the patentee no right to recover at all, unless a disclaimer has been filed before trial or judgment. But, assuming that the privilege given by the ninth section be available to the patentee in this case, has he brought himself within the proviso? He has refused to avail himself of the privilege tendered to him by the law, and stands upon his patent. Notwithstanding the decision of the Circuit Court against this claim in 1848; notwithstanding the decision of this court in O'Reilly *v.* Morse; notwithstanding the verdict in 1853, declaring this claim false, no disclaimer has ever been entered. The pendency of the suit could be no reason, for the acts contemplate a pending suit. I cannot consent to say that this is not a case not only of unreasonable delay, but of stubborn rejection of the privilege offered by the law.

The case of O'Reilly *v.* Morse cannot be quoted as a precedent for this. There, Morse was admitted to be the original inventor of the application of an element of nature in his eighth claim; but the court decided that it was void, because it was too broad. Until that decision was read in court, the patentee had not the least reason to suspect his claim to be invalid. The decision was a surprise not only to him, but many others more learned in the law, who had carefully examined this claim, and advised the patentee that it was valid. In the present case, the patentee disregarded the judgment of a Circuit Court, a verdict of a jury, and judgment of this court, all of which warned him of the necessity of a disclaimer many years before final judgment.

I cannot consent to annul the statute altogether, and allow its benefits to a patentee who has stubbornly refused to submit to the conditions on which they are tendered.

II. The interlocutory decree of the court below does not condemn the defendants for infringing the third claim of the complainant's patent, on which alone it was decided on the trial at law the defendant was liable, and on which it is now attempted to justify this decree. What that decree is, must be judged by the record, and not by any parol explanations or contradictions of it.

The decree affirms—

1st. That the plaintiff was the first inventor of the *application* of the expansion and contraction of the inflexible metallic rod to the regulation of the heat of stoves.

2d. That any regulator in which the expansive and contracting power of an inflexible metallic rod, which expansion and contraction is produced by changes in the heat of the stove regulated, is *applied* to the damper to regulate the heat of the stove, is embraced within the principle of the invention claimed in the patent.

3d. That the defendants have made and sold regulators embracing that principle.

4th. That they must account for all regulators made and sold by them, which embrace that principle.

This decree charges the defendant with the infringement of the first claim of the patent, and is in conformity with the doctrines advanced in the charge of the court, on the issue tried before them, where the court thus define the claim of the patent:

"Now, in this case, as I understand the claim of the patentee, he claims the application of the principle of expansion and contraction in a metallic rod for the purpose of regulating the heat of a stove. That is the new conception which he claims to have struck out, and, although the mere abstract conception would not have constituted the subject-matter of a patent, yet, when it is reduced to practice by any means, old or new, resulting usefully, it is the subject of a patent, independently of the machinery by which the application is made."

Again, speaking of the first claim, he says:

"That claim is not for any mode or method of applying the expansion and contraction of the metallic rod to regulate the heat of the stove, but it is for the conception of the idea itself."

The interlocutory decree says, therefore, in effect, that the brass rod regulators, which the defendants admit in their answers that they made and sold, are infringements of the plaintiff's patent, *because* they embrace the principle of the application of the expansive and contracting power of an inflexible metallic rod to the damper of a stove. And the master is directed to take an account of all regulators that fall within the principle specified, no matter what their mechanical structure is or how they may differ from the regulators of which the plaintiff gives a description in his specification, and no matter whether they embrace or not anything that the plaintiff claims in either his second, his third, or his fourth claim. The plaintiff and the court below say, in effect, that they do not care for any proof as to whether any claim of the patent but the first is infringed; and that, as the defendants have been guilty of ap-

plying the expansive and contracting power of an inflexible metallic rod to open and close the damper of a stove in which changes in the heat of the stove produce the expansion and contraction, they must respond for all instances of such application.

The defendants are found guilty of infringing the first claim of the patent alone. No testimony was produced in the case to show that the Race patent infringed the third claim, and this fact was emphatically denied in the answer. Nor was the verdict and judgment at law put in evidence. And if it had been, it is no estoppel in equity to the defendants' putting the truth of that charge of the bill in issue in his answer. That verdict and judgment is put into the bill, as laying a proper ground for the granting of the preliminary injunction. Nor is it true, as now asserted, that this court has decided the question in the case of Silsby *v.* Foote, 14 Howard, 225.

On that trial the court below had instructed the jury, "that the defendants had not infringed the plaintiff's patent unless they had used all the parts embraced in the plaintiff's combination," and submitted the question to the jury whether there had been such infringement.

This instruction was adjudged by this court to be correct. The question whether the verdict was correct was not before this court, and could not have been decided.

The third claim which it is *now* alleged to be infringed is as follows:

"I also claim the combination *above described*, by which the regulation of the heat of a stove or other structure, in which it may be used, is effected."

The law requires that a patent should "particularly specify and point out the part, improvement, or combination, which the patentee claims as his own invention."

This claim does not specify the combination claimed, otherwise than by reference to the body of the specification where two distinct and complex combinations of numerous parts and devices are set forth.

After a full and fair trial, the jury have found, on an issue directed for that purpose, that the complainant was not the first and original inventor of the combinations set forth in this claim. But assuming that the court may disregard this verdict, and, without setting it aside or ordering a new trial of the issue, treat it as a nullity; and assuming, that without any testimony whatever being offered in the case, the court may, on view of the models, declare that the defendants' patent infringes that of complainant; and assuming the doctrine affirmed by this court in Silsby *v.* Foote, and McCormick *v.* Manny,

to be correct, "that defendant has not infringed plaintiff's patent unless he has used all the parts embraced in plaintiff's combination," I think it is clear to ocular demonstration that the defendants have not infringed either of the combinations claimed, unless we assert that all other combinations which produce the same result are equivalents for the first—a sophism which has just been rejected by this court in the case of McCormick *v.* Manny. A vindication or demonstration of the correctness of this conclusion could not be made intelligible unless by a long recital from the specification, and an exhibition of models or diagrams. The decree of the court below very properly does not assert or adjudge that defendants have used the complex combination of complainant's specification in any of its numerous parts save one—the expanding rod. On this point, therefore, my objection to the affirmance of any portion of this decree is, because it is founded on a claim admitted to be void in law, and is sustained by presuming, contrary to the record, that it was founded on a claim found by verdict in the case to be void in fact, and without any proof of infringement save ocular demonstration of the contrary.

III. But, assuming the verdict of 1848 between the present complainant and some of the defendants to be conclusive as an estoppel on all of them, notwithstanding the denial of the answer and the evidence of our senses, yet that verdict was between the complainant's patent and the Race patent, which is called the "brass-rod regulator," then used by the defendants. It had no reference whatever to the "expander patent," afterwards used by defendants. There is no charge in the bill that the combination of this last patent infringes the complainant's patent. There was no evidence offered to prove such to be the fact. The master's report declares it not to be an infringement of the combination of the third claim—it is patent to the eyes of any one who will examine the models, that it does not; yet, because it used the expansive power of metals, the defendants are mulcted in the sum of $7,033 damages, not for invading the complainant's rights, but for evading his patent by a patented invention for a different combination. I forbear to make any further remarks on this enormity, because it is affirmed by the division of the court, and their opinion has, happily, not been compelled to defend it by argument. As it is without precedent, so neither can it be cited as such hereafter.

IV. Lastly, after a very long and laborious investigation, the master has found that the profit of making and vending the machine charged as an infringement, is ten cents on each regulator. This finding of the report was excepted to by the

complainant. The court overruled the exception and confirmed the report on this point; and, nevertheless, assess the damage at *ten-fold the amount.* By what process of reasoning or arithmetic, on what facts or what principle of law, this astonishing and ruinous decree is founded, it does not undertake to explain. I can conceive of no other ground than that the court have calculated the whole profit of the stove, as was done in the case of Seymour *v.* McCormick, and overruled by this court.

Believing, therefore, that the decree of this court, so far as it affirms any portion of the decree of the Circuit Court, is not only unsustained by evidence, but contrary to the law as heretofore established by this court, I cannot give my assent to it.

THE PEOPLE'S FERRY COMPANY OF BOSTON, CLAIMANTS OF THE STEAMBOAT JEFFERSON, APPELLANTS, *v.* JOSEPH BEERS AND DAVID WARNER, ASSIGNEES OF B. C. TERRY.

The admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction.

Whether the District Courts can enforce a lien in such cases, where the law of the State where the vessel was built gave a lien for its construction, is a question which the court does not now decide.

[MR. CHIEF JUSTICE TANEY, HAVING BEEN INDISPOSED, DID NOT SIT IN THIS CAUSE.]

THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. O'Connor* for the appellants, and *Mr. Benedict* for the appellees.

Mr. O'Connor made the following points:

First Point.—A contract to build and complete a ship or vessel is not within the admiralty jurisdiction of the United States courts, though it be intended to employ her in navigating the ocean, and even though the employer be a citizen or inhabitant of some other State or country than that in which the work is to be done; much less is a contract merely to construct the hull of an intended vessel within that jurisdiction.

I. The Constitution and laws of the United States conferred on the courts of the Union the admiralty and maritime jurisdiction, as it existed at our separation from the parent State, under a just view of English jurisprudence.

1. The attempt to tie down the jurisdiction, as a moral and legal entity, to a definition based upon the instances in which the English court has been able to exercise its powers in despite of judicial rivalry and hostility, may not have succeeded. But there is nothing inconsistent with the above proposition (I) in any of the decisions of this court which carry the exercise of admiralty cognizance beyond the limit marked by practice in England prior to and at the Revolution, nor even in any of the opinions favoring such extension. (Genesee Chief *v.* Fitzhugh, 12 How., 455; New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 How., 392; 18 How., 189.)

2. No one at this day will propose to extend the admiralty jurisdiction to all cases which would fall within it according to the practice of continental Europe. And unless it is defined by a reference to the true principles of that law on which our whole judicial polity is based, we shall be left without guide or precedent. (1 Kent's Com., 369, notes, 8th ed.)

II. The laws of continental Europe in respect to claims for repairs and supplies to ships or vessels, and in respect to the question of admiralty jurisdiction, do not discriminate between foreign and domestic vessels. The law of England always has so discriminated, and this court has in like manner discriminated. In English and American law, the admiralty jurisdiction is confined to repairs, &c., furnished in a place other than the home port of the vessel. (The Nestor, 1 Sumner, 79; Justin *v.* Ballam, 2 Ld. Raym., 806, first resolution; 3 Hagg., 144; 3 Knapp P. C. R., 194; Act of 3d and 4th Vic., ch. 65, sec. 6; The Alexander, 1 W. Robinson, 288; ib., 360; Ward *v.* Peck, 18 How., 267; Benedict's Adm., sec. 108; Zane *v.* The Brig President, 4 Wash. C. C. R., 456; The General Smith, 4 Wheaton, 438; 12th Admiralty Rule of this court; 1 Curtis's Com., sections 51, 52.)

1. The Roman civil law and the law of several modern nations, estimating less highly than the English common law the free and unrestricted circulation of property, gave a lien on solid grounds of natural equity to the producer, preserver, and improver of a thing, and to him who lent money for any of these purposes. This policy extended alike to every description of property. (Cushing's Domat, secs. 1741, 1745, 1765; The Nestor, 1 Sumner, 79; Bee's Ad. Rep., 78; Code Civil of Napoleon, sec. 2103, subs. 4, 5; French Com. Code, Book 2, art. 191, sec. 8; Civil Code of Louisiana, art. 3194, 3204 to 3215; Vanleuwen's Roman Dutch Law, Book, 4, ch. 13, sec. 8.)

2. The English common law, on the contrary, favoring the free negotiation of property, gave no lien in any of these cases,

unless the claimant retain possession of the thing. And even those nations of Europe which adopted the civil law as the general basis of their jurisprudence, and yet held intimate relations with England, assimilated their laws to the English policy. (Lickbarrow *v.* Mason, 1 Smith's Leading Cases, 430; Phila. Law Reg., 1856, vol. 4, p. 577; Bell's Com., secs. 1385, 1387, 1397.)

3. There was no reason in any other nation than England for a dispute as to the jurisdiction of the admiralty where the *right* existed; but in England that jurisdiction, if not kept within defined limits, encroached upon trial by jury. In this country, there is an additional objection. Every assumption of admiralty cognizance is an encroachment upon the jurisdiction and independence of the States.

III. Although the law and policy of continental Europe, overlooking as immaterial the distinction between foreign and domestic owners, gave a lien for building or constructing a vessel, as well as for repairs, and overlooked, as equally immaterial, in which court the claim was prosecuted, it is clear that, according to the principles and policy both of English and American law, the *builder* has not any lien by the general law, and cannot prosecute in the admiralty for his compensation. (The General Smith, 4 Wheat., 438; Robinson *v.* Hosier, 4 B. and Ald., 344; Wood *v.* Russell, 5 B. and Ald., 942; 2 Story's R., 462.)

IV. Building or constructing a ship for a citizen or a foreigner is a purely local matter, merely tending toward and not in any way directly connected with maritime commerce. It is not within the reasons on which admiralty jurisdiction is founded. (St. Jago de Cuba, 9 Wheat., 409; Shrewsbury *v.* Two Friends, Bee, 435; Hurry *v.* John and Alice, 1 Wash. C. C. R., 296; 2 Woodb. and Min., 110.)

Second Point.—The builders had no lien by any rule of maritime law, nor by the common law, nor by any local law, nor by any contract.

I. The lien recognised in some of the maritime codes of continental Europe is not admissible in this country.

II. They relinquished their builder's lien under the common law by parting with the possession.

III. There is no statute or other local law in New Jersey giving a lien to shipwrights.

IV. The laws of New York giving a lien to shipwrights apply only to the case of debts contracted within the State of New York, and for work done or materials furnished in the State of New York. (2 R. S., 493, sec. 1.)

V. The contract created no lien. The special provision

on that subject contained therein was designed for other objects.

1. Although a vessel is to be paid for by instalments as the work progresses, it depends on the terms of the contract whether any title is acquired by the employer before final delivery. This is especially so as to materials provided but not applied to the vessel. It was designed to settle this question in favor of the employer as security for his advances. (Andrews *v.* Durant, 1 Kernan, 45; Spanish Co. *v.* Bell, 34 Eng. L. and Eq., 188; Wood *v.* Bell, 36 Eng. L. and Eq., 148.)

2. The second branch of this clause was designed to save the common-law lien of the mechanic from the possible implication of a relinquishment in consequence of the transfer of the ownership to the employer. The common-law lien remained until the mechanic parted with the possession.

Third Point.—If any lien existed at common law, by local statute or by express contract, it was not enforceable in the admiralty.

I. If there was a lien by force of the contract, it was not a maritime lien. (Leland *v.* Medora, 2 Wood. and Min., pp. 107 to 113; Hurry *v.* John and Alice, 1 Wash. C. C., 296; 2 Brown's Civ. and Adm. Law, p. 116, 95; Bogart *v.* The John Jay, 17 How., 400; Schuchardt *v.* Angelique, 19 How., 241.)

II. Where State law, either positive or customary, gives a lien, there is no ground for enforcing such lien by admiralty process.

1. When the lien is given by the State law, that same law provides adequate means for enforcing it. (1 Peters Adm. Dec., 228; Barque Chusan, 2 Story, 462.)

2. Enforcing the lien of the State law by admiralty process would lead to inconvenient conflicts of power. (The R. Fulton, 1 Paine's C. C. R., 623.)

3. Furnishing repairs, &c., to *foreign* vessels is the only case in which the maritime law gives a lien. If it was necessary for the purposes of maritime commerce, the lien would be given in other cases. That a lien for repairs, &c., in other cases, is not needed, proves that such liens, when given *by other laws*, are not in their nature maritime. And there is a great incongruity in enforcing by admiralty process a title unknown to the admiralty law.

4. Although it has been often decided in the circuits that a lien for repairs, &c., not known to the general maritime law, and merely arising from State legislation, might be enforced in the admiralty, that point has never been conclusively determined in this court. (Peyroux *v.* Howard, 7 Pet., 341; Barque Chusan, 2 Story's R., 463.)

Mr. Benedict's points were the following:

First. Liens upon vessels for maritime services to the vessel are beneficial to the general interests of commerce, are founded in natural equity, and are favored in law, especially in the admiralty. (The Calisto, Davies Rep., 38; The Atlantic, Crabbe Rep., 442; Emerigon, Mar. Loans, ch. 12, sec. 3.)

Second. The building of a vessel and the repairing of a vessel are in principle the same thing. Repairing is reconstruction *pro tanto.* They are both of them making fit for maritime service as a vessel, what was before unfit for that service. Both furnish to the owner a serviceable vessel for the purpose of commerce. Both are labor and materials made part of or incorporated in the vessel of another. Both are necessaries, in the legal sense of that word. They are reasonable and proper services for the owner to the vessel, to make her more available to him as an instrument of maritime commerce, always subject to the perils and laws of the sea. In the sense of absolute necessaries, they are neither of them necessaries. They are necessaries just as the various articles of comfort and luxury which make up the stores of a ship or a family are necessaries, although mere bread and water are all that are necessary to sustain life.

They are united and classed in the books of maritime law as like maritime causes of action or services of the same nature, and declared to be a lien upon the vessel by the maritime law, from its earliest period, "Building, amending, saving, victualling." (Benedict Ad., secs. 95, 270, 271, 272; Flanders Mar. Law, secs. 242, 249; Dig. Lib., 42, lit. 6, sec. 11; 1 Boulay Paty, 121; Consulato, Ch. 32; Ord. de la Marine Art., 17; Cleirac, 351, 352; Davies Rep., 29; The Nestor, 1 Sumner Rep., 79.)

The State laws give liens—New York for "building, repairing, fitting, furnishing, and equipping," (2 Rev. Stat. N. Y., 491, sec. 1, subd. 1;) New Jersey, same as New York, (Laws of New Jersey, 1857, 382;) Pennsylvania, "building and fitting ships," (New Brig, Gilpin, 540;) Maine, "building or repairing," (The Calisto, Davies, 29;) Louisiana, "construction or repair," (7 Pet. Rep., 341, Peyroux *v.* Howard.)

"All matters that concern owners and proprietors of ships, as such, and shipwrights, are within the admiralty jurisdiction." (Godolphin, 43; Benedict Adm., sec. 264.)

The civil law, the general admiralty law, the British admiralty law, the lien laws of the States, the decided cases in our own courts, all concur. For obvious reasons, cases to enforce the builder's lien are much more rare than those for repairs.

Nothing is so much favored as the price for building a ship—

commerce and the State are interested in it. It is just that the builders should enjoy the lien which the law gives them. (Emerigon Mar. Loans, ch. 12, sec. 3.)

Third. Any lien upon a vessel for a maritime service to the vessel may be enforced in the admiralty. (The Marion, 1 Story Rep., 73; Bened. Adm., sec. 270; Flanders Maritime Law, sec. 242.)

Fourth. The lien in this case is established as follows:

1. The vessel while building in New Jersey was a foreign vessel, and *so there was a lien by the maritime law.*

2. She was in the builders' hands, and so by the common law, which is the law of New Jersey, they had the *common-law or possessory lien.*

The builders never entirely gave up the possession; although they allowed the owner to take her to put in the machinery, they did not deliver her absolutely, but continued on board to finish her.

3. There was the *express lien given by the contract,* "*subject to a lien,*" &c., which was for the maritime cause of materials and labor for building.

4. For the work and labor done in New York there was also *a lien by the State law.*

5. As the builders had the possession in this State as builders, they had also the common-law or possessory lien in New York.

None of these liens ever existed by the mere possession or by the contract alone, but by the beneficial service to the boat, and for all these liens the remedy is complete in admiralty, because the lien has a maritime consideration or cause—the beneficial service in fitting the boat for the maritime service of the owner. No matter how the lien is acquired—if it be of a maritime character—the admiralty has the jurisdiction to enforce it. (The Marion, 1 Story Rep., 68.)

Fifth. This result of the ancient and modern authorities has by repeated examination become more and more clearly and firmly settled every year, for more than half a century. (Benedict Adm., secs. 257, 258, 259, 260.)

The defence in this case presents another of those instances in which an effort is made to deprive the admiralty of a large part of its jurisdiction, on the narrow English doctrines of two hundred years ago.

It cannot be necessary to reargue that general doctrine, after the investigations and decisions of the Supreme Court within the last ten or fifteen years.

Sixth. The possession of the vessel was never surrendered by Crawford & Terry.

1. The bringing her to New York to Small's works, and

allowing Small's men to take temporary and divided charge of her, to put in the engines preparatory to finishing her, was not a delivery. They were "to construct and build" complete in all her ship-carpenter work, and "deliver complete," which could not be done till after the engines were in. The taking charge and watching by the engine men was for a purpose of construction, and was subordinate and necessary to the legal possession of the builders for the purpose of ultimate completion.

2. The attaching her by one of the creditors of Crawford & Terry as their property, could have no effect upon the property or possession of the boat. She was the property of Small, in the possession of the libellants.

Mr. Justice CATRON delivered the opinion of the court.

This was a libel filed by Beers & Warner as assignees of Crawford & Terry, the builders, against a new steam ferry-boat, called the Jefferson, for a balance due the builders on account of work done and materials employed in constructing the hull of the vessel. It is alleged that Crawford & Terry contracted to build for Wilson Small, of New York, three ferry-boats, at Keyport, New Jersey, for $12,000 each; that they built one of them, to wit, the Jefferson; that they have a lien for the unpaid balance of the price, and that the vessel is now in the southern district of New York.

Process having been issued, the People's Ferry Company, of Boston, intervened as owners, and filed their claim and answer, denying the facts alleged.

On the trial, the defendants proved and put in evidence a written agreement for building the hulls of three vessels, between Wilson Small, who was building under a contract for the Ferry Company, and Crawford, by which the latter was to construct, build, and deliver at New York city, the hulls of the three vessels. The contract provides that the boats and materials, as soon as the same may be fitted for use, shall be the property of Small, subject only to the lien of Crawford for such sum or sums of money as may be due under the contract.

When the Jefferson was nearly finished, she was taken to New York and delivered to Small, to receive her engine; and afterwards, Crawford & Terry assigned their claim to the libellants, Beers & Warner. The balance due to the builders was over seven thousand dollars, and for this sum the libellants obtained a decree of condemnation.

The only matter in controversy is, whether the District Courts of the United States have jurisdiction to proceed in

admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends.

The lien reserved by the *contract* is not set up in the libel, nor can it avail, as it amounted to nothing more than a mortgage on the vessel for a debt. (Bogert *v.* John Jay, 17 How., 400.) Nor could a maritime lien for work and materials be claimed by the local law, as no statute creating any lien existed in New Jersey when the vessel was built. We have then the simple case, whether these ship carpenters had a lien for work and materials, that can be enforced *in rem* in the admiralty?

The District Court held: "That it is very clear that the admiralty law creates a lien in favor of a party who does work or furnishes supplies to a foreign ship, and that a ship owned in another State is foreign.

"That in determining the question whether such lien is created also in favor of the builder of a ship, as well as of him who furnishes work and supplies to her after she is built, the court is not controlled by the restricted jurisdiction of the admiralty courts of England, as exercised by them under the supervising power of the common-law courts. The rules and principles of the admiralty law, as administered by the admiralty courts of this country, are more enlarged—more in conformity to the principles of the civil law, as administered by the maritime nations of continental Europe.

"That, according to that law, the interests of shipping and ships, not only in their creation, but in their preservation, are of paramount importance; that the importance of this consideration is the reason why the material man who furnishes supplies for the preservation of the ship is entitled to a lien; and there is the like reason for giving a lien to him who has furnished necessaries to bring the ship into being.

"That the English law gives only the common-law possessory lien to a material man or to a builder; but the maritime law of continental Europe gives a maritime lien to those who build, supply, or repair, a ship, at least where she is a foreign ship. This is expressly stated by Boulay Paty, and this principle was acted upon for a long time by the English admiralty, before it was overthrown by the courts of common law.

"That the right of a material man who has furnished necessaries for the preservation of a foreign ship, has been repeatedly acknowledged by the admiralty courts of this country; and as the like reason exists why a carpenter should have a lien on that which by his work and materials he creates, as on that which he preserves, after he has created it; and as by the gen-

eral maritime law a lien exists in the one case, as in the other, the court must hold that Crawford & Terry had a lien upon the boat for the work done and materials furnished in building her."

Foreseeing that the cause would be brought up by appeal to this court, the circuit judge merely acquiesced in the decision of the District Court, and affirmed its decree.

The question presented involves a contest between the State and Federal Governments. The latter has no power or jurisdiction beyond what the Constitution confers; and among these, it is declared that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction;" and by the judiciary act of 1789, this jurisdiction is conferred on the District Courts of the United States. The extent of power withdrawn from the States, and vested in the General Government, depends on a proper construction of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now; what was reserved to the States, to be regulated by their own institutions, cannot be rightfully infringed by the General Government, either through its legislative or judiciary department. The contest here is not so much between rival tribunals, as between distinct sovereignties, claiming to exercise power over contracts, property, and personal franchises.

How largely these may be involved in the contest is most apparent when we take into consideration that the admiralty courts now exercise jurisdiction over rivers and inland waters, wherever navigation is or may be carried on, and extends to almost every description of vessel which may be employed in transporting our products to market. Over all these the admiralty jurisdiction is now exercised in proper cases; and the question is, whether the contract before us is a proper case, and within the grant of Federal jurisdiction. The contract is simply for building the hull of a ship, and delivering it on the water. The vessel was constructed *and delivered* according to the contract, and was in the possession of the party for whom it was built when the libel was filed.

The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation. (1 Conckling M. L., 19.)

In considering the foregoing description, it must be borne in mind that liens on vessels encumber commerce, and are dis-

couraged; so that where the owner is present, no lien is acquired by the material man; nor is any, where the vessel is supplied or repaired in the home port. The lien attaches to foreign ships and vessels only in favor of the carpenter who repairs in a case of necessity and in the absence of the owner. It would be a strange doctrine to hold the ship bound in a case where the owner made the contract in writing, charging himself to pay by instalments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation, (on the ocean or elsewhere,) it was a contract made on land, to be performed on land. The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built; they were bound to rely on their contract. It was thus held by the first Judge Hopkinson, in 1781, who then declared, as respects ship builders, that "the practice of former times doth not justify the admiralty's taking cognizance of their suits." (Chilton *v.* The Brig Hannah, Bee's Admiralty R., app., 419.) And we feel warranted in saying that at no time since this has been an independent nation, has such a practice been allowed. (Turnbull *v.* Enterprise, Bee's Adm. R., 345.)

It is proper, however, to notice the fact that District Courts have recognised the existence of admiralty jurisdiction *in rem* against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien had been created by the local law of the State where the vessel was built; such as Read *v.* The Hull of a New Brig, 1 Story's R., 244; and Davis & Lehman *v.* A New Brig, Gilpin's R., 473; ib., 536; Ludington & King *v.* The Nucleus, 2 Law Jour., 563. Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court.

For the reasons above stated, it is ordered that the decree below be reversed, and the libel dismissed for want of jurisdiction.

CYRUS H. MCCORMICK, APPELLANT, *v.* WAITE TALCOTT, RALPH EMMERSON, JESSE BLINN, AND SYLVESTER TALCOTT, SURVIVORS OF JOHN H. MANNY.

The reaping machines made by Manny do not infringe McCormick's patent, either as to the divider, the manner in which the reel is supported, or the combination of the reel with a seat for the raker.

McCormick not being the original inventor of the machine called a divider, but the patentee of only an improvement for a combination of mechanical devices, could not hold as an infringer one who used only a part of the combination.

The manner of supporting the reel in Manny's machine is not like that in McCormick's, and was used before McCormick's first patent.

With respect to the raker's seat, McCormick's patent was for a combination of the reel with a seat arranged and located according to his description. But Manny's arrangement differs from McCormick's in principle as well as in form and combination, and is therefore no infringement of McCormick's patent.

THIS was an appeal from the Circuit Court of the United States for the northern district of Illinois, sitting as a court of equity.

The bill which was filed by McCormick alleged that the defendants in error had infringed his patent for a reaping machine; called upon them for an account, and prayed for an injunction. The defendants denied the infringement, and claimed a right to construct their machines under letters patent granted to John H. Manny. The Circuit Court dismissed the bill, and McCormick appealed to this court.

McCormick's patents had been twice before this court, as will be seen by referring to 16 Howard, 480, and 19 Howard, 96. The same claims, viz: the fourth and fifth of the patent of 1845, were involved in the case in 19 Howard, and the remaining claim, viz: that relating to the seat of the raker, under the patent of 1847, was before the court in 16 Howard, only that it now comes up under a reissued patent in 1853.

The reporter despairs of giving any intelligible account of the argument in this case. The record was upwards of one thousand pages of printed matter, of which seven hundred and fifty pages were the depositions of witnesses; and the court room was filled with models and drawings, introduced upon either side, to which constant reference was made by the counsel.

The case was argued by *Mr. Reverdy Johnson* and *Mr. Dickerson* for the plaintiff in error, and *Mr. Stanton* and *Mr. Harding* for the defendants.

Mr. Justice GRIER delivered the opinion of the court.

The bill charges the defendants with infringing two several patents granted to complainant, for improvements in the machine known as McCormick's Reaper. One of these patents bears date the 31st of January, 1845; the other on the 24th of May, 1853, being the reissue of a previous one, dated 23d of October, 1847. The defendants are charged with infringing the fourth and fifth claims of the patent of 1845, and the second claim of the reissued patent of 1853.

I. The first infringement charged is that of the divider, or that part of the reaping machine which is defined "as an ar-

rangement, or apparatus, for separating the grain to be cut from that which is to be left standing."

The claim is as follows: "4th. I claim the combination of the bow L and the dividing-iron M, for separating the wheat in the way described."

The description referred to is as follows:

"The *divider* K is an extension of the frame on the left side of the platform, say three feet before the blade, for the purpose and so constructed as to effect a separation of the wheat to be cut from that to be left standing, and that whether tangled or not. E is a piece of scantling, say three feet long and three inches square, made fast to a projection of the platform by two screw-bolts. To the point of this piece, at K, is made fast by a screw or *bolt* a bow L of tough wood, the other end of which is made fast in the hinder part of the platform at R, and it is so bent as to be about two and a half feet high at the (left) reel-post, and about nine inches *out* from it, with a regular curve. The *dividing-iron* M is an iron rod of a peculiar shape, made fast to the point of the same piece E, and by the same screw-bolt that holds the bow L. From this bolt this iron rises towards the *reel* S, at an angle of say 30°, until it reaches it, then it is bent so as to pass under the reel as far back as the blade, and to fit the curve of it (the reel.) From the bolt in the point aforesaid, the other end of this iron extends, say nine inches, along the inside of the piece E, where it is held by another screw-bolt M, and where it has a groove (or slot) in it to admit the other ends being raised or lowered (turning on the point screw K as a pivot) to suit the height of the reel. By means of the bow to bear off the standing wheat, and the iron to throw the wheat to be cut within the powers of the reel, the required separation is made complete."

The answer denies that the arrangement of the divider used by defendants for separating the grain to be cut from that to be left standing is the same in construction or mode of operation as that claimed by complainant, or a colorable evasion of said claim, and avers that it is a different and distinct arrangement, invented by J. H. Manny, after several years' experiments.

It would be a difficult task to make intelligible to the uninitiated the construction of a very complex machine, without the aid of models or diagrams. But, for the purposes of the case, the divider, although a component part of the great complex machine called the reaper, may be considered by itself as a machine, or combination of devices, attached to the reaper to perform certain functions necessary to complete the whole operation. In order to ascertain whether the divider used by defend-

ants infringes that of the complainant, we must first inquire whether McCormick was the first to invent the machine called a divider, performing the functions required, or has merely improved a known machine by some peculiar combination of mechanical devices which perform the same functions in a better manner.

If he be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first.

That portion of a reaping machine called the divider or separator may be described as a pointed, wedge-formed instrument, which is attached by its butt at that extremity of the cutting apparatus which runs in the grain, in such manner that its point projects in advance of the cutting apparatus, and enters the standing grain. Its functions, where the grain stands erect, are to divide it into two portions, one of which is borne inwards by the inner side of the wedge-formed implement within the range of the cutting apparatus and of the reel, in case the machine is fitted with a reel; the other portion of the grain is borne outwards by the outer side of the divider, so as to be passed by that portion of the machine which lies behind the cutting apparatus. When grain is inclined outwards, the function of the divider is not only merely to divide the grain into portions, but also to raise up the inclined stalks of the grain, below which the divider passes. When the grain inclines inwards, the function of the divider is not only to divide the mass, but also to raise up the inclined stalks of grain beneath which the divider passes, and to bear them outwards without the range of the reel, if the machine has a reel, and of the cutting apparatus. When grain, in addition to being inclined, is also entangled, the divider not only separates and raises the stalks, but also tends to disentangle them. The lower face of a divider also performs the function of a shoe or runner, to prevent the cutting apparatus from digging into the earth, when, by any accidental movement of the machine, it would

otherwise do so. The divider also performs the function of limiting or regulating the width of the swath, by raising up and turning inwards those stalks of grain which, from their inclination outwards, would otherwise escape the action of the cutter; and by raising up and turning outwards those stalks of grain which, from their inclination inwards, would otherwise be within the range of the cutter. All dividers perform these functions in a greater or less degree. The English patent of Dobbs, in 1814, had dividers of wood or metal. The outer diverging-rod rose as it extended back, and diverged laterally from the point, to raise the stalks of grain inclining inwards, and to turn them off from the other parts of the machine. The patent of Charles Phillips of 1841 had a divider, shaped like a wedge, performing the same function, turning the grain aside on both sides of the machine, and raising it up. Ambler's machine had a triangular divider performing the same functions, as also the machines of Hussey, Schnebly, and that of McCormick, patented in 1834, which is now public property. The present claim is for the combination of this bow with a dividing iron of a certain form, and for nothing more. This dividing iron is but a new form or substitute for that side of the triangle or wedge which in other machines performed the function of separating the inside grain, and raising it to the cutters.

It is described in the patent as having these peculiarities to distinguish it from those that preceded it.

1. It rises at an angle of about thirty degrees till it reaches the reel.

2. It is curved under the reel.

3. It is made adjustable by means of a slot, so as to suit the different heights of the reel.

Its function is to raise and support the grain along the inner edge of the divider, at the maximum elevation consistent with the employment of the reel. As a form or combination of devices it is new, and no doubt an improvement, and therefore the proper subject of a patent. But as a claim for a combination of mechanical devices or parts, it is not infringed by one who uses a part of the combination. Nor can it challenge other improvements of the same machine, different in form or combination, as infringements, because they perform the same functions as well or better by calling them equivalents. The machine constructed under defendants' patent has a wooden projection, somewhat in the form of a wedge, extended beyond the cutting-sickles some three feet, and which, from the point in front, rises as it approaches the cutting apparatus, with a small curve (not approaching to an angle of thirty degrees) so

as to raise the leaning grain. It has no dividing-iron, nor substitute or equivalent possessing the peculiar qualities of that instrument. It more resembles the wedges in use before McCormick's patent of 1845. As an improvement on former machines, it has some peculiarities of form and construction, but it does not adopt the combination of complainant's patent. It is a distinct improvement, probably inferior to McCormick's, but certainly no infringement of his claim.

II. The fifth claim of complainant's patent of 1845, which the bill charges the defendants with infringing, is as follows:

"5. I claim setting the lower end of the reel-post R behind the blade, curving it at R^2, and leaning it forward at top, thereby favoring the cutting, and enabling me to brace it at top by the front brace S, as described, which I claim in combination with the post."

In the reaping machine of McCormick's original patent of 1834, he had placed the reel-post in front of the cutters. This position of the post interfered with the action of the reel in drawing the grain to the cutters, especially in gathering tangled grain. In order to remedy this defect of his own machine, he set the post farther back, and braced it as described.

Defendant does not support his reel by posts, as was done by McCormick. He uses the horizontal reel-bearer connected by a frame with the hinder part of the machine. This device for supporting the reel was invented and used many years before McCormick's first patent of 1834. It had no reel-post situated as in his patent, and encountered none of the evils remedied by the change in its position. This attempt to treat the earlier and better device used by defendant as an infringement of a later device to obviate a difficulty unknown to the first, is an application of the doctrine of equivalents which needs no further comment.

III. The bill charges defendants with infringing the second claim of the reissued patent of 1853. This claim is as follows:

"2. And I also claim the combination of the reel for gathering the grain to the cutting apparatus, and depositing it on the platform, with the seat or position for the raker *arranged and located as described*, or the equivalent thereof, to enable the raker to rake the grain from the platform, and deliver and lay it on the ground at the side of the machine as described."

If this claim be construed to include all machines which have a reel and a raker's seat, it is void, for want of novelty. Hite, Woodward, Randall, and Schnebly, had invented and publicly used reaping machines which had reels, and a place for the raker on the machine. But the true construction of this claim, and the only one which will support its validity, is to treat it

as a claim for a combination of the reel with a seat "arranged and located as described." And such was the construction given to it by the defendant himself, when the Commissioner had refused to grant him a patent claiming the mere combination of a reel and a raker's seat, "because such a combination was not patentable, the functions of each device having no necessary connection with the other."

This arrangement for the location of a raker's seat was made "by placing the gearing and crank forward of the driving-wheel, and thus carrying the driving-wheel further back than heretofore, and sufficiently so to balance the rear part of the frame and the raker thereon."

By this device he obtained a place for the raker over the finger-bar, just back of the driving-wheel, and at the end of the reel, where he could have free access to the grain, and rake it off the machine at right angles to the swath. It was by limiting his claim to this arrangement, location, and combination, that the complainant obtained his patent; and without this construction of it, the claim is neither patentable nor original.

The arrangement, combination, and location of the raker's seat, by defendants, has been patented to Manny, as an independent contrivance, and distinct invention. The place for the raker is obtained by a change in the shape of the platform, different from any before employed. It differs from the complainant's device in principle as well as in form and combination. The raker's seat is on a different part of the machine, where he may stand without destroying the balance of the machine, or tilting it up. It requires no modification of the reel. It requires no such combination or modification of parts of the machine in order to find a place for the raker, which is an essential part of complainant's claim.

It is substantially different, both in form and in combination, from that claimed by the complainant, and is consequently no infringement of his patent.

Concurring, as we do, in the opinion and decision of the court below on these several points, the decree is affirmed with costs.

Mr. Justice DANIEL dissenting:

In the opinion of this court just delivered I do not concur. Protracted as the discussion by counsel in the case has been, the real grounds for controversy between the parties are obvious, and comprised within quite a limited compass. The unusual display of mechanical ingenuity, and the comment upon its progress exhibited in the conduct of this cause, whilst they evince great zeal and industry, and may afford entertainment to the

curious on such subjects, are in a great degree irrelevant to and beside any legitimate inquiry which an adjustment of the claims of the parties either imposes or warrants. In the decree of the court below, as well as in the arguments in this court, it has been conceded, that the patent of the appellant is strictly legal. This *concession* necessarily excludes, and in legal acceptation *concludes*, all inquiry as to the right of the appellant to the full benefit of his invention, either as an original or a combination, and renders unnecessary, and irregular, and improper, any and every comparison between that invention and previous claims to discovery and improvement, having in view the same results, and the same or merely equivalent modes of producing them. This *concession*, therefore, narrows down and confines the proper investigation before this court, as it should have restricted that before the Circuit Court, to the single question, whether the machine complained of as an infringement, either in theory, in construction, or in operation, was the same with the improvement invented by the appellant, for the benefit or the reward for which the law had given its guarantee? This was the proper inquiry before the court below, is the only regular inquiry here. All others connected with previous inventions were and must be irregular, and are excluded and forbidden by the concession that the patent of the appellant is legal and valid. To guide them in this, the only legitimate inquiry, this court has had before them a species of evidence of all others best calculated to conduct them to the truth—evidence superior to, and unaffected by, the interests or prejudices of partisans, or by the opinions (the reveries, they may often be called) of a class of men styled experts; men as often skilful and effective in producing obscurity and error, as in the elucidation of truth. No witnesses can testify so clearly and so impartially as do the subjects (though mute) concerning which a controversy about identity or dissimilarity is pending. These witnesses have been produced, and their testimony eagerly and keenly scrutinized; and that testimony establishes, in my judgment, with a force and certainty which no ingenuity can either withstand or evade, that the machine put in operation by the appellees is a palpable infringement of the rights of the appellant; that in theory or principle, in structure, in the modes of operation, and in the results proposed, it is essentially, and, with some insignificant and merely apparent diversity, *formally identical*, at least in one important particular, with the invention secured by the Government to the appellant, and admitted by the appellees, and by the court, to have been rightfully and legally guarantied to him.

That portion of the machines put in operation by each of

the parties to this controversy, and which constitutes the most material subject of contention in this cause, consists of what in the description and specification of the respective patents is called a divider. The function and the value of this divider are experienced in separating the stalks of wheat designed to be immediately severed by the cutters, from those which do not come within their immediate and regular operation, but which it is desired should be left to the future or succeeding action of the machine. It frequently happens, in fields of luxuriant growth, that from high winds, heavy rains, and even from its own weight, wheat is pressed down, and becomes in rustic phrase *lodged*. In this condition, the stalks and heads of the wheat, on both sides of a line described by the track of a machine, will become entangled, and inclined in various and opposite directions, accordingly as the momentum which displaces the natural position of the growing crops has been applied. In such a condition of the wheat, any process by which a portion of the crop should be torn apart from portions with which it was intertwined, would prove highly detrimental, inasmuch as it would necessarily increase the irregularity in the position of the wheat not cut, and standing outside of the regular track of the machine; and, by violently and rapidly rending apart the tangled straw, would shatter and waste the grain in each division, creating thereby a serious diminution in the yield or product. In order to prevent these mischiefs by disentangling the wheat, by separating that designed to be immediately severed from that reserved for the succeeding action of the machine, and by raising up the former, and bringing it within the scope and operation of the reel and the cutters, was devised an addition or appendage to the reaper, called the *divider*. The importance of this appendage, both to the success of the reaper and on account of its real utility in practice, cannot be with reason called in question. Its essential importance is sufficiently evinced by the zeal and industry displayed, and the extraordinary expense which must have been incurred in this controversy. The divider of McCormick may be thus substantially described: A pointed instrument or structure, called by the patentee a *bow*, formed of strong hard wood, confined in front, and projecting so far in advance of the cutters as to enter the wheat in time to effect its preparation for the approach of the cutters. This bow is extended in a curvilinear form on the outer side of the machine, next the grain to be separated from the cutters, and is gradually elevated from the point in front to a degree increasing towards the rear of the machine, sufficient to disentangle the straw, and place it in a position proper for the sweep or action of the returning machine. On the interior side of

the machine, or that on which the grain is to be severed, the divider of McCormick is constructed of a bar of iron, confined at the same point with the wooden bow above mentioned as operating externally; and this iron bar is capable of being so adjusted as to disentangle and raise the wheat separated from that standing on the exterior of the machine; and by a lateral and angular direction given this adjustable bar, as well as by its vertical extension, it embraces and secures the wheat on the interior side of the machine, and presses it to the action of the reel and the cutters.

Such as has been just described, I hold to be McCormick's divider, and such, too, its operation and effects. Let us now compare them with the structure and operation of the structure complained of as an infringement, in order to ascertain how far the rival claims of the parties are identical or diverse. And this comparison will be most fairly and satisfactorily accomplished, and the results most clearly established, by a recurrence to that silent but irresistible testimony already referred to, the testimony of the machines themselves.

On Manny's machine, the divider on the exterior side, or the side of the standing grain, is formed of a piece of timber which, according as fancy shall dictate, may be denominated a *bow*, or by any other appellation which may be preferred. This piece of timber, like the divider of McCormick's machine, is confined in front, and penetrates the standing grain in advance of the cutters. Like McCormick's divider, it rises obliquely from the stationary point in front, towards the rear of the machine, to a degree intended to be sufficient to separate and support the straw, and in the same manner diverges in an angle supposed to be great enough to secure that separation, and to prevent the breaking down of any portion of the straw by being pressed to the earth, or by being torn away by the machine in its progress. On the interior side or section of Manny's divider, there is no adjustable iron bar or rod, as a part of the divider; but for this is substituted a piece of timber or a board, connected and confined in the front of the machine with the wooden fixture extended on the outside next the standing grain; and from that point of connection this substituted board is protracted in a diverging angle, and to a length corresponding exactly with those of McCormick's adjustable iron bar, and, like the latter, it is gradually curved to a vertical elevation intended to be great enough to separate and raise up the wheat designed to be immediately severed by the cutters from that reserved for farther action of the machine. The only differences between this fixture and the adjustable bar of McCormick (and they are merely pretended and de-

ceptive) are these: that the former, instead of being of *iron*, is made of wood; that instead of being movable or adjustable, it is stationary; that it is broader on its lateral surface than is that of the iron portion of McCormick's divider, and on that lateral surface is somewhat curved. But these differences, correctly apprehended, are mere disguises, and were indispensable to shelter the possession of property evidently pirated from the rightful owner. Had the appellees openly taken McCormick's iron instrument, adjusted it so that it could be graduated in practice to the quality or height of the grain in which the machine was to operate, and placed it at an angle suited to the conducting of the grain within the action of the reel and cutters, there would in so bold a piracy have been left no ground, no pretext even, for contest or cavil. Hence the effort at distinctions or differences attempted in the case. To my mind, it seems impossible not to perceive that they are entirely unfounded, and cannot for one instant conceal these truths, viz: that the instrument or structure called a divider, introduced and practiced by the appellees, is in *theory* or principle, in *manner* of its operation, in its *effects* or *results*, and it may almost be said in its *minute constituent portions and formation*, identical with the instrument invented by and patented to the appellant, and therefore an infringement of the rights guarantied to him by the Government.

Entertaining this opinion, I must dissent from the decision of the court in this cause, and declare it as my opinion that the decree of the Circuit Court should be reversed, and this cause remanded with instructions to reinstate the injunction formerly awarded by the Circuit Court, and to direct an account between the parties. The only legitimate inquiry for the court is this: whether the improvement of McCormick called a divider, and the instrument claimed and put in operation by Manny, are essentially the same, or are essentially or substantially different. All that has been said (and a great deal has been said) about the comparative superiority or inferiority of inventions or improvements previous to those patented to McCormick, is wholly irrelevant, and out of this cause; and is calculated only to confound and to divert the attention from the only proper subject of investigation here, which is the rightfulness of the claims advanced by the appellant and appellees in this cause, relatively to themselves, and to no others.

THE UNITED STATES, APPELLANTS, *v.* CHARLES FOSSAT.

Where a petitioner files a claim to land in California before the board of commissioners created by Congress, the intervention of rival claimants is a practice not to be encouraged.

Where there is no natural boundary or descriptive call for the termination of lines of a tract of land, and the quantity of land called for in the grant is "one league of the larger size, a little more or less," the survey must only include a league. The words "a little more or less" must be rejected.

The grant is for one league of land, to be taken within the southern, western, and eastern boundaries designated therein, and to be located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the Executive department of this Government.

[MR. CHIEF JUSTICE TANEY, BEING INDISPOSED, DID NOT SIT IN THIS CASE.]

THIS was an appeal from the District Court of the United States for the northern district of California.

Fossat claimed an interest of three-fourths in the tract of land granted to Justo Larios by Governor Alvarado, on the 1st of August, 1842. The mesne conveyances need not be stated, as the only dispute in this court related to the location of the land.

In June, 1842, Larios presented a petition to the Governor, stating that he had previously presented one in 1836, and another in 1840, both of which were lost. He stated that he had purchased a house upon the premises, and resided there since 1836. Whereupon, the following grant was issued:

Juan B. Alvarado, Constitutional Governor of the Californias:

Whereas the citizen Justo Larios has asked, for his own benefit and that of his family, the land known by the name of the Capitancillos, bounded by the sierra, by the Arroyo Seco, on the side of the establishment of Santa Clara, and by the rancho of citizen José R. Berreyesa, which has for boundary a line running from the junction of the Arroyo Seco and Arroyo de los Alamitos, southward to the sierra, passing by the eastern base of the small hill situated in the centre of the cañada, the necessary steps having been taken and inquiries made, according to the laws and regulations on this subject, by virtue of the powers conferred upon me, in the name of the Mexican nation I have granted him the said land, declaring it his property by these presents, subject to the approval of the Departmental Assembly and to the following conditions:

1st. He may enclose it without injury to the passes, roads, and servitudes: he may enjoy it freely and exclusively, using

or cultivating it as may best suit him, and within one year he shall build a house, and it shall be inhabited.

2d. He shall solicit the proper judge to give him juridical possession, in virtue of this decree, by whom the boundaries shall be marked out, and he shall put on the boundaries, in addition to the landmarks, some fruit trees or useful forest trees.

3d. The land herein referred to is one league of the larger size, a little more or less, as is explained by the map accompanying the espediente. The judge who shall give the possession shall have it measured, in conformity to law, leaving the surplus which remains to the nation, for the purposes which may best suit it.

4th. If he should violate these conditions, he shall lose his right, and liable to be denounced by another.

Wherefore I order that this title, being held firm and valid, shall be registered in the book of adjudications of vacant lands, and delivered to the person interested, for his protection and other purposes.

Given in Monterey, the 1st of August, 1842.

The reporter will endeavor to give the reader an idea of the locality without a map, which it would be difficult to make.

Let him imagine himself standing upon a range of hills or sierra about three thousand feet above tide. Looking to the north, he sees another range of hills about half as high as the one upon which he stands, and running nearly parallel therewith. The two ranges are connected together by a spur, running from one to the other, and from either side of this spur springs flow, which, running down ravines to his right and left, find their way around the lesser hills in front. Upon his left hand, the spectator may be supposed to trace the Arroyo Seco, which is Larios's boundary on that side; and upon his right he may see the marked line which had been mutually agreed upon by Larios and his neighbor Berreyesa as the separating line between them, and which constituted Larios's boundary upon that side. Thus standing at one end of a narrow parallelogram, the spectator may see the two lines upon his right and left, looking indefinitely into the distance for the closing line.

In this state of things, two questions arise:

1st. Which is the sierra where the tract of land begins? Is it the range of hills upon which we have supposed the spectator to stand, or the lesser range in front, called "Lomas Bajas."

2d. How far does the tract run in the direction where no boundary is given? Does it run as far as the dividing line is laid down between Larios and Berreyesa, or does it stop where

the quantity of land called for in the grant is obtained? The board of commissioners adopted the former rule, and therefore continued the tract up to the Arroyo Seco, which was the termination of the boundary line between Larios and Berreyesa. It may not be easy for the reader to apprehend precisely the different decisions hereafter referred to, because the points of the compass did not exactly correspond with those heretofore mentioned in the general view which a spectator is supposed to take from the top of the sierra.

The decree of the commissioners was as follows:

Decree.

CHARLES FOSSAT *v.* THE UNITED STATES.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the said petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is a portion of the place known by the name of Los Capitancillos, situated in Santa Clara county, and the same which was formerly occupied by Justo Larios, and the portion thereof hereby confirmed to the petitioner is bounded and described as follows, to wit:

On the south, bounded by the sierra; on the north, by the Arroyo Seco; on the west, by the middle of the ridge of the low hills running north and south, (which hills lie at the western end of said rancho los Capitancillos,) and the said division line being the same line of division adopted in a partition of said rancho, made by William Wiggins, and John B. Weller, and James M. Jones, as will appear by their deeds of partition recorded in the office of the recorder of deeds for Santa Clara county, in liber "C" of deeds, page 458; and on the east, by the place known as the rancho of the citizen José R. Berreyesa, which has for boundary a line running from the junction of the Arroyo Seco and Arroyo de los Alamitos, southward to the sierra, passing by the eastern base of the small hill situated in the cañada.

The said premises containing three-fourths of a square league of land, a little more or less; reference to be had to the grant of said rancho to said Justo Larios, and to the map which constitutes a part of the espediente, which are on the file in this case.

ALPHEUS FELCH,
THOMPSON CAMPBELL,
R. AUG. THOMPSON,
Commissioners.

Filed in office, February 28, 1854.

(Signed) GEO. FISHER, *Secretary.*

The United States appealed from this decision to the District Court of the United States for the northern district of California.

In that court there were a number of depositions and plats filed.

In August, 1857, that court passed the following decree, by which it will be seen that the tract of land was ordered to begin at the higher range of hills, and to run as far as the boundary line reached which had been adopted by Larios and Berreyesa:

Transcript from Board of Commissioners, No. 340.

THE UNITED STATES, APPELLANTS, *v.* CHARLES FOSSAT, APPELLEE.

STATED TERM, JUNE, 1857.

On appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California.

Decree.

This cause came on to be heard at a stated term of the court, on appeal from the final decision of the board of commissioners to ascertain and settle the private land claims in the State of California, under the act of Congress approved on the 3d of March, A. D. 1851, upon the transcript of the proceedings and decision of the said board of commissioners; the papers and evidence on which the said decision was founded, the petition of the appellants and answer of the appellee, and the further evidence given in this court, by leave of the court, and it appearing to the court that the said transcript has been duly filed according to law, and the appellee in open court confessing error in the said decision of the board of land commissioners, in this, that it does not describe in a manner sufficiently definite the boundaries of the tract of land intended to be confirmed to the claimant; and consenting that the said decision be reversed, and such decree be entered in this court as may be lawful and proper upon the whole evidence; and counsel for the respective parties having been heard, it is by the court hereby ordered, adjudged, and decreed, that the said decision of the board of land commissioners be, and the same is hereby, reversed.

And the court now proceeding to render a new decree in the premises, it is further hereby ordered, adjudged, and decreed, that the grant made to Justo Larios, from whom the appellee, Charles Fossat, derives his title, is a good and valid grant to said Larios of the place known by the name of Los Capitancillos, situated in the present county of Santa Clara, and formerly occupied by the said Justo Larios, and bounded and described as follows, to wit: On the south by the main sierra,

on a spur of which sierra is situated, as shown in evidence, a certain well-known and conspicuous live-oak tree, or enciño, and a portion of which sierra is separated, as shown in evidence, by the stream called the Arroyo de los Capitancillos, from the range of hills called Cuchilla de la Mina, or Cuchilla de la Mina de Luis Chabolla, in which are situated the quicksilver mines known as the Guadalupe, San Antonio, and New Almaden mines; on the west by the Arroyo Seco, on the side of the establishment of Santa Clara, the said Arroyo Seco being the continuation of the same stream above designated as the Arroyo de los Capitancillos; on the east by a line running from the junction of a certain other rivulet called Arroyo Seco, and the Arroyo de los Alamitos, southward to the aforesaid main sierra, passing by the point or part of the small hill situated in the centre of the cañada which is designated, in the espedientes and grants of Justo Larios and José Reyes Berreyesa, as La Falda de la Loma, and crossing the range of hills designated above as the Cuchilla de la Mina, or Cuchilla de la Mina de Luis Chabolla, and in which are situated the said Guadalupe, San Antonio, and New Almaden mines, and which is the same range of hills designated Lomas Bajas on the diseño, or map, in the aforesaid espediente of José Reyes Berreyesa, the said eastern line herein described being intended to be the same line agreed upon as the line of division between the lands of Justo Larios and José Reyes Berreyesa, as expressed in the respective espedientes and grants of said Justo Larios and José Reyes Berreyesa, and delineated by the dotted line on the said diseño, or map, in the espediente of José Reyes Berreyesa; in the location of said line, reference to be made to the description thereof in the said espedientes and grants, and the delineation thereof on the said diseño, or map, in the espediente of José Reyes Berreyesa; which espedientes, grants, and diseño, or map, are on file and in evidence in this case; and the northern boundary of said tract of land granted to Justo Larios being the same which is shown in the diseño, or map, contained in the espediente of Justo Larios, which is on file and in evidence in this case, the said tract of land containing one square league, more or less.

And it is likewise further ordered, adjudged, and decreed, by the court, that the claim of the appellee to a portion of the said described tract of land is a good and valid claim, and that the said claim be, and the same is hereby, confirmed.

The land of which confirmation is hereby made to the appellee is the whole of the tract of land described above, and which was granted to Justo Larios, with the exception of the two adjacent parcels thereof lying at the westerly end of said

tract, and claimed by the Guadalupe Mining Company, and which were conveyed to the said Guadalupe Mining Company by the two instruments of writing which are on file and in evidence in this case, and marked, respectively, "Exhibit M" and "Exhibit P;" the line dividing the land intended to be confirmed hereby to the said Charles Fossat, from the land of the said Guadalupe Mining Company, being the same which is expressed in said exhibits to be the eastern line of the tracts thereby severally conveyed, and the same which is more particularly designated as the eastern line of the lands of the Guadalupe Mining Company by the survey made by John La Croze, whose deposition, with the field notes of said survey attached, is on file and in evidence in this case, and delineated on the map of said survey, certified by John C. Hayes, U. S. Surveyor General, which is also on file and in evidence, marked "Exhibit I M," attached to the deposition of John La Croze, to which exhibits, map, deposition of John La Croze, and field notes, reference is made for a more full description of the said line, which is the western line of the land hereby confirmed to the said appellee, Charles Fossat.

OGDEN HOFFMAN,
U. S. Dist. Judge.

August 17, 1857.

The United States appealed from this decree to this court.

It was argued by *Mr. Gillett* and *Mr. Reverdy Johnson* for the United States, with whom were the Attorney General and *Mr. Rockwell*, and by *Mr. Badger* and *Mr. Bayard* for the appellee, with whom were *Mr. Carlisle* and *Mr. Stanton.*

It is not possible to do more than merely state the points assumed by the counsel. The arguments from geographical considerations and those founded on authorities must necessarily be omitted.

It has already been mentioned that the two questions which arose in the case were—

1st. Whether more land could be given than the quantity called for in the grant.

2d. Where was the sierra at which the location was to begin?

Upon the first branch, the counsel for the United States made the following points:

I. The decree of the District Court confirming this claim to the entire amount included in the boundaries of the tract, without regard to the quantity, is erroneous.

II. By the law in force in Mexico when this grant was made, and for a long time prior to that time, a grant like the one in

question was regarded as a grant of a certain quantity of land within the boundaries named, to be ascertained by measurement and separated from the residue of the tract, which residue or surplus continued to be the property of the nation.

III. This clause requiring the survey, and that the surplus shall remain to the nation, is embraced in most of the California grants, and has received an almost uniform construction by all the tribunals which have been called upon to adjudicate upon these claims. The decision of the commissioners has been uniform, that a grant like the present was only a grant of a quantity of land to be ascertained by measurement, and not a grant by metes and bounds. The same has been the decision of the Circuit Court, and in most cases by the District Court, and these decisions of the commissioners and District Court have been sustained by the Supreme Court of the United States in the cases which have been to that court, although the question was not expressly raised in these cases, nor does it appear that the counsel or court doubted it.

IV. In this very case of Fossat, the commissioners in their opinion regard the grant in this case as one of quantity, and only for one league.

V. Such we claim is the rule according to the law governing the case, yet these views are, we think, strengthened by the principles which prevail at common law in relation to public grants generally, and especially as to the construction of a grant like the one in question.

VI. It is true, as a general rule at common law, that in conveyances between individuals, monuments and definite boundaries are to control in preference to quantity, where the difference of quantity named in a deed does not greatly vary from the amount included within the boundaries, especially when the words "more or less," or "be the same more or less," are used; but this rule does not prevail where the boundaries are not definite, or where the excess or deficiency is large. Nor would the rule apply where the grant was from the Government, nor in a case like the present, where the words are, "a little more or less."

VII. The rule in relation to the survey of confirmed claims under the statute, and the practice adopted by the executive department of the Government, show that the decree of the District Court is erroneous. (9 Stat. at L., 633.)

On the second branch of the subject, the counsel contended that this grant was void for uncertainty, and could not be located. They also contended that the location should not commence at the highest range of hills, which we have seen was on the extreme south.

The southern boundary. The grant calls for the sierra. In the diseño, the only ranges of hills or mountains shown are the Lomas Bajas on the north, and a range on the south, designated as Sierra del Enciño.

It is in proof, and not denied, that between these two ranges is a valley called the Cañada de los Capitancillos, in which was the house of Justo Larios, and that the eastern and western boundaries being defined, this part of the cañada contained about one square league.

There is no evidence whatever of any possession or occupation by Justo Larios of any land beyond these limits.

This embraced the whole of the cañada between the eastern and western boundaries of this rancho.

The western portion of the same cañada was the rancho of Berreyesa, which was by a grant of a similar kind, with a description by metes and bounds in the body of the grant, but limited to one league, and which he himself described as a grant of "one league only." We claim on behalf of the United States that this cañada was alone granted—that it is bounded on the south by the highland, and only highland in that direction, represented on the diseño; that either as the sierra mentioned in the grant, or the Sierra del Enciño as named in the diseño, it was clearly designed as the southern boundary of the tract.

The claimants contend that there is at a point much further south a live oak, an enciño, at a considerable elevation, which is more properly called Sierra del Enciño; and that the hills or mountains lying north of it, and on which are the New Almaden mines, are included in the grant. We will examine this question of boundary in reference to the language of the grant alone. 2. In connection with the diseño or map of Justo Larios. And 3. In view of any evidence connected with the claim of Berreyesa.

[The counsel then went into a minute examination of these several points.]

The counsel for the appellee had to establish the three following points:

I. That the land of Larios had to begin at the range of high hills, (where we placed the spectator in the beginning of this report,) instead of the lesser range of hills.

II. That it had to run as far as the boundary line which had been established between Larios and Berreyesa.

III. That by the insertion of the words "a little more or less" in the grant, it was intended that the grantee should not be confined to a league.

1. At the time when Larios obtained his grant, he presented a map or diseño upon which were depicted, in a very rough way, the boundaries of the land he was soliciting. Upon this map there was a representation of hills, marked Sierra del Enciño, or Sierra of the Live Oak, and upon the plat introduced upon the argument there was marked the locality of a large oak tree, which some of the witnesses said could be seen for many miles off.

2. Upon this point the remarks of the counsel were as follows:

A corresponding grant to Berreyesa had been made on the 20th of August. The boundaries of this grant are as follows:

"A part of the place called Cañada de los Capitancillos, bounded on the north by the Low Hills (Lomerias Bajas) in the vicinity of the plain of the town of San Jose; on the south by the mountain, (sierra;) on the east by the Laurel-tree Hills, (Lomerias del Laurel;) and on the west by the rancho of the citizen Justo Larios, which has for a boundary the angle which the Arroyo Seco (Dry Creek) forms with that of the Alametos' (Little Poplar's) direction; southward the eastern base of the low hill situated in the centre of the valley, (cañada,) until reaching the sierra."

On comparing these grants, it appears that the sierra is called for as the boundary of both—the Pueblo Hills form the northern boundary of both. The division line between them is described in both grants as beginning at the same point, the junction of the Arroyo Seco with the Alametos, and extending southward until reaching the sierra, passing the eastern slope of the lometa or small hill in the centre of the cañada. The rancho of one is called for in the other's grant as its abuttal. The division line extending from the junction of the Alametos with the Arroyo Seco, until reaching the sierra, is in Berreyesa's grant declared to be the boundary of Larios's rancho, while in Larios's grant the same line is designated as the boundary of Berreyesa's rancho.

Both ranchos had exactly the same boundary on the south, the southern boundary of both being the same sierra, named in the diseño of one Sierra Azul, and by the other, Sierra del Enciño.

3. As to the quantity of land which was conveyed by the grant, there is room only to insert the two first points, which were as follows:

In the District Court, the counsel for the New Almaden Company sought to limit the quantity to the exact measure of one square league, and no more. By the official survey, the quantity within the boundaries confirmed by the court is one league and a fraction of about three-fourths of a league.

The point made by the New Almaden Company rests upon the following condition annexed to the grant:

"2. The land herein referred to is one league of the larger size, a little more or less, as is explained by the map accompanying the espediente. The judge who shall give the possession shall have it measured, in conformity to law, leaving the surplus which remains to the nation, for the purposes which may best suit it."

To this point it is answered:

1. The direction to the judge to "have it measured in conformity to law, leaving the surplus which remains to the nation," is a formal direction, accompanying most, if not all, California grants, and does not in this case limit or define any precise quantity. This direction is annexed to grants, whether there be or be not any surplus, and it does not import that any surplus will remain.

The surplus to be left to the nation is what remains after "it," viz: "the land herein referred to" shall be measured. But the "land referred to" is one league of the larger size, a little more or less, as is explained by the map accompanying the espediente. No exact quantity is expressed in the condition, but reference is made to the espediente as explaining what has been granted and is to be measured. The condition therefore expresses an indeterminate quantity, to be made certain by measurement according to the boundaries defined in the grant itself, in connection with which the condition is to be interpreted, and by the map to which reference is made. The words "a little more or less" following the words "one league of the larger size," repel the idea that exactly one league and no more was intended; for if that exact quantity was meant, the words "a little more or less" would not have been added.

In every California case decided by the Supreme Court, it has been held that the subsequent conditions could not defeat the precedent grant. And although a limitation of quantity clearly expressed may restrict prior terms of larger import, yet, in the absence of clear expression, such restriction is not to be imposed. It is a fundamental rule of construction, that a consistent and reasonable effect is to be given, if possible, to *all* the words of a written instrument. The addition of the words "a little more or less," implies some meaning in the grantor—for *explanation* of that meaning, distinct reference is made by the condition itself to the diseño. The grant, then, is for land not limited to an exact quantity by the condition, but "as is explained" in the diseño. The grantor used words having some meaning, and referred to a particular document to ex-

plain, and which does explain, that meaning consistently with the boundaries specified in the body of the grant; the words therefore cannot be rejected, nor the condition construed as if they were stricken out.

In the case of The United States *v.* Larkin et al., 18 How., 561, the Supreme Court held that "the plan or sketch in the espediente, in connection with the description given in the grant, furnishes all the materials essential to determine the boundaries." That creeks, hills, and mountain ranges, exhibited on the maps or diseño, and referred to in the grant, are adequate monuments, and define boundaries of California grants with sufficient certainty, was decided in Pedrorena's case. (19 How., 365.)

No principle of law is better settled, than that designated boundaries called for in a grant control in general the quantity of land that passes by the grant.

Of the multitude of cases on this point, reference to a few only need be made. "Where the boundaries of land are fixed, known, and unquestionable monuments, although neither courses nor distances, nor the computed contents, correspond, the monuments must govern." (6 Mass., 131; 2 Mass. Rep., 380; 5 Pick. Rep., 135; 6 Wheat., 582; 8 Wend., 183; 1 U. S. Dig., Bound., 474, and cases cited.)

"Where a deed describes land by its admeasurement, and at the same time by known and visible monuments, these latter shall govern. "(4 U. S. Dig., Bound., and cases cited; Cleveland *v.* Smith, 2 Story, 278; Nelson *v.* Hall, 2 McLean, 518.)

"In locating lands, well-ascertained natural or artificial boundaries are to prevail over course, distance, and quantity; and although the boundaries included 136,000 acres instead of 14,900, the number called for by the deed, the boundaries were held to govern." (Sturgeon *v.* Floyd, 3 Rich, 80.)

An illustration of this rule is furnished by an early decision of the Supreme Court of the United States, Lodge's Lessee *v.* Lee, 6 Cranch, 237, where a grant of an island by name, superadding courses, distances, and quantity, which were found to exclude a part of the island, was held to pass the whole island, without regard to the courses, distances, and quantity, called for by the deed. (6 Cranch, 237.)

But it is deemed needless to multiply authorities upon a rule of law so well established.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee presented to the board of commissioners, appointed under the act of Congress of the 3d March, 1851, (9 Stat. at L., 632, ch. 41,) to settle private land claims in Cali-

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fornia, a claim for three-fourths of a league of land, known as part of the Cañada de los Capitancillos. He produced to the board satisfactory evidence of the authenticity of a grant from the Governor of California, bearing date in 1842, to Justo Larios, for a parcel of land having that name; also that Larios had occupied, improved, and cultivated it, conformably to the conditions of the grant; that in 1845 he had sold it to a person from whom the appellee deduced his title to an undivided three-fourths interest, and that his share had been set apart to him by a valid conveyance. The board pronounced in favor of the validity of the grant, and rendered a decree of confirmation in favor of the claimant for land included in specific and well-defined boundaries, but adding as a part of the description the quantity that was embraced in them. It is somewhat doubtful whether the board designed to impose a limitation to the claim for the quantity thus declared. From this decree the United States appealed to the District Court. In that court the appellee confessed that the decree of the commissioners was erroneous, because it did not describe in a manner sufficiently certain the boundaries of the tract of land intended to be confirmed to the claimant, and consented that the decision should be reversed, and such decree be entered in the District Court as might be lawful and proper upon the whole evidence.

The claimant proceeded to examine a number of witnesses to identify the locative calls of the grant to Larios, and produced documentary evidence from the archives disclosing the circumstances under which the grant was asked for and obtained, in order to determine with exactness the subject on which it was designed to operate. He also procured a survey from the surveyor general of California, to exhibit the extent and description of the land included in the claims of those who now represent the rights of Larios. Much counter evidence was adduced under the direction of private and adversary claimants, to whom the law officers of the Government of the United States in California seem to have committed the preparation of the case on the appeal to the District Court, and who were allowed to maintain, in the name of the United States, the alternative of the issue tendered by the claimant.

The District Court confirmed the claim of the appellee to land limited by specific boundaries, and ascertained those boundaries, as they exist on the land, with precision. Under this decree, the grant to Larios includes seven thousand five hundred and eighty-eight and ninety hundredths acres.

It is the opinion of the court that the intervention of adver-

sary claimants in the suit of a petitioner, under the act of 3d March, 1851, for the confirmation of his claim to land in California, is a practice not to be encouraged. The board of commissioners was instituted by Congress to obtain a prompt decision on the validity of private land claims, to enable the Government to distinguish the public land from that which had been severed from the public domain by Mexico; and that it might fulfil the obligation assumed at the time of the cession of California, to secure and protect the property of its inhabitants. The jurisdiction of the board of commissioners in the first instance, and the appellate jurisdiction of the courts of the United States, are limited to the making of decisions on the validity of the claim, preliminary to its location and survey by the surveyor general of California, acting under the laws of the United States. This officer is required to survey and to furnish plats of the claim that may be confirmed.

In reference to interfering and conflicting claims, he is authorized to decide by adopting the lines agreed to by the claimants; and in the absence of an agreement, to follow the rule of justice. The acts of Congress provide, that neither the decisions of the commissioners, nor of the District or Supreme Court, nor of the surveyor general, nor the surveys or patents made in pursuance of them, shall preclude a legal investigation and decision, by the proper judicial tribunal, between parties having such interfering claims; and provision is made in the act of 3d March, 1851, for a contest of the right of the confirmee before the issue of the patent, but after the location and survey; and a patent under the act is only conclusive between the United States and the claimant, and does not affect third persons. (9 Stat. at L., 631, ch. 41; 4 Stat. at L., 492, ch. 116, sec. 6.) The language and policy of these enactments limit a controversy like the present to the United States and the claimant.

We concur in the opinion of the board of commissioners and of the District Court, that affirms the validity of the grant of the Governor of California to Justo Larios, and the regularity of the conveyances through which the claimant deduces his title.

The papers in the record show, that in 1842 the proprietors of adjacent ranches in the valley de los Capitancillos (Larios and Berreyesa) had a dispute concerning the location of their line of separation, which was carried before the public authorities for settlement; that Larios, after the adjustment of the controversy, represented to the Governor that, since 1836, he had occupied his place in the cañada under a purchase from a former proprietor; that the records of his title had been lost,

and that he desired to obtain a grant which would declare his right. This petition was accompanied by a sketch of the property, and its contents were represented to be one league, a little more or less. The Governor made the necessary order for the issue of the grant, in conformity to the prayer of the petition, and the grant itself was issued in August, 1842. In the grant, the petition for the land known as Capitancillos—bounded by the sierra, by the Arroyo Seco on the side of the establishment of Santa Clara, and by the rancho of the citizen José R. Berreyesa, which has for boundary a line running from the junction of the Arroyo Seco and Arroyo de los Alamitos, southward, to the sierra, passing by the eastern base of the small hill situate in the centre of the cañada—is recited; and the Governor granted it to Larios, to be his property, subject to the approval of the Departmental Assembly, and to the performance of four conditions. The second and third of these conditions are:

"2d. He shall solicit the proper judge to give him judicial possession, in virtue of this decree, by whom the boundaries shall be marked out, and he shall put on the boundaries, in addition to the landmarks, some fruit trees or useful forest trees.

"3d. The land herein referred to is one league of the larger size, a little more or less, as is explained by the map accompanying this *espediente*. The judge who shall give the possession shall have it measured, in conformity to law, leaving the surplus which remains to the nation, for the purposes which may best suit it."

The southern, western, and eastern boundaries of the land granted to Larios are well defined, and the objects exist by which those limits can be ascertained. There is no call in the grant for a northern boundary, nor is there any reference to the diseño for any natural object, or other descriptive call, to ascertain it. The grant itself furnishes no other criterion for determining that boundary than the limitation of the quantity, as is expressed in the third condition. This is a controlling condition in the grant. The delivery of judicial possession, an essential ceremony to perfect the title in the land system of Mexico, was to be accommodated to it. The diseño presented by the donee to the Governor, to inform him of his wants, represents the quantity to be one league, a little more or less. This representation is assumed to be true by the Governor, and it forms the basis on which his consent to the petition is yielded. He prescribes to the officer to whom he confided the duty of completing the title, to measure a specified quantity, leaving the surplus that remains to the nation, as preparatory to the delivery of judicial possession to the

grantee. The obligation of the United States to this grantee will be fulfilled by the performance of the executive acts, which are devolved in the grant on the local authority, and which are declared in the two conditions before cited. We regard these conditions to contain a description of the thing granted, and, in connection with the other calls of the grant, they enable us to define it. We reject the words "a little more or less," as having no meaning in a system of location and survey like that of the United States, and that the claim of the grantee is valid for the quantity clearly expressed. If the limitation of the quantity had not been so explicitly declared, it might have been proper to refer to the petition and the diseño, or to have inquired if the name Capitancillos had any significance as connected with the limits of the tract, in order to give effect to the grant. But there is no necessity for additional inquiries. The grant is not affected with any ambiguity. The intention of the Government of California is distinctly declared, and there is no rule of law to authorize us to depart from the grant to obtain evidence to contradict, vary, or limit its import.

The grant to Larios is for one league of land, to be taken within the southern, western, and eastern boundaries designated therein, and which is to be located, at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of this Government. The external boundaries designated in the grant may be declared by the District Court from the evidence on file, and such other evidence as may be produced before it, and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee.

The decree of the District Court is reversed, and the cause is remanded to that court, with directions to enter a decree conforming to this opinion.

JAMES H. SUYDAM, PLAINTIFF IN ERROR, *v.* WILLIAM H. WILLIAMSON, DAVID R. WILLIAMSON, MARY A. WILLIAMSON, ISABELLA WILLIAMSON, CATHERINE B. WILLIAMSON, CHARLOTTE A. WILLIAMSON, RUPERT J. COCHRAN, ISABELLA M. COCHRANE, AND BAYARD CLARKE.

Rulings of the court below, in admitting or rejecting evidence, can be brought to this court for revision only by a bill of exceptions.

Every special verdict, in order to enable the appellate court to act upon it, must find the facts on which the court is to pronounce the judgment according to law, and not merely state the evidence of facts. In this manner it becomes a part of the record.

Where there is a bill of exceptions, the writ of error does not operate only upon that part of the record. Wherever an error is apparent on the record, it is open to revision, whether it be made to appear by a bill of exceptions, or in any other manner.

Where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the case may be brought before an appellate court by a special verdict or an agreed statement of facts.

But in such a case, the previous rulings of the court upon questions of evidence do not come before the appellate court, unless brought up by a bill of exceptions.

A bill of exceptions may include in its scope the rulings of the court as to the admissibility of evidence, which a demurrer to evidence cannot do.

A demurrer to evidence makes the evidence a part of the record.

So where oyer of any instrument is prayed, or there is a demurrer to any part of the pleadings.

A writ of error operates only upon the record, and brings it into this court.

Therefore, where a paper was filed in the court below after the writ of error was issued, which paper, purporting to contain all the evidence, both admitted and rejected, was signed by the judge and certified to be correct by the counsel of the appellee, and concluded as follows: "A verdict was then, by direction of the court, taken for the plaintiffs for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to turn this case into a special verdict or bill of exceptions," this paper cannot be considered a part of the record.

A special verdict requires the presence and assent of the court, and a bill of exceptions must always be signed and sealed by the judge.

In this case, the paper is merely a report of the judge who presided at the trial, and as such must be disregarded by this court.

Under the twenty-fifth section of the judiciary act, where the jurisdiction of this court is not shown upon the record, the writ of error must be dismissed; but under the twenty-second section, if no error appears upon the record, the judgment of the court below must be affirmed.

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

It was an action of ejectment brought by the defendants in error against Suydam to recover two lots of ground in the city of New York. On the part of the defendants in error, it was contended that every material question in the case was adjudged by this court in the cases of Williamson *v.* Berry, 8 Howard, 495; Williamson *v.* The Irish Presbyterian Congregation, 8 Howard, 565; and Williamson *v.* Ball, 8 Howard, 566. The counsel for the plaintiff in error alleged that this case was unlike those in several important particulars. But as the decision of this court turned altogether upon the manner in which the case had been brought up, it is only necessary to state so much of it as will illustrate the point of practice.

The record showed a declaration in ejectment, a plea of not guilty, issue joined, suggestion of the death of some of the plaintiffs and substitution of their heirs, empannelling of a jury, their verdict of guilty against Suydam, the case held under a curia, the judgment for the plaintiffs with costs, and a prayer

for a writ of possession, which was granted. Judgment signed this 6th day of December, 1854. R. E. STILWELL,
Deputy Clerk.

Then came the following:

Circuit Court United States, Southern District of New York.

WILLIAMINA H. WILLIAMSON ET AL. *v.* JAMES H. SUYDAM.

This is an action of ejectment for two lots in the sixteenth ward of the city of New York. The declaration is in the usual form; the plea is not guilty. Either party may refer to the pleadings as part of this case.

The plaintiff gave in evidence an exemplified copy of the will, &c., &c., &c.

The plaintiffs thereupon rested.

The defendants' counsel then proved the acts of the Legislature, the deed of Clement C. Moore, the petitions to the Legislature and to the chancellor, the master's reports, the orders of the chancellor, the extracts from the journals of the two Houses, of which copies are hereto annexed; these were all objected to by the plaintiffs' counsel, and were read subject to the objection.

The defendants' counsel then offered in evidence a deed from Thomas B. Clarke to Peter McIntyre, of which the following is a copy, &c., &c., &c.

The plaintiffs' counsel then offered to prove—

1st. That the acts of the Legislature were not for the benefit of the infants, but for the benefit of Thomas B. Clarke merely.

2d. That the orders of the chancellor had the effect to take the proceeds of their future interest in the property sold, and to apply the same to the father's debts, without giving them any benefit, by support or otherwise, out of the interest of the life estate in other parts of the property.

3d. That under the acts and orders he actually aliened the lot on Broadway and all the southern moiety of the Greenwich property, excepting two lots, and that none of the children received any benefit from such alienation.

4th. That nearly the whole of the property mentioned in the acts of Legislature was mortgaged or conveyed by Thomas B. Clarke for old debts; that no proceeds were ever invested or secured, or ever received, from the grantors or mortgagees.

5th. That so far from providing for the children or protecting the estate, he suffered a large portion of the northern moiety to be sold for assessments, and was proceeding to dispose of the same moiety for twenty-one years, when, on the 31st of March, 1826, a bill was filed against him on behalf of the children, and an injunction issued.

6th. That on the death of his wife he broke up housekeeping, and ceased to live with his children; that the plaintiff was Mrs. Williamson; was, from the death of her mother, in August, 1815, supported and educated entirely by one of her aunts; and that, after about two years from the mother's death, the other children were supported and educated by their friends, and were entirely neglected by their father.

The defendants' counsel objected; the objection was sustained. The plaintiffs' counsel excepted.

A verdict was then, by direction of the court, taken for the plaintiffs for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to either party to turn this case into a special verdict or bill of exceptions.

SAMUEL R. BETTS. [L. S.]

Endorsed: 127, Circuit Court, southern district New York. Williamina H. Williamson et al., agt. James H. Suydam.—Cr. case.—Jas. L. Sluyter, plaintiffs' attorney.

Filed this 29th January, 1855.

Then followed a transcript of other papers in the case. The writ of error was dated 18th December, 1854.

This was the state of the record upon which the case was brought up to this court.

It was argued by *Mr. Ellingwood* for the plaintiff in error, and *Mr. Field* for the defendants; but as their arguments were upon the merits of the case, they are omitted in this report.

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a writ of error to the Circuit Court of the United States for the southern district of New York.

The view we have taken of this case, as it is exhibited in the record, renders an extended statement of the facts entirely unnecessary. It was an action of ejectment brought in the court below to recover the possession of a certain parcel of land, with the appurtenances, situated in the sixteenth ward of the city of New York, and described as lots sixty-four and sixty-five, according to a certain map made by George B. Smith. The declaration, which was in the usual form, was filed in the Circuit Court for the southern district of New York on the 15th day of August, 1845, and the defendant, James H. Suydam, appeared, by his attorney, and pleaded that he was not guilty of unlawfully withholding the premises claimed by the plaintiffs, as was alleged in the declaration, and tendered an issue, which was duly joined by the plaintiffs. During the

pendency of the suit, and before the trial, two of the plaintiffs, being the two first named in the declaration, died, and the cause was regularly revived in the name of the survivors and the heirs of those deceased. At the adjourned session of the Circuit Court held at the city of New York on the first Monday of October, 1849, the parties went to trial on the general issue, and the jury returned a general verdict in favor of the plaintiffs; after the verdict, the cause was continued, as the record states, until the first Monday of October, 1850, and "the same day is given to the parties to hear the judgment of the court," and on that day the judgment was rendered on the verdict for the plaintiffs, that they do recover against the said James H. Suydam the possession of the said premises according to the said verdict of the jury, and for their damages, costs, and charges; and a writ of possession was duly issued, directed to the marshal of the district. All these proceedings were in the usual course of judicial action, and were duly and formally entered on the record of the suit, and consequently furnish no ground of complaint whatever on the part of the present plaintiff, who was the defendant in the court below. The declaration contained on its face a good cause of action, and the general issue and joinder were regularly filed in the cause, and were entirely sufficient to make up a valid issue between the parties to the suit; and the verdict, which was strictly formal and legal, was in every respect responsive to the issue formed. It appears that the jury found, in the very words of the issue, that the defendant was guilty of unlawfully withholding the premises claimed by the plaintiffs, as alleged in the declaration; and the judgment followed the verdict, and was founded upon it, for the premises as they were set forth and described in the pleadings. Every step in the cause, from the filing of the declaration to the issuing of the writ of possession, was in exact conformity to the most approved practice and precedents in the Federal courts.

We do not understand that the pleadings or the regularity of the proceedings are in any manner called in question, except as the foundation of a judgment, which it is insisted was erroneous, for reasons altogether aside from any connection with mere matters of form. The real controversy between the parties has reference more especially to the right of possession, and consequently extends to the title of the premises described in the declaration, and necessarily involves the principal questions which were presented to this court at the December term, 1850, in the case of Williamson et al. *v.* Berry, 8 How., 495; and we regret that the facts of the case, and the rulings of the court below, are not now exhibited in a manner to justify this

court in giving the subject a re-examination with the aid of the additional light which has been thrown upon it by the elaborate and very able discussion at the bar; and the more so, as it appears that a case depending upon the same evidences of title has since that time been before the Court of Appeals of the State of New York, where a conclusion was reached widely different from the one expressed by this court on the former occasion, in the answers given to the questions then submitted for its consideration. The difficulty, however, in the way of any such examination at this time, is insurmountable, for the reason that the record does not contain either a bill of exceptions, special verdict, or an agreed statement of facts. Some of the questions discussed at the bar might have been satisfactorily presented in a special verdict, or by an agreed statement of facts, while in respect to others, apparently regarded as important, such as the rulings of the court in admitting or rejecting evidence, it is proper to remark that they could only be brought to this court for revision by a bill of exceptions. Such rulings are never properly included in a special verdict, any more than in an agreed statement of facts. A special verdict is where the jury find the facts of the case, and refer the decision of the cause upon those facts to the court, with a conditional conclusion, that if the court should be of opinion, upon the whole matter thus found, that the plaintiff has a good cause of action, they then find for the plaintiff; and if otherwise, they then find for the defendant; and it is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found; and every special verdict, in order to enable the appellate court to act upon it, must find the facts, and not merely state the evidence of facts; so that, where it states the evidence merely, without stating the conclusions of the jury, a court of error cannot act upon matters so found. In practice, the formal preparation of such a verdict is made by the counsel of the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars on which they have passed, and with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them. After the special verdict is arranged, and it is reduced to form, it is then entered on the record, together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort

to a court of error, where nothing is open for revision, except the questions of law inferentially arising on the facts stated in the special verdict; and we here remark, for the purpose of illustration, that it is not so much because the proceeding is denominated a special verdict, that the party by virtue of it is authorized to invoke the aid of a revisory tribunal, as it is because it has the effect to incorporate the facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error; and the same remark applies to a bill of exceptions, which is a still more comprehensive method of enlarging the record by incorporating into it not only the facts of the case, but the rulings of the court in admitting and rejecting evidence, and the instructions given to the jury; and after it is signed, sealed, and filed in the case, it becomes a part of the record, and the matters therein set forth can no more be disputed than those contained in any other part of the same record, and are alike subject to revision in a court of error. It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal. The rule is, that whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner. (Bennet *v.* Butterworth, 11 How., 669; Slacum *v.* Pomeroy, 6 Cranch, 221; Garland *v.* Davis, 4 How., 131; Cohen *v.* Virginia, 6 Wheat., 410.)

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequences of his own neglect. Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record, unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law. A bill

of exceptions undoubtedly is the safest method, as it is the most comprehensive one in its operation; and where the facts are disputed, and cannot be arranged except from evidence admitted under the ruling of the court as to its admissibility, oftentimes it becomes the only effectual mode by which all the rights of the complaining party can be preserved. On the other hand, where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by a special verdict, or, according to the rule established in this court, by an agreed statement of facts. (United States *v.* Ellason, 16 Pet., 291; Stimpson *v.* Railroad Company, 10 How., 329; Graham *v.* Bayne, 18 How., 60.) Where the facts are without dispute, and agreed between the parties, a statement of the same may be drawn up and entered on the record, and submitted directly to the court, for its decision, without the intervention of a jury; or a general verdict may be taken, subject to the opinion of the court upon the facts so agreed; and in either case, the aggrieved party may bring error after final judgment, and have the questions of law, arising upon the facts thus spread upon the record, re-examined, as in the case of a special verdict. (Faw *v.* Bordeau, 3 Cran., 174; Brent *v.* Chapman, 5 Cran., 358.)

It should be observed, however, that the rulings previously made by the court, in admitting or rejecting evidence during the progress of the trial, are no more revisable on a special case, as it is called, when the verdict is taken subject to the opinion of the court on an agreed state of facts, than where the agreed statement is submitted directly to the court, without the intervention of the jury; and for the obvious reason that, in the one case as much as in the other, the foundation laid for the action of the revisory tribunal is based upon the consent of the parties to the suit, and consequently the action of the appellate court must be confined to the facts as they were agreed, and as they appear in the record of the case. (Arthurs *v.* Hart, 17 How., 6; Bixler *v.* Kunkle, 17 S. and R., 310.) At one time an attempt was made to introduce a different practice into this court; but it was distinctly disclaimed, and has never been sanctioned in writs of error to any of the Circuit Courts in States where the proceedings are according to the course of the common law. (Shankland *v.* The Corporation of Washington, 5 Pet., 390.)

In that case, it was agreed by the parties that the question of the admissibility, competency, and sufficiency of the evidence to maintain the action, should be submitted to the court, and that, in considering the evidence, the court should draw

from it, so far as it was admissible and competent, every inference of fact and law which it would have been competent for a jury to have drawn from it; and that agreement was appended to an agreed statement of facts, on which the case was submitted to the determination of the Circuit Court in this District. Subsequently, it was brought into this court on a writ of error for revision, and was heard and determined upon the matters properly exhibited in the record; but this court, in giving judgment, took occasion to characterize the agreement as an unusual one, and denied that it was competent for parties to impose any such duties on this court, and expressly declared that the case was not to be drawn into precedent. Whenever the parties to a pending suit desire to place the facts of the case upon the record, so as to secure the right to have the law arising on the facts revised on a writ of error, they must adopt some one of the methods already suggested to effectuate that purpose, as there are no other effectual methods by which it can be accomplished.

Other modes are known to the practice of this court, by which the evidence produced against a party may in certain cases be put on the record either in whole or in part, according to the circumstances, so as to secure the right to have the questions of law arising upon it revised on a writ of error; but every proceeding of that kind is either so limited in its application or so tied up by conditions, that they are seldom of much practical importance, and are only referred to on the present occasion to confirm the proposition already advanced, that no ancillary step in the cause is of any avail to a party as laying the foundation to support a writ of error, any farther than it has the effect to place on the record what otherwise would rest in parol. Formerly it was considered that a party might always demur to the evidence produced against him, as a matter of right; and while that was so, a demurrer to evidence was equally effectual with a bill of exceptions to the extent of its operation. (4 Chitt. Gen. Prac., 7; 2 Inst., 427.) The bill of exceptions was always the more comprehensive remedy, because it extended, as it still does, not only to the facts in the case, but also to the rulings of the court in admitting or rejecting evidence, and to the instructions given to the jury upon its legal effect. A demurrer to the evidence, while its operation in one respect is nearly the same as that of the bill of exceptions, in another is very different. It extends only to the evidence produced, as the term imports, and has no effect at all upon the rulings of the court by which it was received; and as a necessary consequence, where the error of the court consists in having admitted improper evidence, the effect of a

demurrer to it would be to waive the objection to the ruling, instead of laying the foundation to correct the error. (Bulkely *v.* Butler, 2 Barn. and Cress., 434.) A demurrer to evidence is defined by the best text writers to be a proceeding by which the court in which the action is depending is called upon to decide what the law is upon the facts shown in evidence, and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. When a party wishes to withdraw from the jury the application of the law to the facts, he may, by consent of the court, demur in law upon the evidence, the effect of which is to take from the jury and refer to the court the application of the law to the facts, and thus the evidence is made a part of the record, and is considered by the court as in the case of a special verdict. A mere description of the proceeding is sufficient to show that it is the evidence, and nothing else, that goes upon the record. Since it was determined that a demurrer to evidence could not be resorted to as a matter of right, it has fallen into disuse; and as long ago as 1813, it was regarded by this court as an unusual proceeding, and one to be allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case. (Young *v.* Black, 7 Cran., 565; United States Bank *v.* Smith, 11 Wheat., 172; Fowle *v.* Common Council of Alexandria, 11 Wheat., 322.)

Another method by which certain evidence may be incorporated into the record at the nisi prius trial is by oyer, which occurs where the plaintiff in his declaration, or the defendant in his plea, finds it necessary to make a profert of a deed, probate, letters of administration, or other instrument, under seal, and the other party prays that it may be read to him, which in such a case cannot, as a general rule, be denied by the court; and the effect of the proceeding, in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error. (1 Chitt. on Plead., 10th Am. ed., 431; 1 Tidd. Prac., 3d Am. ed., 586.) And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends; and so it must have been understood by this court in Gorman et al. *v.* Lenox, 15 Pet., 115, where it

was held, in accordance with the principle here advanced, that the action of the Circuit Court of this District, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict.

We have now adverted to the several methods acknowledged by courts of error, by which matters resting in parol at the trial in the subordinate tribunal may be put on the record, so as to lay a proper foundation for a revision of the legal questions arising out of them in the appellate court, and there are no others which can be recognised in this court in cases where the proceedings are required to be according to the course of the common law. (Dougherty *v.* Campbell, 1 Blackf., 24; Cole *v.* Driskell, 1 Blackf., 16.)

A writ of error is an original writ, and lies only when a party is aggrieved by some error in the foundation, proceedings, judgment, or execution, of a suit in a court of record, and is defined to be a commission, by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse; and it was expressly held by this court, in Cohens *v.* Virginia, (6 Whea., 410,) that the writ of error operated upon the record, and that its effect, under the judiciary act, was to bring it into this court, and submit it to a re-examination; and it is also laid down by the best writers on pleading, that nothing will be error in law that does not appear on the face of the record, for matters not so appearing are not supposed to have entered into the consideration of the judges. (Steph. on Plea., 121.)

The writ of error in this case was issued on the eighteenth day of December, 1854, and on the twenty-ninth day of January, 1855, an additional paper was filed, which in the transcript is denominated the "case," and is the one which furnished all the materials for the discussion at the bar. It purports to contain all the evidence introduced at the trial in the court below, as well that given by the defendant as that given by the plaintiffs, and certain offers of proof on the part of the plaintiffs, which were objected to by the defendant, and excluded by the court. This mass of evidence, with the exhibits, filling sixty pages of the transcript, has respect, on the one side or the other, to the title and right of possession to the premises described in the declaration, and comprises all the evidences of title which were before this court on the former

occasion; and, in addition thereto, certain admissions of the parties and other parol evidence. It is now drawn up in the form of a report of the judge who presided at the trial, and is signed by him, and is under seal; and, as we understand the endorsement, is certified to be correct by the counsel of the plaintiffs. The conclusion of the report is as follows:

"A verdict was then, by direction of the court, taken for the plaintiffs, for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to either party to turn this case into a special verdict or bill of exceptions."

Whatever might have been the right of the parties under that report, it is too plain for argument, that no one connected with its preparation could have regarded it either as a special verdict or a bill of exceptions. All that it professed to do was to give either party the liberty to turn the case into one or the other of those forms of proceeding; and it is a sufficient answer to any pretensions under the report to say, that the change has not been made; that, for some reason unknown to this court, the right to make the change, if such it was, has never been exercised; and that it is now presented here in the form in which it was prepared when it is too late to make the alteration. And we also say, that this court cannot so far depart from the settled practice and regular course of proceeding as to give an effect to the paper which neither its contents nor terms would warrant; nor can we attempt to do for the plaintiff in error what it was his duty to have done at the trial, and before the writ of error was sued out; nor are we prepared to admit that the option given to turn the case either into a special verdict or a bill of exceptions could have been exercised by either party under the concluding portion of that report, without the assent of the judge who presided at the trial, and irrespective of his authority. On the contrary, we conclude that, "where a case shall be made with leave to turn the same into a special verdict or bill of exceptions, the party shall not be at liberty to do either, at his election, but the court may, if they think proper, prescribe the one which he shall adopt." (Conk. Trea., 3d ed., p. 444.)

Nothing less than the presence and assent of the court, we think, can give any legal validity to a special verdict; and in respect to a bill of exceptions, it must always be signed and sealed by the judge, or else it would be a nullity. (Phelps *v.* Mayer, 15 How., 160.) A special verdict ought always to be settled under the correction of the judge who presided at the trial, and, whether prepared at the time or subsequently, it should be filed as of the term when the trial took place. (Tur-

ner *v.* Yates, 16 How., 14; Sheppard *v.* Wilson, 6 How., 275.) The necessary effect of the proceeding, where the verdict is taken subject to the opinion of the court, would be to postpone the preparation of the special verdict till after the parties were heard, and the opinion given; and to that extent the delay is allowable, though we are by no means prepared to admit that it may be done after the cause has been removed into this court. The result is, we have come to the conclusion, on this branch of the case, that the paper in the transcript denominated the "case" must be considered merely as a report of the judge who presided at the trial; that it is not a part of the record, and, consequently, must be wholly disregarded by this court, in determining whether the judgment of the court below ought to be reversed or affirmed. Having come to that conclusion, it becomes unnecessary to notice any of the rulings of the court in admitting or excluding evidence, as no part of that report can be taken into consideration. The question whether the report of a judge who tried the cause was a part of the record, came up directly before this court, in Ingle *v.* Coolidge, 2 Whea., 363; and, after a deliberate consideration, the court unanimously determined that it did not. It was a writ of error to the Supreme Judicial Court of Massachusetts. The record showed that the jury found a general verdict for the original plaintiff, and the cause was then continued, as the record stated, "for the opinion of the whole court upon the law of the case, as reported by the judge who tried the same, and at a subsequent term judgment was rendered for the plaintiff upon the verdict. When the record was brought into this court, the report of the judge was annexed to the writ of error with the other proceedings and exhibits in the cause, and this court, in speaking of the report, said: It is not like a special verdict, or a statement of facts agreed of record, upon which the court is to pronounce its judgment. The judgment was rendered upon a general verdict, and the report is mere matter *in pais* to regulate the discretion of the court as to the propriety of granting relief, or sustaining a motion for new trial.

Other cases have been decided by this court, asserting the same general principle, that nothing can be considered upon a writ of error except what appears upon the record; and one in particular, which, in that point of view, bears a very close analogy to the case under consideration. We allude to the case of Minor *v.* Tillotson, (2 How., 392,) which was a writ of error to the Circuit Court of the eastern district of Louisiana, under the twenty-second section of the judiciary act. A mass of evidence in that case was received from both parties, consisting of concessions and grants under the Spanish Government, inter-

mediate conveyances, documents showing the proceedings in regard to the title under the laws of the United States, and parol testimony; and the cause was submitted to the court under an agreement that those documents, proceedings, and parol testimony, constituted all the evidence on which the cause was tried, and that the agreement was "made for a statement of the facts in the case." This court then said, it seems to have been supposed that the agreement of the counsel that the evidence in the cause should be considered as a statement of facts, was a sufficient ground for a writ of error on which a revision of the legal questions might be made, and intimated, very strongly, that if it were so, it would be to require the court to try the cause on its merits, and emphatically declared, "this is never done on a writ of error, which issues according to the course of the common law." And so also it was held in Leland et al. *v.* Wilkinson, (6 Pet., 317,) that the private laws of a State, and special proceedings of the Legislature of a State, in regard to the sale of the estate of a deceased person for his debts, could not be considered, unless they were found in the record; and in Williams *v.* Norris, (12 Whea., 117,) it was determined that neither depositions nor exhibits, of any description, constitute "any part of the record on which the judgment of an appellate court is to be exercised, unless made a part of it by a bill of exceptions, or in some other manner recognised by law." These cases, we think, have a strong tendency to support the proposition, that the paper, in the transcript denominated the "case," cannot be regarded as a part of the record; and if not, then it is clear that it cannot be considered on the present occasion, irrespective of the fact that it was not filed till more than a year after the writ of error issued, which of itself is decisive of the point that it cannot be considered. (Williams *v.* Norris, 12 Whea., p. 120.)

It is certain, therefore, that there is no error in the record; and the only remaining question is, what disposition ought to be made of the cause, under the circumstances of the case?

An important distinction exists in respect to writs of error issued under the twenty-second section of the judiciary act, from those issued under the twenty-fifth section of the same act, which it becomes necessary to notice in this connection, in order to maintain a writ of error to this court from a State court within the twenty-fifth section of that act, it must appear on the face of the record that some one, at least, of the questions stated in that section did arise in the State court, and that the question was decided in the State court, as required in the section; and if it does not so appear in the record, then

this court has no jurisdiction of the case, and in that event the writ of error must be dismissed, as this court, under those circumstances, has no power either to reverse or affirm the judgment brought up for revision; and such was the state of the record in Inglee *v.* Coolidge, and accordingly the writ of error was dismissed. The writ of error, however, in this case issued under the twenty-second section of the judiciary act, in respect to which a different rule prevails, as will be seen by attending to the language of the act. That section provides, in effect, that final judgments in a Circuit Court brought there by original process may be re-examined, and reversed or affirmed, in this court, upon a writ of error; and where the cause is brought into this court upon a writ of error issued under that section, and all the proceedings are regular, and no question is presented in the record for revision, it follows, by the express words of the section, that the judgment of the court must be affirmed. Beyond question, the record in this case exhibits every fact required by the section to give this court jurisdiction of the cause, and in strict compliance with the terms of the act. The action was originally brought in the Circuit Court for the southern district of New York, and the record shows a sufficient declaration duly filed in court—a proper and valid issue between the parties—a perfect finding by the jury upon the issue joined, and a regular judgment on the verdict, which was final, unless reversed; and certainly these are all the requisites of a record, according to the requirements of the twenty-second section of the judiciary act, to entitle a party to retain the judgment which has been given in his favor. (Minor et al. *v.* Tillotson, 1 How., 287; Stevens *v.* Gladding, 19 How., 64; Lathrop *v.* Judson, 19 How., 66.) It is only when the special verdict is ambiguous or imperfect, or when it finds only the evidence of facts, and not the facts themselves, or finds but a part of the facts in issue, and is silent as to others, that this court can regard the finding as a mistrial, and order a *venire de novo.* (Barnes *v.* Williams, 11 Wheat., 415; Carrington *v.* Pratt, 18 How., 63; Prentice *v.* Zane, 8 How., 484.)

When the record exhibits such a state of facts, it is then competent for this court to remand the cause for a new trial, in order that the finding of the jury may be perfected. The record itself in such a case shows the imperfection which it is the purpose of the new trial to remedy, and it constitutes the basis of the action of the court in giving the order to send the cause down to a rehearing. No such imperfection appears on this record. On the contrary, the record shows a perfect finding of the jury, and, on a careful inspection of the tran-

script, we are unable to discover error in any part of the proceedings.

The judgment of the Circuit Court is therefore affirmed, with costs.

TAYLOR BROWN, PLAINTIFF IN ERROR, *v.* LEROY M. WILEY, HUGH R. BANKS, WILLIAM G. LANE, HENRY VAN DERZEE, AND EDWARD H. LANE, MERCHANTS, TRADING UNDER THE NAME AND STYLE OF L. M. WILEY & CO.

Where a bill of exchange was drawn in proper form and protested for non-acceptance, parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn, calculated to vary the terms of the instrument, was not admissible.

THIS case was brought up, by writ of error, from the District Court of the United States for the district of Texas.

Wiley & Co. were citizens of New York, and Brown a citizen of Texas.

The cause of action was the following bill of exchange:

$2,359.26. SHREVEPORT, *March* 23, 1854.

On or before the 1st of May next, 1855, please pay to order L. M. Wiley & Co. twenty-three hundred and fifty-nine and twenty-six one hundredths dollars, for value received, and charge same to my account, without further advice.

TAYLOR BROWN.

Messrs. Campbell & Strong, merchants, New Orleans.

By W. L. MCMURRAY.

This draft was presented and protested for non-acceptance on the 10th of June, 1854, more than ten months before the time when it was payable; and it appeared from the record that the suit was instituted against the drawer in February, 1855, nearly three months before the maturity of the bill.

The petition, as amended, contained the usual averments of the drawing of the draft, its presentation for acceptance, protest, and notice of dishonor.

The defence was, that there were two bills of similar character, except that one was payable in May, 1854, and the other in May, 1855; and that it was agreed by the parties that the second should not be presented for acceptance until the first was taken up. These pleas were, on motion of the plaintiffs' counsel, stricken out.

The cause then came on for trial, and the defendant offered evidence to prove these facts, the result of which is stated in the following extract from the bill of exceptions:

"The defendant's counsel then offered to prove, that at the time the draft was delivered, it was expressly stipulated and agreed, by and between W. L. McMurray, the agent of the defendant, and Charles Keith, the agent of the plaintiffs, that the said draft should not be presented for acceptance until the defendant should provide for the payment of a previous draft, drawn by the same party, in favor of the same parties, upon the same drawees, falling due in April, 1854, according to an understanding had with the drawees; and that said draft would not have been delivered to plaintiffs' agent, if he had not have agreed to hold it up. This was objected to by plaintiffs' counsel, and the objection sustained; to which ruling and decision of the court the defendant excepts."

The jury found a verdict for the plaintiffs, and the defendant brought the case up to this court.

It was argued by *Mr. Reverdy Johnson* (upon which side there was also a brief by *Mr. Hughes*) for the plaintiff in error, and by *Mr. Larocque* for the defendants.

The following notice of the points made by the counsel for the plaintiff in error is taken from the brief of *Mr. Hughes:*

Is the defence set forth, if true, a good bar of the cause of action of the plaintiffs below?

In regard to this, we think there can be no difficulty. The draft is dated at Shreveport, and the plaintiffs below in their petition state that the draft was drawn "at Shreveport, in the State of Louisiana," upon "Messrs. Campbell & Strong, at the city of New Orleans, in the State of Louisiana." The draft then was a Louisiana contract, and subject to the law of that State in regard to its validity, force, and effect. (Lynch *v.* Postlethwaite, 7 Martin R., 213.)

It is admitted that the general rule of the common law is, that it is not competent by parol evidence to alter, vary, or change a written instrument in its essential terms; and this is believed also to be the rule of the Louisiana law. But this general rule has no application to the agreement set forth in the answer of the defendant in the court below. That agreement did not in any sense propose to alter, vary, or change the written agreement between the parties. As already intimated, though the money mentioned in the draft was not due for a year after date, without some limitation of or restriction upon the rule of the law merchant, if presented for acceptance, and acceptance refused, payment might be enforced by suit, on the cause of action furnished by the refusal to accept, without regard to the time of payment stipulated in the draft. To

prevent this was the object of the agreement attempted to be set up by the amended answer. That agreement contains nothing which is in conflict with the terms of the draft sued on, or, in any sense, attempts to alter, vary, or change the same in an essential part. It does, however, restrain the holder in raising a cause of action by an act to be done by him; which was an act that he might or might not, at his election, perform, and which, of course, it was competent for him, upon sufficient consideration, to agree not to do, and such agreement would be collateral only to the draft.

In a case in Louisiana, it was offered to prove that the defendant's endorsement on the note sued on was merely as security, and that the same was to be paid out of collections to be made of claims due to the drawers. The court said: "We have repeatedly held that the article of our code which provides that parol evidence shall not be received beyond or against the contents of a written act, is inapplicable to a case of this kind. The evidence offered was neither to contradict nor explain a written instrument, but to prove a collateral fact in relation to it." (Dwight *v.* Linton, 3 Rob. La. R., 57.)

And here, the fact was clearly collateral, for the effect of the agreement was a waiver of the right by the payees to demand an acceptance, and of the consequent right to enforce payment by reason of non-acceptance, until it had been ascertained whether a certain act had been performed; but there was no agreement by which the right to sue or recover was denied, after the expiration of twelve months, the time the draft had to run to maturity.

Again: the same court have said that parol evidence is admissible, to prove an agreement between parties, that a bill of exchange, which had been drawn by one of them in favor of the other, should not be negotiated. (Robertson *v.* Nott, 2 Martin, N. S., 122.)

In that case, there was nothing to alter, vary, or change a written instrument, but an agreement to waive a right conferred by law, by reason of the nature of the instrument, within the reason of which this case is clearly embraced; for this, like that case, asks for the admission of evidence to prove a collateral fact, which, so far from contradicting, or altering, or changing a written instrument, proves an agreement cotemporaneously with it, which leaves the written agreement intact, but limits the right which the law gives, by virtue of the draft, of presentment for acceptance at an indefinite period before the maturity of the same.

It cannot be said that no injury is done to the plaintiff in error, and that he has no right to complain by reason of the

violation of the agreement attempted to be set up, in presenting the draft for acceptance before it had been ascertained whether the other draft had been provided for, and suing, as upon a cause of action, for its dishonor by non-acceptance.

The draft sued on, by its terms, was due on the 23d day of March, 1855, and was presented for non-acceptance, and protested on the 10th day of June, 1854; and the other draft was provided for in July, 1854, and the suit was commenced on the 9th day of February, 1855, one month and fourteen days before the draft sued on became due according to its terms, and without any application for acceptance, on or after the time when the first draft was provided for. From this statement, we think sufficient cause of complaint arises. A debt for a large amount is created, and is to be provided for by payment by the defendant to the plaintiff below; two drafts are drawn by the defendants upon their correspondents in New Orleans in favor of the plaintiff below, one having but a short time to run to maturity, and the other at twelve months after date; and at the time, it is agreed by the parties that the latter draft is not to be presented for acceptance until the former is provided for by the drawer, and this agreement is made in consideration of the drawing of the drafts, and concurrent therewith. The short draft is provided for before the other becomes due; and before the maturity of the same, an action is commenced upon a cause of action, by virtue of a protest made in violation of the agreement on the subject. It would be strange, indeed, if no complaint could be made under such circumstances. We think it enough that contracts are performed, or their performance enforced by suit at the time, or after they become due.

Again: it may be attempted to be maintained that the draft, the providing or non-providing for which was to fix and determine the time for the presentment for acceptance of the draft sued on, being due by its terms in May, 1854, and being then, and continuing up to the time of the protest of the draft sued on unprovided for, the time had arrived at which to present the same for acceptance.

But this was not the agreement; no time was specified in which the short draft was to be provided for. We must presume, from the terms used, that this draft had been accepted by the drawers, and that it was paid at maturity; and were the fact not so, something further would have been heard of it. Whether it was provided for in time, so that the drawers and acceptors might not be compelled to pay without funds in the hand of the drawer, was a matter with which the payees had nothing to do; they had no right to complain, if the draft accepted was paid at maturity. The provision for the bill, when

due, was a question between the drawer and his correspondent who had accepted. All that the payees in regard to the draft sued on had to do, was to see that in due time that was done which gave him a right of presentation for acceptance on the draft sued on; and, the act having been performed, then to present his draft for acceptance, and upon refusal, to take such steps as would charge the drawer, or waiting its maturity, to present for payment, and upon refusal, in like manner to charge the drawer by reason of its non-payment. It would be a strange rule, indeed, if the plaintiffs below, having had the full benefit of the agreement attempted to be set up in the acceptance and payment of the first draft, should, in violation of the other part of said agreement, be permitted to maintain a suit, without demanding refusal of acceptance after said first draft was provided for, and before the maturity, by its terms, of the draft sued on; and against this wrong the plaintiff in error thinks he is justified in asking the protection of the court.

Upon the particular point under consideration, *Mr. Larocque* said:

The proof offered by the defendant on the trial was incompetent and inadmissible. It was to prove a parol agreement, made at the time of drawing the draft, and not embodied in it, inconsistent with its terms and legal effect. This would be contrary to the well-settled rule of law on the subject. (Bank of the United States *v.* Dunn, 6 Pet., 51; Bank of Metropolis *v.* Jones, 8 Pet., 12; Rockmore *v.* Davenport, 14 Texas R., 602; Creery *v.* Holly, 14 Wend., 30, per Nelson, J.; Thompson *v.* Ketchum, 8 Johns., 189.)

It is the *lex fori* which governs in this case as to the admissibility of the defence offered by plea, or of evidence to support it. The effort is not to show that by the law of Louisiana the legal import of the bill in question is different from the signification attached to it by the general commercial law, but that an agreement by parol, contrary to that legal import, was made at the same time. (Story's Conflict of Laws, secs. 634, 634 *a*, 635, and cases cited in notes, particularly Yates *v.* Thompson, 3 Clark and Finnell, 577, 580, by Lord Brougham.)

2. The cases cited from Louisiana, of Dwight *v.* Linton, 3 Rob. R., 57, and Robertson *v.* Nott, 2 Mart., N. S., 122, cannot, with great respect to the court which decided them, be sustained.

3. The agreement set up in this case would be void for repugnance and uncertainty. The other draft actually matured May 15, 1854, before the presentment of the one in suit, which was on the 10th of June, 1854; and the theory of the attempted

defence necessarily is, that if the defendant had never chosen to reimburse the drawees the amount of the previous draft, if they had paid it without funds, or never to provide them with funds to pay it, the bill in suit never could be presented, or payment demanded.

1. That the cases of Dwight *v.* Linton, 3 Rob. La. R., 57, and Robertson *v.* Nott, 2 Martin, N. S., 122, have not since been followed, even in Louisiana, but substantially, though tacitly, overruled. (Police Jury *v.* Haw, 2 La. R., 42; Robechot *v.* Folse, 11 ib., 133; Arnous *v.* Davern, 18 ib., 42; Barthete *v.* Estebene, 5 La. Ann. R., 315; Gosserband *v.* Lacour, 8 ib., 75; Williams *v.* Flood, 11 ib., 113.)

2. That it is the *lex fori*, and not the *lex loci contractus*, which governs the question, according to the decisions in Louisiana herself. (Shewell *v.* Raguet, 17 La. R., 457.)

Mr. Justice GRIER delivered the opinion of the court.

Wiley & Co., plaintiffs below, declared on a bill of exchange drawn by Taylor Brown on Messrs. Campbell & Strong, of New Orleans, to order of plaintiff, dated 23d of March, 1854, and payable on the 1st of May, 1855. It was presented for acceptance on the 10th of June, 1854, and was protested for non-acceptance; of which the drawer had due notice.

It is admitted the bill was given for full value; but the defendant set up by way of special plea, and offered to prove to the jury, a parol agreement between him and the plaintiffs, that this bill should not be presented for acceptance till after a certain other draft, payable in May, 1854, was provided for, by placing funds in the hands of the drawees, who had agreed to accept the last bill after funds had been received to meet their acceptance of the first.

It is the rejection of this defence by the court below that is the subject of exception. It presents the question, whether parol evidence should have been received, to vary, alter, or contradict that which appears on the face of the bill of exchange.

When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our States, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill, the owner of it had a right to demand acceptance immediately, and

to protest it for non-acceptance. The proof of a parol contract, that it should not be presentable till a distant, uncertain, or undefined period, tended to alter and vary, in a very material degree, its operation and effect. (See Thompson *v.* Ketchum, 8 John., 192.)

Any number of conflicting cases on this subject might be cited. It will be sufficient to refer to the decisions of this court, those of Texas, where the suit was brought, and of Louisiana, where the contract was made.

In the Bank of United States *v.* Dunn, (6 Peters, 56,) this court have declared "that there is no rule better settled or more salutary in its application than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." The case of Brochmore *v.* Davenport, 14 Texas Rep., 602, a case precisely similar to the present, adopts the same rule. The case of Robishat *v.* Folse, 11 Louisiana, and of Barthet *v.* Estebene, 5 Ann. Rep., 315, and several others, acknowledge the same doctrine, thereby overruling some early cases in Louisiana which had departed from it.

This being the only point urged by plaintiff in error as a ground of reversal, the judgment of the court below is affirmed.

FRANCIS WARNER, PLAINTIFF IN ERROR, *v.* CEPHAS H. NORTON, ALBERT JEWETT, BENJAMIN C. BUSBY, JOHN C. PHELPS, JOHN J. PHELPS, ISAAC N. PHELPS, AND JAMES BEMAN, DEFENDANTS.

Where a sheriff was sued for taking goods under an attachment, which goods had been previously assigned under circumstances which were alleged to be fraudulent, it was proper for the court to charge the jury, "that if they believed, from the evidence, that the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of fact, to be determined by the jury under all the circumstances of the case; that if the sale were secret, and no means taken to apprise the public of it, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant.

A decision on a motion for a new trial, being addressed to the discretion of the court, is no ground for a writ of error.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the northern district of Illinois.

It was an action of trespass brought by Norton, Jewett, & Busby, against Warner, for taking certain goods in a storehouse in the village of Lasalle. Warner justified the taking, as sheriff of Lasalle county, under certain writs of attachment against one Haskins, the former owner.

The jury found a verdict for the plaintiffs, assessing the damages at five thousand six hundred dollars and sixty-four cents.

The bill of exceptions shows the whole case, and it is inserted *in extenso*, because the questions of law involved have been decided in different ways by courts of justice, and elementary writers do not agree about them.

Be it remembered, that on the trial of this cause, plaintiffs in this action claimed title to the goods, for the taking of which this suit was brought, by a sale of the goods alleged to have been made by one Haskins to them, through one Isaac Anderson, as their agent.

The proof of the plaintiffs tended to show that Beman, one of the plaintiffs, had a claim as creditor against Haskins, of about $1,200, and that the firm of Norton, Jewett, & Busby, had a similar claim of about $3,000. That each of these claims had been put in the hands of one Anderson, by the owners thereof, respectively, for collection, with authority to settle or arrange in any way. That on the 10th of January, A. D. 1855, the goods were chiefly in a hardware storeroom, and in the tin shop attached thereto, in the village of Lasalle; and that, up to that time, Haskins had been carrying on the business of a hardware retailer, and of manufacturing tinware in his tin shop adjoining; that while he was absent, his business was conducted for him by one Atherton, as his head clerk, who employed the operatives and superintended them, the business being done in the name of Haskins; that on the tenth of January, 1855, Haskins sold his stock of hardware and tinware to Beman and the firm of Norton, Jewett, & Busby, through Anderson, as their agent as aforesaid, Anderson cancelling the aforesaid debts, and giving his notes on time, to Haskins, for the balance of the price agreed upon; that thereupon, by way of putting the purchaser in possession, Haskins, Anderson, and Atherton, being in the storeroom, Haskins got the key of the front door, and gave it to Anderson, and Anderson gave the key and charge of the store and tin shop to Atherton, who up to that time had been carrying on the business for Haskins, but then undertook to act for Anderson.

That Anderson left town, and about the same time Haskins left town, and neither of them returned until after the taking by the defendant, (Haskins never having returned to reside there, and never having since resided there, or interfered with the goods in any way after the sale;) that Cephas H. Norton, Albert Jewett, and Benjamin Busby, were the ostensible partners of the firm of Norton, Jewett, & Busby; but that Ander-

son, in preparation for the bringing of this suit, was informed by the ostensible partners that there were special partners; that John C. Phelps was a special partner, and a brother of John C. Phelps.

There was no distinct evidence in the case to show that John J. Phelps and Isaac N. Phelps, or either of them, were members of the firm of Norton, Jewett, & Busby, or that they ever were in any way interested in the property taken; but the witness stated he believed or supposed the parties named in the record were the parties in interest, but he did not actually know it of his own knowledge.

[It is but fair to state, that while this point was made by the defendant, it was not pressed or insisted on, and the court thinks the plaintiffs' counsel might so infer, and therefore might not have thought it necessary to furnish additional proof.]

Plaintiffs' proof further tended to show that defendant was sheriff of Lasalle county, and that, as such, he did, on the ninth day of February, A. D. 1855, take and carry away the said hardware and tinware. Defendant offered evidence tending to prove, that before and at the time of said sale, said Haskins was in failing, and that certain creditors (by judgment) had sued out writs of attachment, as set forth in defendant's special pleas, against the goods of said Haskins; and that said taking, complained of in this suit, was the levying of legal process upon the said property as the property of said Haskins.

Defendant further offered evidence tending to prove that said sale was made secretly; but several of the plaintiffs' witnesses stated the sale was not made secretly, but that while the invoice was being made out, people were coming in and out of the store, as usual; that no steps were taken by any one to make it known till after said levy; that from the time of the sale, said Atherton continued to control the goods and the business as before, and to all appearance was doing so for Haskins, as he had done before; that he made sales to customers as formerly, without notice to any one of the change in proprietors, and in some instances made out the bills and receipts of said sales to customers in the name of Haskins.

That no change was made in keeping the books; that the servants and operatives about the store and tin shop continued to work under the direction of Atherton, with no knowledge of any sale, and supposing the business was being carried on as formerly, in the name and for the use of Haskins; but it did not appear that any of these things were authorized by the plaintiffs, or known to them. And that this condition and course of things continued until said goods were seized by said sheriff on the 9th day of February, 1855.

After the evidence was given to the jury, the court charged as follows, substantially:

1. That the jury must be satisfied, from the evidence, that the plaintiffs named in the declaration had a joint interest in the property sued for, or they must find for the defendant.

2. That if the jury believe, from the evidence, the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as against the defendant.

3. That whether the sale was or was not fraudulent, was a question of fact, to be determined by the jury under all the circumstances of the case.

4. That if the sale was secret, and no means taken to apprise the public of the sale, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant.

5. That the jury were to determine the facts as to the possession after the sale. If a sale is made by a party, and the vendor remains in possession, it is ordinarily a badge of fraud, and requires explanation. But in this case there did not seem to be any evidence tending to show that the vendor (Haskins) was in possession after the supposed sale, except that Atherton retained possession, and as to his possession the jury would determine. If it was the possession of the plaintiffs, and not of Haskins, the sale was not necessarily fraudulent.

6. The court declined to charge the jury, that, as a matter of law under the facts in evidence, the sale was fraudulent as to the defendant; but left it to the jury to decide whether the sale was in good faith, and for an honest purpose.

After verdict, a motion for a new trial was overruled. To which instructions, as then given, the defendant's counsel, and to each severally, then and there excepted, and also to the overruling the motion for a new trial.

Exceptions allowed. THOMAS DRUMMOND. [seal.]

The case came up upon this exception, and was argued by *Mr. Dickey* for the plaintiff in error, and *Mr. Badger* for the defendants, upon which side there was also a brief by *Mr. Badger* and *Mr. Carlisle.*

Mr. Dickey made the following points:

The question, whether a sale of goods, unaccompanied by a change of possession, is good as against creditors, has been a vexed question in England and in many of the United States. The weight of American authority is thought to be against the validity of such sales. See 2 Kent's Com., 515 to 529, where the subject is fully discussed.

The decisions of the Federal courts are against the validity of such sales—and this is considered "a settled principle in Federal jurisprudence." (2 Kent, 521; Hamilton *v.* Russell, 1 Cranch, 309.)

This sale was made in Illinois, and the Supreme Court of that State have adopted and adhered to what Chancellor Kent calls the more wise, sound, wholesome, and true doctrine, and have held, in Thornton *v.* Davenport, 1 Scam., 296, that where possession of goods is permitted to remain with the vendor, the sale is fraudulent, unless the retaining is consistent with the deed. The same doctrine is recognised in Powers *v.* Green, 14 Illinois, 386; so that there is no debate about the law in that State on this question—the decision of the Supreme Court of the United States and of the Supreme Court of that State concurring.

This change of possession, to be effective, must be *actual*, and *not colorable*. (2 Kent Com., 525.)

It must be substantial and exclusive. (2 Kent Com., 518.)

It must be an apparent, open, avowed, notorious change of possession. The purpose must not only be honest, but appearances must agree with the real state of the case. (2 Kent Com., 553; Burrell on Assignments, 303.)

This change of possession must also be *continued*. If Atherton did agree to hold possession of said goods and conduct said business for Anderson, he did not in fact do so; and if he violated his duty to Anderson, *that* is Anderson's misfortune. Even if Atherton was acting for Anderson in good faith all the time, still Anderson, by his agent, Atherton, permitted the *visible* possession to remain in Haskins, and the question for the jury ought to have been not merely whether this possession of Atherton was that of Anderson, and not that of Haskins, but was an apparent, visible, open, avowed, substantial change of possession effected.

The court held that an actual change of possession was sufficient; but we insist that such change of possession, to be good against creditors, must be not only actual and *bona fide*, but must be *apparent*, avowed, open, and not secret.

Again: plaintiffs claimed Anderson's title to said goods; and to show title in themselves, proved that Anderson made the purchase for James Beman, and for the members of the firm of Norton, Jewett, & Busby.

Who were the members of this firm? The plaintiffs proved on that subject that Cephas Norton, Albert Jewett, and Benj. C. Busby, ostensibly constituted the firm; and that in preparation for this suit, these ostensible partners told witness that there were special partners, and that John C. Phelps was one

of these special partners, and a brother of said John C. was another special partner.

There was no direct evidence that John L. Phelps or Isaac N. Phelps were members of the firm—all that was shown on that subject was, that witness had no personal knowledge, but supposed the parties to the record were the parties in interest.

This constitutes no evidence at all that John L. Phelps or Isaac N. Phelps had any interest in the property. It was essential, to maintain the action, for plaintiffs to show that they all jointly owned the property in question. This point was distinctly made, and yet the court submitted the question to the jury. This was error.

Whether there is any evidence on a point, is a question of law for the court. Whether the evidence is sufficient to convince or satisfy, is a question for the jury. (1st Greenleaf Ev., p. 63, sec. 49.)

The court certifies, that although this point was made, it was not pressed. We reply, that it was not waived; and when such a point is distinctly made and overruled, courtesy requires that it should not be pressed. It is sufficient that it was not waived.

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

The first instruction to the jury was, that they must be satisfied that the plaintiffs named in the declaration had a joint interest in the goods, or they should find for the defendant.

This instruction in form is unexceptionable, and, if there was any evidence of such ownership, was properly given to the jury. The plaintiff in error, as shown by the record, (p. 19,) objected to the admissibility of evidence offered for that purpose, but did not insist upon his objection.

Therefore, he cannot raise the objection here; but, on the contrary, it must be held waived; for, in the case of Walton *v.* United States, already cited, the court say: "It is true that the bill of exceptions states that the evidence was objected to at the trial; but it is not said that any exception was then taken to the decision of the court; so that, in fact, it might be true that the objection was made, and yet not insisted on by way of exception."

In our case, the record shows that the objection was not insisted on.

Again: in the case of Phelps *v.* Mayer, already cited, the court say, in substance, that objections to evidence must be insisted on by way of exception, for, if this is done, the opposite party may then supply the defect. (See, also, Hinds's Lessee *v.* Longworth, 11 Wheaton, 199.)

Therefore, the objection to the evidence being waived, by not being insisted upon by way of exception, no objection can now be made, and therefore there was evidence to be left to the jury on the point of ownership

But, if there was not, that question cannot be raised upon an instruction formally right, but must have been specially presented in the court below; for, in Garrard *v.* Reynolds's Lessee, 4 Howard, 123, it was held, that whether there was evidence to be left to a jury, was a question which could not be considered by this court, unless the opinion of the court below had been asked thereon, and an exception regularly taken.

Therefore, in our case the question cannot be here raised.

The substance of all the other instructions is this:

The court having declined to charge the jury that the sale was fraudulent in law, left it to them, under all the circumstances, to say whether the sale was or was not made to delay, hinder, or defraud creditors; telling them that if the sale was secret, suspicion was thrown upon it thereby, but that it did not thereby become fraudulent in law; and, leaving them to decide as to the possession after the sale, instructed them that if the possession of Atherton was the possession of the plaintiffs, (defendants in error,) the sale was not necessarily fraudulent.

Now, there could be no possible ground for the judge below declaring the sale void in law. Had Haskins, the vendor, remained in possession, the case would have been like Edwards and Harben in the King's Bench, and Hamilton and Russell in this court; but it is certain that Haskins did not personally have possession after the sale, for he left the town, ceased altogether to reside there, and was never there for any purpose until after the taking of the goods by the plaintiffs in error. It was proved that an inventory of the goods was taken, the price agreed upon and paid, the door-key given to the agent of the defendants in error, and by him delivered to Atherton, the former salesman of Haskins, who undertook to hold for the plaintiffs in error. Here, then, was evidence of a change of possession. All might indeed be illusive and fraudulent; but that was a question for the jury under all the circumstances of the case; and until that question was decided, no other than a hypothetical instruction could be given.

And the court did instruct the jury, in effect, that if the possession after the sale was in Haskins, the sale was necessarily fraudulent.

To this instruction the plaintiffs in error cannot object, though the defendants in error, had the verdict been against them, would have had just cause of complaint.

For if it were necessary to our case, and were allowable for us to question any decision of this court, we should contend that the rule laid down in Hamilton *v.* Russell, (1 Cranch, 310,) founded upon Edwards *v.* Harben, in 2 Term Reports, cannot be supported. In England, Edwards and Harben has been long since overruled; first questioned, then impugned, and finally denied. The cases fully justify the position of the very learned Mr. Smith, in his Leading Cases, (1 vol., p. 41, of 4 Amer. ed.,) in these words:

"It may therefore be safely laid down, that, under almost any circumstances, the question, fraud or no fraud, is one for the consideration of the jury;" and again, page 40: "Though in Edwards *v.* Harben it was laid down, in the express terms above stated, that an absolute sale, without delivery of possession, was in point of law fraudulent, the tendency of the courts has lately been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of possession shall prevail."

And the admission of plaintiff's counsel, (whose interest it was to maintain the doctrine of Edwards and Harben,) in Wood *v.* Dixie, 7 Q. B., 894, is in these words: "Some doubt has existed whether upon certain facts, as, for instance, want of possession, fraud is a question of law to be decided by the court, or of fact for the jury; but it seems to be now established that the question is for the jury."

This position of Mr. Smith is further supported by Martindale *v.* Booth, 3 B. and Ad., 498, in which Parke, J., says: "The *dictum* of Buller, J., in Edwards *v.* Harben, has not been generally considered in subsequent cases to have that import. The want of delivery is only evidence that the transfer was colorable." It is fully sustained by the numerous cases cited by him, and especially by Benton *v.* Thornhill, 2 Mar., 427, and Latimer *v.* Batson, 4 Barn. and C., 652, in the former of which, Ld. Ch. J. Best dissented from the doctrine of Edwards *v.* Harben, when assumed by counsel; and in the latter, the court notices and in effect repudiates, as furnishing a general rule, what was said by Lord Ellenborough in Wordall *v.* Smith, 1 Camp., 332.

(These two cases also show that the question of possession under the circumstances of our case was for the jury, and not for the court, and was therefore properly left to them by the court below.)

It may therefore be assumed with confidence, that the stringent rule laid down in Edwards *v.* Harben is entirely exploded in England, and there want of possession by the vendor is only

a badge of fraud to be considered by the jury. Why should a rule adopted by this court from Edwards *v.* Harben be here maintained, after the foundation of the rule has been utterly demolished in the country from which it was taken? It does not tend to expose and defeat fraud, any more than to disappoint an honest purchaser. Every case of real fraud will be sufficiently reached by making want of possession a badge or evidence of fraud, according to Twyne's case, whilst an indiscriminating disallowance of all sales which are not followed by possession must in many cases do injustice.

But whether the rule in Edwards *v.* Harben be maintained in all its strictness or not, is in our case immaterial. Here, possession was taken by the purchaser. It has been so found by the jury. There was evidence proper to be left to the jury of that fact; but if there was not such evidence, no objection can be made therefor, because there was no special prayer for an instruction that there was not such evidence as required by this court in the before-cited case of Garrard *v.* Reynolds's Lessee, 4 How., 123; and consequently the whole case was for the jury on the question of fraud.

As to the alleged secrecy of the sale, the court instructed the jury that secrecy threw suspicion on the transaction, but did not make it fraudulent in law.

Now, this is giving to secrecy precisely the effect properly belonging to it according to Twyne's case, *dona clandestina sunt semper suspiciosa.* In Twyne's case, the judges in the Star Chamber, passing on fact as well as law, gave what effect they pleased to the suspicious secrecy, with the other circumstances, in drawing the conclusion to which they came, that the sale made by Twyne was fraudulent. In our case, the secrecy was left, with the other circumstances, to the jury, to draw the inference which upon the whole evidence was in their judgment just. No exception can be taken to this, for secrecy has never been by any judicial decision withdrawn from the place it occupies amongst the other signs or badges of fraud, and dignified, like want of possession, with an unexplainable and resistless legal effect.

Of course, the exception for error in the refusal to grant a new trial is merely idle, after the decisions of this court in Marine Insurance Company of Alexandria *v.* Hodgson, 6 Cr., 206; Barr *v.* Grat's Heirs, 4 Wheat., 213; and Blount's Lessee *v.* Smith, 7 Wheat., 248.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before us by a writ of error from the northern district of Illinois.

An action of trespass was commenced by Norton et al. against Warner, charging him with having seized and carried away personal property of the value of ten thousand dollars. The defendant pleaded not guilty, and by several special pleas set up that certain creditors of Augustus A. Haskins, who had left his residence at Lasalle, procured a writ of attachment, under the statutes of Illinois, which was directed to the defendant, as sheriff, in virtue of which he attached the personal property of Haskins, which is the trespass charged, &c.

The bill of exceptions taken on the trial will show the points of law which were made on the facts. The proof of the plaintiffs tended to show that Beman, one of the plaintiffs, had a claim as creditor against Haskins for the sum of twelve hundred dollars, and that the firm of Norton, Jewett, & Busby, had also a claim of about three thousand dollars; that each of these claims had been put into the hands of one Anderson for collection, with authority to settle them; that on the 10th of January, 1855, the goods were chiefly in a hardware store-room, and the tin shop attached thereto, in the village of Lasalle; that up to that time Haskins had been carrying on the business of a hardware retailer and manufacturer of tin ware; that while he was absent the business was conducted by one Atherton, his head clerk, who employed the operatives and superintended their work; that on the 10th of January, 1855, Haskins sold his stock to Beman, and the firm of Norton, Jewett, & Busby, through Anderson as their agent, Anderson cancelling the aforesaid debts, and giving his notes on time to Haskins for the balance of the price agreed upon; and thereupon, by way of putting the purchaser into possession, Haskins, Anderson, and Atherton, being in the store-room, Haskins got the key of the outer door, and gave it to Anderson, and Anderson gave the key and charge of the store and tin shop to Atherton, who, up to that time had been carrying on the business for Haskins, but then undertook to act for Anderson.

Anderson and Haskins left Lasalle, and did not return until after the attachment was laid on the goods. Haskins never returned to reside there, and exercised no ownership over the goods after the sale. Norton, Jewett, & Busby, were the ostensible partners of their firm, but they informed Anderson that John C. Phelps and his brother were special partners. There was no further evidence to show the interest of the Phelpses, except the belief of the witness that they were parties, though he could not so state from his own personal knowledge. An objection to this defect of proof was made, but not insisted on.

The plaintiffs' proof further tended to show that the sheriff, on the 9th of February, 1855, did take property attached, and

removed it; and evidence was offered to show that, before and at the time of said sale, Haskins was in failing circumstances, and that certain creditors had sued out writs of attachment, as set forth in defendants' special pleas, against the goods of said Haskins, and that the taking of the property complained of was by legal process.

Defendant offered further evidence, tending to prove that said sale was made secretly, but several of the plaintiffs' witnesses stated the sale was not made secretly, and that, while the invoice was being made out, people were coming in and going out of the store as usual; that no steps were taken by any one to make the sale known until after the attachment was laid; that from the time of the sale, Atherton continued to control the goods and the business as before, and to all appearance was doing so for Haskins; that sales were made to customers as formerly, without notice to any one of the change of proprietors, and, in some instances, the bills and receipts of sales to customers were made out in the name of Haskins. No change was made in keeping the books; that the servants and operatives about the store and tin shop continued to work under the direction of Atherton, with no knowledge of any sale, and supposing the business was being carried on as formerly, and for the use of Haskins; but it did not appear that any of these things were authorized by the plaintiffs or known to them; and that this condition and course of things continued until the goods were seized by the sheriff.

After the testimony was closed, the court charged the jury: First, they must be satisfied, from the evidence, that the plaintiffs named in the declaration had a joint interest in the property sued for, or they must find for the defendant.

The jury found for the plaintiffs; which shows they were satisfied with the evidence on the point made, or considered the objection abandoned. If it were not insisted on in the court below, it cannot be raised here. There is no error in this charge of the court.

The second, third, and fourth charges were, "that if the jury believe from the evidence the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of fact, to be determined by the jury under all the circumstances of the case. That if the sale were secret, and no means taken to apprise the public of it, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant."

It is insisted that the sale was void as matter of law against

creditors, and should have been so held by the court; and the case of Hamilton *v.* Russell, 1 Cranch, 310, 1 Curtis, 415, is cited as sustaining this position. In that case, Hamilton made an absolute bill of sale for a slave on the 4th of January, 1800, which was acknowledged and recorded on the 14th of April, 1801. The slave continued in the possession of the vendor until an execution was levied on him as the property of the vendor. Trespass was brought against the plaintiff in the execution, who directed the levy to be made. The court held, under the statute of Virginia against frauds, that an absolute bill of sale, unless possession "accompanies and follows" the deed, is fraudulent; and the case of Edwards *v.* Harben, 2 Term Rep., 587, was cited. It is admitted that the statute is in affirmance of the common law.

In his 3d volume of Commentaries, Chancellor Kent has an interesting chapter on this subject, in which the case of Edwards *v.* Harben, and many other authorities, are cited; and he favors the doctrine, that unless the possession of goods follows the deed, it is fraudulent *per se.* But he states many exceptions to this rule, as where the possession of the vendor is consistent with the deed or the circumstances of the case. And he says, in Steward *v.* Lambe, 1 Brod. and Bing., 506, the court of C. B. questioned very strongly the general doctrine in Edwards *v.* Harben, that actual possession was necessary to transfer the property in a chattel, and the authority itself was shaken. And he observes, the conclusion from the more recent English cases would seem to be, that though a continuance in possession by the vendor be *prima facie* a badge of fraud, yet the presumption of fraud may be rebutted by explanations.

In the case of Wood *v.* Dixie, 7 Q. B., 894, the counsel, who was interested in maintaining the doctrine of Edwards *v.* Harben, admitted that "some doubt has existed whether upon certain facts, as, for instance, want of possession, fraud is a question of law to be decided by the court, or of fact for the jury; but it seems to be now established that the question is for the jury." In Martindale *v.* Booth, 3 B. and Ad., 498, Parke, Justice, says, the dictum of Buller, Justice, in Edwards *v.* Harben, has not been considered in subsequent cases to have that import; the want of delivery is only evidence that the transfer was colorable. In Benton *v.* Thornbell, 2 Marsh., 427; Lattimer *v.* Batson, 4 Barn. and Cress., 652; the same doctrine is laid down. In the more modern English cases, the stringent doctrine of Edwards *v.* Harben has been departed from; and the want of possession of chattels purchased is considered evidence of fraud before the jury. In Kidd *v.* Rawlin-

son, 2 Bas. and Pull., 59, Lord Eldon admitted that a bill of sale of goods might be taken as a security on a loan of money, and the goods fairly and safely left with the debtor. And this decision conformed to Lord Holt's view, in Cole *v.* Davis, 1 Lord Raymond, 724; and Lord Eldon, many years afterwards, declared, in Lady Arundell *v.* Phipps, 10 Ver., 145, that possession of goods by the vendor was only *prima facie* evidence of fraud. In Eastwood *v.* Brown, 1 Ryan and Moody, Lord Tenterden held, want of possession was only *prima facie* evidence of fraud.

It would seem to be difficult, on principle, to maintain that the possession of goods sold is, *per se*, fraud, to be so pronounced by the court, as that cuts off all explanation of the transaction, which may have been entirely unexceptionable. If circumstances, at law, may be proved to rebut the presumption of fraud, the case must be submitted to the jury.

But the case before us is not similar to that of Hamilton *v.* Russell. There was a change of possession in the goods purchased by Anderson, by the delivery to him of the key of the outer door of the storehouse, which he delivered to Atherton, who had agreed to continue in the business as the agent of the purchasers. From the time of the purchase, Haskins had no possession of the property, nor did he exercise any acts of ownership over it. He was absent from Lasalle from the time of the sale until after the attachment was laid.

Now, whether this was a colorable delivery or not, was a matter of fact for the jury, and not a matter of law for the court. It is clearly not within the case of Hamilton *v.* Russell.

Few questions in the law have given rise to a greater conflict of authority than the one under consideration. But for many years past the tendency has been, in England and in the United States, to consider the question of fraud as a fact for the jury under the instruction of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of goods does not accompany the deed, it is *prima facie* fraudulent, but open to the circumstances of the transaction, which may prove an innocent purpose. But if such explanation may be given, it is a departure from the stringent rule in the case of Edwards *v.* Harben.

It is urged that the fourth instruction is erroneous, as the jury were told, though the sale was secret, and no means taken to make it public, it was not fraudulent in law against the defendant. Whilst in the old cases it was held that the possession of the vendor of goods sold was fraudulent against creditors, no case, it is believed, has been so held by the court on the alone ground of secrecy in making the contract. It is

a circumstance connected with other facts from which fraud may be inferred. But if the secrecy supposed amounted to absolute fraud, yet the court could not have so pronounced in this case, as there was evidence controverting the supposition of secrecy, which the court could not properly take from the consideration of the jury.

The fifth and sixth charges were, that the jury were to determine the facts as to the possession after the sale; and that, if a sale is made by a party, and the vendor remains in possession, it is ordinarily a badge of fraud, and requires explanation; and under the sixth they left the case to the jury, to determine whether the sale was in good faith and for an honest purpose; which instructions were, as we think, correct, and in accordance with the general doctrine on the subject.

A decision on a motion for a new trial, being addressed to the discretion of the court, is no ground for a writ of error.

The judgment of the Circuit Court is affirmed.

JAMES STINSON, PLAINTIFF IN ERROR, *v.* HERCULES L. DOUSMAN.

Where there was a covenant to sell land upon condition that the purchase-money should be paid in instalments, and other acts done by the covenantee, in failure to perform which, rent was to be charged, and the covenantee failed to execute his contract, the rent was justly chargeable.

The Territory of Minnesota having abolished the court of chancery, the excuses of the defendant must be judged of as if it was a case in chancery, the statute having so directed. But in this case, time would be held to be an essential consideration in the contract by a court of equity, and the excuses for non-performance are insufficient.

The equitable as well as legal considerations being involved in the case, and the amount of property large, this court can take jurisdiction, although the amount of rent is less than one thousand dollars.

THIS case was brought up, by writ of error, from the Supreme Court of the Territory of Minnesota.

The facts are stated in the opinion of the court.

It was argued by *Mr. Cooper* for the plaintiff in error, and *Mr. Cushing* and *Mr. Gillet* for the defendant.

The principal question in the case was, whether or not time was of the essence of this contract as to the payment of the first instalment. Upon this point, the counsel for the plaintiff in error admitted that—

While time is material, it was not so far of the essence of such a contract as this, as to authorize Dousman to declare it void, especially when it was manifest that there was neither

wilful laches, negligence, nor want of ability, on the part of Stinson to perform the contract. In such a case, equity always affords relief. (2 Story's Eq. Jur., secs. 775, 776, 776 note, 777, 1314, 1315, 1316, 1319; Taylor *v.* Longworth, 1 McLean, 402, 403; same, 14 Pet., 170; Brashear *v.* Gratz, 6 Wheat., 528; Bank of Washington *v.* Hagner, 1 Pet., 464; 1 Fonblanque's Eq., 31 and 32, note; Newland on Contr., ch. 12, p. 238.)

Upon the question of time, the counsel for the defendant in error said:

At law, the time of performance is a material part of a contract; non-performance, at the very day, is always to be held as a breach. There is no other rule applicable, except the one named in the contract.

In equity, the same rule applies where, in the agreement, the parties evidently contemplated that time would be material, and influence their action or interests. In the present case, the parties not only looked to the possibility of the non-performance according to the letter of the agreement, but they made an express agreement providing for that contingency. They did not leave the law to determine the consequences of a default, but made a law for themselves on that subject, by an express provision in the body of their agreement. Instead of providing that the performance might be made at a future day, and a compensation in damages for the delay, the parties provided that, in case of default in making payment, or insuring, or paying taxes, the plaintiff might waive the contract of sale, and accept the defendant as his tenant, from the date of the agreement to the time of the election by the plaintiff to avoid the contract. There is no case for the law to act upon; nothing has occurred unprovided for in the contract. The law cannot step in and act upon a case, and declare what shall be done by the parties, when they had, by their agreement, determined for themselves.

[The counsel then quoted the cases of Hipwell *v.* Knight, and Secombe *v.* Steele, and continued:]

In the present case, it clearly appears affirmatively that the parties regarded the time an essential element in their agreement, because they made a special provision to meet that very contingency. They arranged that the plaintiff might elect to annul the contract, if it was not literally fulfilled. No other reason can be assigned for that provision. Without it, the plaintiff could only have sued upon the agreement to recover the purchase-money and interest by way of damages. Before suit, the defendant might have avoided the strict rule of law,

by tender, and resorting to equity to relieve from his default; but after suit, that relief would not have been open to him. In the present case, the parties stipulated for an additional privilege in behalf of the plaintiff. They made a provision for a change in the contract, by which the original agreement to sell was converted, by the action of the plaintiff, into a lease, with a specified rent. The plaintiff availed himself of this provision on the occurrence of the default by the defendant, as he had the legal and equitable right to do.

Hence, if it be true, under the laws of Minnesota, (Laws of March 3, 1853, p. 20, secs. 5, 6,) which we controvert, that the defendant can meet a legal claim by setting up an equity, there is nothing in this case to authorize any such defence, because there is no such equity in favor of the defendant which he can set up.

[Other points were made upon both sides, but the above was the principal one upon which the decision of the court turned.]

Mr. Justice CAMPBELL delivered the opinion of the court.

This suit was commenced in the District Court of the United States for Ramsey county, Minnesota, by Dousman, to recover of Stinson four hundred and eighty-one and sixteen one-hundredths dollars, as the rent of a parcel of land in the city of St. Paul, under a written contract, executed in February, 1854, by those persons. In that contract, Dousman covenanted to sell and convey to Stinson the same land for the sum of eight thousand dollars, which was to be paid, with interest at the rate of ten per cent. annually, in three instalments; the first instalment of two thousand dollars, and interest, was to be paid the 1st of September, 1854. The vendee was required to keep the buildings insured, and engaged that the policy in case of loss should inure to the benefit of the vendor; and also agreed to pay all the taxes accruing from May, 1853. The contract concludes with an express condition, "that in case of failure by the vendee to perform either of the covenants on his part, the vendor was at liberty to declare the contract void, and thereupon to recover, by *distress* or otherwise, all the interest which shall have accrued upon the contract up to the day of declaring the contract void, as rent for the use and occupation of the premises, and to take immediate possession thereof; to regard the person or persons in possession at the time as tenant or tenants holding without permission, and to recover all damages sustained by unnecessary destruction of timber or trees growing on the premises, or by holding over without permission."

It was agreed, that if the vendee paid the entire purchase-

money, or secured it to the satisfaction of the vendor, he should have a deed at any time after the payment of the first instalment. Contemporaneously with the execution of the contract, under the seals of the parties, the vendee gave his promissory note for the first instalment. This instalment was not paid according to the note or contract; no insurance was effected on the property within the terms of the agreement before September, 1854; nor were the taxes on the lot paid before that date.

On the 14th of September, 1854, the plaintiff notified the defendant that the contract of sale was annulled, and he should claim as rent the amount of interest that had accrued on the price stipulated for the property, and demanded immediate possession of the premises, under the conditions of the contract. The object of this suit is to recover that sum as rent.

The statute law of Minnesota provides, "that all equities existing at the commencement of any action in favor of a defendant therein, or discovered to exist after such commencement, and before a final decision, shall be interposed, if at all, by way of defence to the action, by answer or supplemental answer in the nature of a counter claim, and issue taken thereon, by a reply or supplemental reply thereto, and be determined as other issues in such actions;" and that, "when the party prosecuted has equities, claims, or demands, which could heretofore only be enforced by cross-action or cross-bill, the same shall be interposed by way of answer in the nature of a counter claim, and the plaintiff may reply thereto and put the same in issue; and if the same be admitted by the plaintiff, or the issue thereon be determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment or otherwise. The court of chancery and the right to institute chancery suits are abolished in the Territory. (Acts of Minnesota, 1853, ch. 9, secs. 5, 6, 14.) The answer of the defendant is framed not only to present a legal defence against the claim preferred in the petition, but also to obtain a decree affirmative of the continuing validity of the contract of sale.

He alleges that the note executed for the first instalment of the purchase-money was accepted and received by the plaintiff for that instalment. That, to provide for the punctual payment of the note, he sent to the agents of the plaintiff, who held, and were authorized to collect it, a draft on a merchant of responsibility for its full amount, under a reasonable expectation and belief that the money would be paid. That this draft was presented at the office of the drawee by the agents of the plaintiff, at a time when he was absent, and that his clerk, through mis-

take or error, declined to pay it; that, as soon as he heard of the dishonor of the bill, he made other arrangements for the payment of the first instalment by a bill on bankers in New York, and that this bill was offered to the plaintiff before the date of his notice to the defendant. That he has tendered the money and interest to the plaintiff, and his tender has been refused, and he now deposits the money in court for his use. He further answers, that the buildings on the lot have been covered by a suitable policy of insurance, but the amount of the loss, if any, was not payable to the plaintiff. That there was a mistake in the contract relative to this stipulation, which needed amendment, and that he deferred the transfer of the policy till the correction was made. That he is now willing to assign the policy to the plaintiff.

He answers, that since the notice of the plaintiff he has attempted to pay the taxes in arrear, but that he had been forestalled by him; that he is ready to pay the amount of taxes paid by the plaintiff into court. The defendant claims that the plaintiff has sustained no injury from any delay on his part, and that he is able and willing to fulfil his contract.

The District and Supreme Court of Minnesota decided that the answer was not sufficient, and judgment was entered for the plaintiff. The admissions of the answer exhibit a case of default on the part of the defendant in respect to his performance of the covenants in the contract of sale. The technical rule, that "accord and satisfaction is no bar to an action for debt certain, covenanted to be paid," is, perhaps, inapplicable in a system like that contained in the code of Minnesota; and it is probably true, that a debt by covenant may be discharged there by a simple contract or agreement. But the answer of the defendant does not show that the promissory note given for the first instalment of the purchase-money was designed to be a substitute for the covenant, and was taken in discharge of the debt created by it. Nor can we suppose that the plaintiff intended to release the condition which formed so important a part of his security. The contract and the note bear date of the same day, relate to the same subject, and are consistent with each other. The evidence must be very explicit and unequivocal, to lead to the conclusion that the one was designed to impair or alter the effect of the other.

The excuses rendered by the defendant for his non-payment of the taxes due upon the property, and his failure to insure the buildings for the security of the plaintiff, are insufficient. The record discloses a case of inattention and neglect on the part of the defendant, which authorized the plaintiff at law to annul the contract.

The question arises, whether his answer affords any ground for equitable interposition in his favor. In respect to contracts for the sale of land, a court of equity, in general, does not exact from the parties a punctual performance of their engagements, to entitle them to its aid in obtaining a specific performance. If the contract is silent in respect to the condition of time, or fails to indicate a distinct purpose of the parties to make it an essential consideration, and where no circumstance exists to manifest its importance, it is the habit of the court to relax the stringency of the rules of legal interpretation on that subject, and to decree performance, and direct compensation, even in cases where there has been inattention or neglect. (Secombe *v.* Steele, 20 How., sup.; Roberts *v.* Berry, 3 De G., M., and Gord.) But if the parties have declared in their contract that time is a material consideration, and have agreed that their rights shall depend upon a scrupulous fidelity to their engagements, it does not belong to that court to make another law for the parties. Where it plainly appears that the sale is conditional, and its completion is dependent upon the fulfilment of any of the terms with punctuality by either party, a court of equity, in general, will not interpose to relieve the party in default, on the principle that time is not of the essence of the contract.

In the case before us, the contract recites, that the vendor, in consideration of one dollar, part of the purchase-money thereafter mentioned, and then actually paid, and upon the *express condition* that the defendant do well and faithfully perform the covenants and agreements thereafter mentioned, agreed to execute and deliver a deed of conveyance in fee simple, &c.

To the terms of sale there is the condition, "Provided, always, (and these presents are upon this express condition,) that in case of failure in the performance of either of the covenants or agreements on the part of the vendee to be performed, the vendor shall have the right to declare this contract void." The contract concludes with a minute description of the relations and consequences that were to ensue from the exercise, by the vendor, of the right he had thus reserved.

The contingency thus foreseen and provided for occurred. The defendant failed to perform either term of his contract, and his answer contains no valid excuse for his neglect.

The defendant in error objected, that the matter in dispute was not of the value of one thousand dollars, and therefore this court had no jurisdiction of the cause. The objection might be well founded, if this was to be regarded merely as an action at common law.

But the equitable as well as the legal considerations involved in the cause, are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit.

The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at eight thousand dollars. (Bennett *v.* Butterworth, 8 How., 124.) We think this court has jurisdiction. Judgment affirmed.

ENOCH C. ROBERTS, PLAINTIFF IN ERROR, *v.* JAMES M. COOPER.

This court again decides, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate.

The deposition of an officer of the General Land Office, as to the opinions and practice prevailing in that office, cannot be read to the jury as proof of the law, although it might have influence with the court in explaining the law to the jury.

The ancient English doctrines respecting maintenance or champerty have not found favor in the United States; and in Michigan (where the land lies which is involved in the present controversy) its application to sales, by one out of possession, has been annulled.

Although, in that State, an agreement to carry on a suit upon condition of receiving a share of the proceeds might be void, yet the rule would not apply to a transfer of the legal estate to one, in trust for himself and the other stockholders in a corporation.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Michigan.

It was the same case which was before this court at December term, 1855, and is reported in 18 Howard, 173.

A venire *de novo* having been ordered, the case came up again for trial, on the circuit, in June, 1856. The result was a verdict and judgment in favor of Cooper, the lessor of the plaintiff in the original action.

The bill of exceptions stated that an agreed state of facts, dated Washington city, April 17th, 1854, signed by S. F. Vinton for plaintiff, and Truman Smith for defendant, with all the papers therein referred to and thereto annexed, was read in evidence to the jury, a true copy of which statement, with the papers thereto annexed, is hereto appended.

And there was also put in evidence, and read to the jury, a statement and stipulation, dated June 24th, 1856, and signed by S. F. Vinton for the plaintiff, and T. Romeyn for the defendant, together with the papers therein referred to and at-

tached thereto, a true copy of which statement, with a copy of all the papers thereto annexed, is hereto appended. The plaintiff objected to the reading of the deposition of John Wilson, and the court excluded the same from the jury, to which ruling the defendant excepted.

The defendant then produced and offered to prove a deed of release from Alfred Williams and wife to the Minnesota Mining Company, dated June 20th, 1856, covering the lands in controversy; and further offered to prove, in connection therewith, that at the time when the said Cooper obtained the deed of the premises in controversy from Alfred Williams, the Minnesota Mining Company was in actual and open possession of the same, claiming title under their patent from the United States, and that the said Cooper knew of such claim and occupancy before and at the time of his purchase, and of said conveyance; that he obtained said title from Alfred Williams, he being the naked trustee of John Bacon, and that all the negotiations for the said purchase, and the purchase itself, were had between said Cooper and Bacon, the said Williams acting under the directions and for the benefit of said Bacon, and having or claiming no personal interest in said lands; that said purchase and conveyance were made for the following purpose, namely: That said Cooper should hold the same in trust for a corporation known as the National Mining Company, all of whose stock was held by said John Bacon; and by the conditions of said sale, the said Cooper was to receive, and did receive, with said conveyance, six-tenths of the stock aforesaid, and the said Bacon was to retain, and did retain, four-tenths of said stock. That the said Cooper purchased said stock, and took said conveyance, with a full knowledge of the claims and occupancy of the Minnesota Mining Company, and with the intention of prosecuting the title purchased by him, by legal proceedings in this court against the Minnesota Mining Company, for the benefit of the National Mining Company; and that before said conveyance was delivered to him by said Williams, the said Cooper, in conjunction with the said Bacon, applied to counsel in the city of Detroit, to employ such counsel in the litigation aforesaid, which was to be had with the Minnesota Mining Company—to which evidence the plaintiff objected, and the court excluded the same—to which the defendant excepted.

The bill of exceptions then stated sundry prayers offered by the defendant upon points which were covered by the decision of this court in 18 Howard, and which it is not thought necessary to insert.

The defendant further requested the court to charge the jury, that if, when said Williams conveyed to said Cooper the prem-

ises in question, the said Minnesota Mining Company was in actual and open possession of said lands, claiming title thereto under their patent, the said conveyance was void in law against the said company and all claiming under them; which instructions the court refused to give, and to this ruling the defendant excepted.

Upon these exceptions the case came up to this court, and was argued by *Mr. Truman Smith* and *Mr. Reverdy Johnson* for the plaintiff in error, and *Mr. Vinton* for the defendant.

The counsel for the plaintiff in error made the following points:

I. The plaintiff in error, who was the defendant below, should have a rehearing accorded to him on the whole case, irrespective of the former decision.

1. The statute of Michigan gives to the defendant in ejectment an opportunity for a new trial before he is dispossessed. (Mich. Rev. Stat., 492.)

On a revision of the case, the party is to be heard at large, both as to the law and fact. Besides, in this case, the former verdict and the intermediate rulings were all in favor of the defendant below; and therefore it might well happen that he did not (as the fact was) introduce all the evidence at his command, nor take all the available grounds of defence.

2. In this case, the court was obliged to deal with questions arising under the acts of Congress, which treat of a peculiar subject in a new and special manner, and therefore it could not avail itself of the aids of familiar practice and analogous adjudication, usually at command in disposing of cases arising under our land laws, and often throwing much light on the path to satisfactory results. The court, on the former occasion, without knowing, or having any means of knowing, what had been the contemporaneous construction of the act of March 1st, 1847, and what had been the uniform action and course of the Executive in carrying that act into effect, could only look to the terms in which it is conceived; and as it is, to some extent at least, wanting in perspicuity, it is no matter of surprise that a contrariety of opinion should have existed on the bench, or that the court should have arrived at conclusions with some difficulty and hesitation. The new lights alluded to now appearing, on the deposition of the late Commissioner Wilson, and the court being informed that all these lease titles stand on precisely the same footing, it can hardly fail to realize the propriety of giving the act of March 1st a careful reexamination, before it adopts as irreversible a construction

which must subvert numerous titles, and involve in ruin millions of capital. The circumstance that there are numerous properties to be deeply affected by the judgment of the court, where the parties interested have no opportunity to be heard, constitutes a strong reason for according to the plaintiff in error a rehearing, without prejudice—thus realizing one of the principal objects of the statute alluded to.

3. On a careful analysis of the record, it will be found to involve—

a. Two questions arising out of objections, made on the former hearing by the present plaintiff in error, to the title of the defendant in error, based on the compact with Michigan for school lands, or rather on the terms in which that compact is expressed; which objections stand on this record precisely as they stood before; and which, having been fully considered and disposed of adversely to the present plaintiff, are not now renewed.

b. A question arising out of an objection made by the same party to the title of the present defendant, based on the laws of the State of Michigan, which will be renewed for the purpose of submitting acts of the Michigan Legislature that escaped notice on the former hearing, and have, it is conceived, a most important bearing on the matter in issue.

c. A question on the construction to be given to the compact between the United States and Michigan, relative to school lands, insisted on by the defendant in error at the former hearing, and constituting an objection to the title of the Minnesota Mining Company, which was, impliedly at least, overruled by the court, and will doubtless be now renewed; therefore the subject must be re-examined by us (the counsel for the plaintiff in error.)

d. A question on the construction to be given to the acts of Congress of March 1st, 1857, and September 26th, 1850, which the defendant in error contended, and which a majority of the court held, to be fatal to the title of the plaintiff in error. This question will be re-examined in connection with new and very material facts, appearing on the record, which change, it is conceived, the whole aspect of the case. It will be insisted, that if there be anything in this objection, neither the Minnesota Mining Company nor the defendant in error have any title to the lands in dispute, that they remain and are public land, and consequently the defendant in error cannot recover.

e. A question on the admissibility of the evidence offered by the plaintiff in error on the trial below, to show that the deed by which the defendant in error derived title was void, by reason of a champertous agreement made by and between him

(the defendant in error) and John Bacon, in equity the owner of the property in dispute.

f. A question as to the regularity of the verdict and judgment below, and whether the former should not be set aside, and the latter reversed, for reasons which appear of record.

4. The circumstance that the court was not full on the former occasion, and that there was a divided opinion, in connection with the vast interests at stake, constitute strong reasons why there should be a rehearing without prejudice.

[The second, third, fourth, and sixth points are omitted, as being covered by the decision in 18th Howard. The fifth referred to that part of the bill of exceptions which involved the charge of champerty.]

It is difficult to conceive a more aggravated case of champerty. Hence we insist that the deed from Williams and wife to Cooper, executed at the request of Bacon, in performance of this corrupt agreement on his part, was utterly void; and that therefore the evidence was clearly admissible.

Before the enactment of the revision of 1846, by the Legislature of Michigan, it was held, in conformity with the principles of the common law, by the courts of that State, that a grant of land is inoperative and void, if, at the time of the grant, such land is in the actual possession of another, claiming under a title adverse to the grantee. (1 Doug. Rep., 19, 38; Buckner's Lessee *v.* Lawrence; ib., 546, 566; Stockton *v.* Williams, Walker's Ch. Rep., 260; Godfrey *v.* Desbrow.)

But by the revision of 1846, tit. xiv, ch. 65, sec. 7, the Legislature enacted, that "no grant or conveyance of land, or interest therein, shall be void, for the reason that, at the time of the execution thereof, such lands shall be in the actual possession of another claiming adversely." By this provision, the Legislature undoubtedly abolished so much of the common law of the State as inhibited the purchase, under the circumstances named, of disputed titles; but it is submitted that they did not abrogate the common law on the subject of champerty. It is believed that the following remarks, to evince the invalidity of the deed from Williams and wife to Cooper, will not be deemed inappropriate:

1. What is champerty at the common law? "It is," says Lord Coke, (in his Com. on Litt. Ins., 368 *b*,) "to maintain to have a part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit; and this is *campipartia*, or *champertie*. The circumstance that the champertous agreement is a verbal one makes no difference; for Fitz. Nat. Brev., 171, A, says, that 'the writ of champerty lieth where a man, by covenant or agreement, made by writing or by word,

agreeth to have a part of the thing, or land, or debt, which is in suit, that shall be recovered if the party recover, to maintain and aid him in the action and in the manner for which he sueth.' (*a.*) 'Then he who is grieved shall have this action against him who maintaineth the suit for the same intent.'" The author then proceeds to give the form of the writ which is not material to the argument, and therefore is omitted. "Champerty is the most odious species of maintenance." (Comyns, Dig., tit. Maintenance, A 2.) "If he who maintains another is to have, by agreement, a part of the land or debt, &c., in suit, it is called champerty," (ib.;) "or if he agrees to have a rent or other profit out of the land," (ib.,) "though the agreement be by parol or deed." (Ib.) Blackstone, in his Com., vol. 4, p. 135, speaks of these champertors as "the pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes;" and he adds, they "were severely animadverted on by the Roman law."

2. Champerty is an offence at the common law, irrespective of the old English statutes on the subject. (Com. Dig., tit. Maintenance, A 2; 4 Kent. Com., p. 449; Story's Eq. Com., sec. 1048; 3 Greenl. Ev., sec. 180; 1 Russell on Crimes, 180; 3 Vesey, jr., 449, Wallis *v.* The Duke of Portland; 11 Mass. Rep., 549, Sweet *v.* Poor; 5 Pick. Rep., 348, Brinley *v.* Whitney; ib., 353, per Parker, C. J.; 9 Metc. Rep., 489, Lathrop *v.* Amherst Bank; 22 Wend. Rep., 403, Small *v.* Mott; ib., 405, 406, per Walworth, Ch.; 1 Ham. Rep., Ohio, 132, Key *v.* Vattier; 13 ib., 175, Weekly *v.* Hale; 4 Litt., 417, Rust *v.* Larue; 5 Monr., 416, Brown *v.* Beauchamp; 3 S. and M. Rep., 130, Sessions *v.* Reynolds.)

3. Champerty is *malum in se* at the common law, and was so held to be by Bracton before the enactment of the statutes; (3 Edward I, ch. 28, and ch. 33; and 28 Edw. I, ch. 11, per Walworth, Ch., 22, Wend. Rep., 406.) That learned Chancellor, after denouncing champerty as the worst species of maintenance, and after admitting that the revised statutes of New York had in a general degree abrogated the law of maintenance, adds: "I do not think, however, that an agreement actually champertous, as when a stranger to the subject of litigation, who has no interest therein in law or equity, or in expectancy by the ties of blood or affinity, agrees to assist in embroiling his neighbor in litigation, or in carrying their suits through the different courts after they are commenced, upon a stipulation that he shall receive a share of the fruits of the litigation as a reward for his mischievous interference, can be enforced in courts of justice."

4. The courts in this country have uniformly pronounced against the validity of all contracts or transactions tainted with champerty. In Massachusetts, 11 Mass. Rep., 549, Sweet *v.* Poor; 5 Pick. Rep., 348, Brindley *v.* Whiting; 9 Metc. Rep., 489, Lathrop *v.* Amherst Bank; in New York, 2 Sand. Supr. Ct. Rep., 141, Satterlee *v.* Frazer; 5 John. Ch. Rep., 44, Arden *v.* Patterson; 22 Wend. Rep., 403, Small *v.* Mott; in Ohio, 1 Ham. Rep., 132, Key *v.* Vattier; in Kentucky, 8 B. Mon. Rep., 488, Thompson *v.* Warren; in Alabama, 9 Ala. Rep., 755, Byrd *v.* Oden; 17 ib., 206, Elliott *v.* McClelland; 24 ib., 472, Wheeler *v.* Pounds; in Mississippi, 7 S. and M., 130, Sessions *v.* Reynolds; 11 ib., 249, Doe *v.* Ingersolls; in Tennessee, 11 Humph. Rep., 189, Wilson *v.* Nance; 10 ib., 342, Morrison *v.* Draderick; and in Illinois, 11 Ill. Rep., 558, McGoon *v.* Ankeny. In Dishler *v.* Dodge, 16 How. Rep. S. C. U. S., 622; ib., 632, 633, 645, where Dodge, the defendant in error, treasurer, and tax collector of Cuyahoga county, Ohio, had distrained the amount due for taxes from certain banks in bank notes, and had deposited such notes with the Cleveland Insurance Company, and where the banks had subsequently united in a written and absolute transfer of these notes to the plaintiff in error, who brought replevin, it was held by two of the justices of this court (Catron and Daniel) that the transaction was "disreputable," and the transfer void for champerty. But if, in place of making an absolute sale, the banks had transferred the notes on an express agreement that Dishler should institute an action, prosecute it to consummation, and divide the results as in this case, would not the whole court have united in pronouncing the transfer corrupt, and the title thus attempted to be acquired a nullity? It was precisely because the transfer was absolute, and the banks had, or were to have, no remaining interest, that the majority of the court upheld the transaction.

5. Champerty being deemed immoral, and at the common law rendering all contracts or transactions tainted therewith null and void, it is to be presumed that the common-law rule on that subject obtains in the State of Michigan. "But if maintenance or champerty," says Ch. J. Parker, (1 Pick. Rep., 417, Thurston *v.* Percival,) "is *malum in se*, or an offence at common law, it is to be presumed, without any statute, that the same law is in force there;" that is to say, in the State of New York. But we are not left to presumption in this case; for the Supreme Court of Michigan have held expressly that the common law is in force in that State, except so far as it is repugnant to or inconsistent with its Constitution or statutes. (2 Doug. Rep., 184, Stout *v.* Keyes; ib., 515, Rue High, appellant; ib., 528, per Wing, J.) And they have particularly recog-

nised and enforced the common law, on the subject of maintenance and champerty, in that State. (1 Doug. Rep., 19; ib., 38, Buckner's Lessee *v.* Lawrence; ib., 566, Stockton *v.* Williams.)

6. The statute of Michigan, Rev., 1846, tit. xiv, ch. 65, sec. 7, p. 263, did no more than remove the illegality of a conveyance when there was an adverse possession. It did not touch the illegality of an agreement tainted with champerty, nor make a deed, executed in conformity with such agreement, valid. The statute merely allows a grantee, in a case of adverse possession, to recover, in his own name, what the law, as it previously stood, permitted him to do, in the name of his grantor. (1 Doug. Rep., 546, Stockton *v.* Williams; 5 Pick. Rep., 348, Brinkley *v.* Whiting; 8 B. Mon. Rep., 368, Ring *v.* Gray; 11 Humph. Rep., 189, Wilson *v.* Nance.)

7. The authorities show that the offence of champerty is quite distinct from that of the illegality of buying a title in a case of adverse possession. This distinction is recognised in this country, both in statutory enactments and by the decisions of the courts. Thus, in Ohio, it is held that a conveyance of land, in the adverse possession of another, is not void, (15 Ohio Rep., 156, Cressinger *v.* Welch;) but that the aid of the courts will not be given to sanction and enforce champerty or other contracts, contrary to public justice and to the peace and happiness of the community. (1 Ham. Rep., 132, Key *v.* Vattier.) There can be no champerty without an adverse possession; but in Michigan there may be a sale or conveyance where there is an adverse possession, either with or without champerty. In the latter case, the deed is made valid by the statute referred to, and in the former it is void at the common law. In England, and in most of the States of this Union having laws against buying disputed titles, the question of champerty can hardly arise as in this case; but the statute of Michigan, having enabled a party disseized to convey notwithstanding, we now find a champertor in court, invoking the judgment and process of the court to consummate the illegality. Will the court aid him? In ordinary cases, the champertor merely contracts to pay or contribute to the expenses of a lawsuit commenced, or to be commenced, in the name of the party with whom the arrangement is made, in consideration of a share of the proceeds; but Blackstone, in his Commentaries, (4 vol., p. 135,) says, "that, in our sense of the word," champerty "signifies the purchasing of a suit, or right of suing;" and then he adds: "No man should purchase any pretence to sue in another's right." Quoted and approved by Catron, J., in 16 How. Rep. S. C. U. S., 633.) "I am not aware," says the

learned judge, "that this, as a general rule, has been disputed." Certainly not, if the case involves a division of proceeds; and this is exactly what Mr. Cooper has done. The law of champerty does not require an obligation to pay the costs of the suit, or a contribution in cash to the expenses of the litigation, to constitute the offence; but professional or any other aid, in consideration of having a part of the subject or thing in controversy, is sufficient. (*Vide* opinion of Green, J., Backus *v.* Byron, Appendix B.) In this case, Cooper has made himself liable for all the costs, and assumed all the expenses, by taking a deed of the property, and instituting a suit in his own name. Surely the court will not hold that a champertor can elude the imputation arising in the case, by taking a conveyance and making himself plaintiff in a lawsuit which he prosecutes on shares. Champerty will have free course in Michigan if that can be done. The pains and penalties inflicted by the laws of that State on champerty, as a crime at the common law, (*vide* opinion of Green, J., Backus *v.* Byron, Appendix B,) will amount to nothing.

8. The principles here indicated are fully sustained by a recent decision of the Supreme Court of Michigan, (*vide* Backus *v.* Byron, Appendix B.) The opinion given by Judge Green recognises and establishes the following propositions:

1. That the common law on the subject of champerty is in full force in Michigan, and makes all contracts tainted with it void.

2. That it is not necessary to constitute the offence, that the party should obligate himself to pay the taxable costs of a suit, or to contribute to the expenses of the litigation in cash.

3. That champerty as a crime at the common law is to be visited with pains and penalties under and by virtue of a statute of that State. (Revision 1846, tit. xxx, ch. 161, sec. 22.)

The learned judge was the revisor of the statutes of 1846, and is likely to know whether the Legislature intended to set aside or abrogate the law of champerty. The positions assumed in Backus *v.* Byron are so ably reasoned and so thoroughly sustained by authority, that it will be superfluous to add another word on the general subject. (For many authorities, both English and American, not hereinbefore quoted, see the opinion of Judge Green.)

9. If there ever was a case calling for a rigorous application of that law, it is this. The Minnesota Mining Company were in possession of the premises in good faith, relying on the construction given to the act of 1847 by the authorities of the United States, without the slighest suspicion that Michigan could or would advance pretensions under the school-land

compact, and had made costly improvements on the same, when such premises were put up at auction at Lansing, behind their backs, and bid in for a song. Cooper must have been cognizant of all the facts. He knew the situation of the property, and that the claims of Bacon would meet with stern resistance. With his eyes open, after having consulted counsel, he deliberately entered into a copartnership of champerty with Bacon, and now asks the interposition of this court to enable him and his associate to realize the object and end of the corrupt arrangement. What is particularly aggravating in the case is, the certainty that Bacon could not secure his unjust acquisition by a suit in the name of Williams. His recent deed to the Minnesota Mining Company evinces pretty clearly what the course of the latter would have been, on being informed of the true character of the transaction. He would have arrogated equitable powers, and done justice to the parties.

10. If the deed from Williams to Cooper was void for champerty, then we have a perfect title, (even though we are overruled on other points,) by reason of the deed from Williams and wife to the company, of June 26, 1856, and it is submitted that the testimony offered should have been admitted, and the judgment below should be reversed for its exclusion.

The counsel for the defendant avoided a reargument of the points decided in 18 Howard, but upon the new matter made the following points:

Taking these facts in detail, the first question presented is, whether the deed from Williams to the Minnesota Mining Company was properly rejected.

This deed from Williams bears date since his deed to Cooper, and since the decision of this court affirming the validity of Cooper's title. The record also shows that Williams was a naked trustee of the legal title, and conveyed to Cooper, at the request of Bacon, who was in equity the owner of the land.

The subsequent conveyance, therefore, of Williams, without authority from Bacon, to the Minnesota Mining Company, who well knew the fact of the prior conveyance to Cooper, and the relation Williams sustained to the title, was in law a fraudulent act of both grantor and grantee, and could pass no title if his former deed was valid, and had conveyed the land to Cooper. (City of New Orleans *v.* De Armas, 9 Pet., 236; United States *v.* Arredondo, 6 Pet., 738.)

A grant is an extinguishment of the right of the grantor, and therefore he and all claiming under him are always estopped by the grant. (Fletcher *v.* Peck, 6 Cranch, 87; Terrett *v.* Taylor, 9 Cranch, 43; Pollard's Lessee *v.* Hogan, 3 How., 212.)

2. The next fact offered in proof in connection with said deed from Williams to the Minnesota Mining Company was, that said company when Cooper purchased was in possession of the land, claiming title to it, and that he before and at the time of the purchase knew of such claim and occupancy.

It is not necessary to consider whether at common law a deed would be void for maintenance which conveyed land in the adverse possession of another, since the statute law of Michigan expressly recognises the validity of such conveyance.

The following provisions having a bearing on that subject will be found in the laws of Michigan:

"Conveyances of land or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved, and recorded, as directed in this chapter, without any other act or ceremony whatever." (Revised Code of 1846, p. 262.)

"No grant or conveyance of lands or interest therein shall be void, for the reason that at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely." (Page 263.) And at page 490, title Ejectment, is the following provision:

"It shall not be necessary for the plaintiff to prove an actual entry under title, nor actual receipt of any profits of the premises demanded, but it shall be sufficient for him to show a right to the possession of such premises at the time of the commencement of the suit, as heir, devisee, *purchaser*, or otherwise."

From these enactments it is plain that the possession of the Minnesota Mining Company, under claim of title and Cooper's knowledge of it when he purchased, cannot affect the validity of Williams's conveyance to him.

A short time prior to their passage, and which no doubt gave rise to them, the courts of Michigan had decided that a conveyance of land held adversely was void. (Buckner's Lessee *v.* Lawrence, 1 Doug. Mich. Rep., 38; Godfrey *v.* Desbrow, Walk. Mich. Ch. Rep., 266; Root *v.* Chapin, same vol., 79; Hubbard *v.* Smith, 2 Mich. Rep., 212.)

3. The remaining fact offered in proof in this connection was, that Bacon, being the owner in equity of the land, sold it to Cooper in trust for the National Mining Company, and that Williams, his trustee, by his direction, conveyed it to Cooper in trust for said company; and that he, Bacon, was also the owner of the whole capital stock of said National Mining Company, six-tenths of which he sold and transferred to Cooper, retaining the other four-tenths; and that when he took the conveyance of the land, he intended to bring suit against the

Minnesota Mining Company for the benefit of the National Mining Company; and before the conveyance was delivered to him by Williams, he, in conjunction with Bacon, applied to counsel to employ such counsel in such suit.

When the statute allowed a purchaser to take a conveyance of land in the adverse possession of another claiming title, it, as incident thereto and by necessary intendment, gave to the purchaser a right to use all lawful means to obtain possession. There are various lawful means of doing this, and by suit is one of them, which, in such case, is by far the most common. It would be going a great length to hold that he must not, at the time he makes the purchase, intend to use this means; that if he have such intention, the purchase will be void; that the intention to sue must be formed at some time subsequent to the conveyance. It is deemed a sufficient reply to this to say, that no such condition is found in the law which allows the conveyance to be made. Such condition would have rendered the statute almost a dead letter, and given rise to a contest about the *intention* of the purchaser in almost every case.

The Legislature must have well known that in most cases where land was in the possession of another claiming title, the occupant would contest his right by law; and, as a general thing, that the purchaser would be obliged to establish his claim in that way. It is therefore reasonable to presume, that if the Legislature intended to impose such restriction on the conveyance, it would have been expressed in plain language.

But it may be said, in reply, that it was not the intention of the Legislature to license champerty.

Champerty is a species of maintenance; and if it be understood to embrace a conveyance of land held adversely by another claiming title, then the answer is, that to that extent it has been rendered lawful in Michigan; but if it be understood in its original and primitive sense, as being "a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, the champertor to carry on the party's suit at his own expense," it will be admitted that it was not the intention of the Legislature to license it.

This presents the question, do the facts which the plaintiff in error offered to prove, amount to such a bargain?

Was it agreed that Cooper should divide the land, in case the suit prevailed? and if so, with whom? This is the first essential ingredient in champerty.

That he was not to divide it with Williams, the grantor, is certain, nor with Bacon, who was the equitable owner and real vendor, because the conveyance transferred the whole interest

in the land, both legal and equitable, to Cooper, in trust for the corporation called the National Mining Company. There was no agreement or promise that, in case the suit prevailed, or in any other event, either Cooper or the corporation should convey or give back to Bacon any part of the land.

Suppose Cooper, by direction of the National Mining Company, had, instead of bringing suit, immediately after the conveyance to him, sold and transferred the land to a stranger, would any promise to or agreement with Bacon have been violated? and if so, what promise?

Was there any agreement that, if the land was recovered, there should be a division of it between Cooper and the corporation for which he held it in trust? There was no proof of the kind offered. He held the naked legal title, and the corporation held the whole beneficiary interest in the land. In case of recovery, the whole beneficiary interest would belong to the corporation, and it could at any time compel him to convey the legal title to the company. In a word, he sues just as every other trustee sues, for the sole and exclusive benefit of the party owning the equitable estate.

There is then, in the proof offered, a total absence of a bargain that Cooper, or any one else, should divide the land sued for, or receive any part of the same as a consideration for carrying on the litigation, and that essential ingredient of champerty is therefore wanting.

Another essential ingredient to make a case of champerty is, that Cooper should have agreed to bring and carry on the suit, and that, too, at his own expense. (4 Black. Com., 135.)

He did not agree to do either of these things. The proof offered was, that he purchased the land in trust for the National Mining Company, and took the conveyance with the *intention* of prosecuting the title for the *benefit* of that corporation, and not for his own benefit. Was that intention obligatory upon him? Was he not at liberty to carry it out or not, at his pleasure? Did the proof offered show that he bargained to prosecute the suit at his own expense? Not at all.

Every trustee has a right, and it is oftentimes his duty, to sue in behalf of his beneficiary. In such case, unless there is proof to the contrary, the presumption is, the expense is borne by the beneficiary; and in this case the presumption as well as the fact is, that the expense is paid by the corporation.

Does the fact that Cooper owned a part of the stock in the corporation make the case on that account, so far as this question is concerned, any way different from what it would be if he held the title in trust for the corporation, and owned none of its stock?

The individual members or stockholders of a corporation are entirely distinct from the artificial body endowed with corporate powers. They may contract with each other, sue or be sued, as individuals; and for these purposes the members and the corporation are regarded by law as strangers to each other. In a word, they are wholly distinct beings. The one is a natural person, the other an artificial invisible being, which (with its faculties and capacities) is created by law. (Dodge *v.* Woolsey, 18 How., 344, note; Curran *v.* State of Arkansas, 15 How., 308; Waring *v.* Catawba Company, 2 Bay., 109; Pierce *v.* Partridge, 3 Met. Mass., 144; Hill *v.* Manchester Water Works, 5 Adol. and Ell., 866; Dunstone *v.* Imperial Gas Company, 3 Bac. and Adol., 125; Geer *v.* School District, 6 Vermont, 187, 18 Vermont, 405; Marine Bank of Baltimore *v.* Beays, 4 H. and Johns., 388; Angell and Ames on Corp., secs. 193, 390; 5 Ohio, 205.)

It follows, as a necessary consequence from these principles, that the fact that both Cooper and Bacon held stock in the National Mining Company, for whose benefit the conveyance of the land was made to Cooper, had no more influence, either in law or equity, upon the operation and legal effect of the grant, than if that stock had been held by a total stranger to the sale of the land.

If a party who carries on a suit has any interest, legal or equitable, or possibility of interest in the land which is the subject of the suit, there is no ground for the charge of maintenance. In other words, where there is a privity of estate, direct or indirect, present or remote, maintenance is justifiable. (Wickham *v.* Conklin, 8 John., 227; Wallis *v.* Pactland, 3 Ves., 503; 2 Ralls. Abr., 115; Bacon's Abr., title Maintenance, letter B.)

It is not deemed necessary to make further comment on the subject of champerty.

Mr. Justice GRIER delivered the opinion of the court.

Cooper, the plaintiff below, brought this action of ejectment to recover a part of section No. 16, in township 50 north, range 39 west, lying within the mineral district south of Lake Superior, in the State of Michigan. He claimed under the State of Michigan, and the defendant for the Minnesota Mining Company, under a right of pre-emption from the United States. The case was tried in the Circuit Court, and a verdict and judgment rendered for the defendants. On a writ of error to this court, the judgment of the court below was reversed, and the record remitted for further proceedings, in pursuance of the judgment of this court. The report of the case in 18 How-

ard, 173, exhibits a full statement of the facts, and of the questions of law arising thereon, as decided by the court, which it is unnecessary to recapitulate. On the last trial, the Circuit Court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. (See Sizer *v.* Many, 16 How., 173; Corning *v.* Troy Iron Company, 15 How., 466; Himely *v.* Rose, 5 Cranch, 515; Canter *v.* The Ocean Insurance Company, 1 Pet., 511; The Santa Maria, 10 Wheaton, 431; Martin *v.* Hunter, 1 Wheaton; and Sibbald et al. *v.* United States, 12 Pet., 488.)

We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial.

I. The first of these is an exception to the refusal of the court to permit the deposition of John Wilson to be read to the jury. This exception, though not waived, has not been much pressed, and cannot be supported. The deposition refers to no facts relevant to the issue. It tended to show that some of the officers of the land office and the Attorney General had expressed opinions on the questions of law arising in this case, different from those expressed in the opinion of this court. The practice of the land office and the opinions of the Attorney General may form very persuasive arguments to the court, but cannot be read as evidence to the jury of what the law is, or ought to be. It is the province of the court to instruct the jury as to the principles of law affecting the case, and counsel cannot appeal to a jury to decide legal questions by reading cases to them, or giving in evidence the opinions of public officers.

II. The only other exception to be noticed is founded on an offer of testimony overruled by the court, and an instruction refused, involving the same question. The evidence offered and overruled is as follows:

"The defendant then produced, and offered to prove, a deed of release from Alfred Williams and wife to the Minnesota Mining Company, dated June 20th, 1856, covering the lands in controversy; and further offered to prove, in connection therewith, that at the time when the said Cooper obtained the deed of the premises in controversy from Alfred Williams, the Minnesota Mining Company was in actual and open possession of the same, claiming title under their patent from the United States, and that the said Cooper knew of such claim and occupancy before and at the time of his purchase, and of said conveyance; that he obtained said title from Alfred Williams, he being the naked trustee of John Bacon, and that all the negotiations for the said purchase, and the purchase itself, were had between said Cooper and Bacon, the said Williams acting under the directions and for the benefit of said Bacon, and having or claiming no personal interest in said lands; that said purchase and conveyance were made for the following purpose, namely: that said Cooper should hold the same in trust for a corporation known as the National Mining Company, all of whose stock was held by said John Bacon; and by the conditions of said sale, the said Cooper was to receive, and did receive, with said conveyance, six-tenths of the stock aforesaid, and the said Bacon was to retain, and did retain, four-tenths of said stock. That the said Cooper purchased said stock and took said conveyance with a full knowledge of the claims and occupancy of the Minnesota Mining Company, and with the intention of prosecuting the title purchased by him, by legal proceedings in this court against the Minnesota Mining Company, for the benefit of the National Mining Company; and that before said conveyance was delivered to him by said Williams, the said Cooper, in conjunction with the said Bacon, applied to counsel in the city of Detroit to employ such counsel in the litigation aforesaid, which was to be had with the Minnesota Mining Company."

The deed to the Minnesota Mining Company was for portions of the land not demanded in this suit, and by itself was not relevant. The purpose and object for which this testimony was offered is not stated; but it could have no relevancy, unless to show the title to the plaintiff below to be void, because purchased and obtained with full knowledge of an adverse possession, and support the following instruction, which was refused by the court:

"The defendant further requested the court to charge the jury, that if, when said Williams conveyed to said Cooper the premises in question, the said Minnesota Mining Company was in actual and open possession of said lands, claiming title thereto under their patent, the said conveyance was void in law against the said company and all claiming under them; which instructions the court refused to give, and to this ruling the defendant excepted."

As the court had excluded the testimony offered to support this point of defence, the defendant could not expect that it would be submitted to the jury without evidence. We have therefore to inquire whether the testimony offered and overruled by the court ought to have been received to establish the defence of maintenance or champerty.

In this country, where lands are an article of commerce, passing from one to another with such rapidity, the ancient doctrine of maintenance, which makes void a conveyance for lands held adversely, is in many States entirely rejected. In some it has been treated as obsolete by the courts; in others it has been abolished by statute; while with some it appears to have found more favor.

The ancient policy, which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. The repeated statutes which were passed in the reigns of Edw. I and Edw. III against champerty and maintenance, arose from the embarrassments which attended the administration of justice in those turbulent times, from the dangerous influence and oppression of men in power. (See 4 Kent Com., 477.)

The earlier decisions of the courts of Michigan seem to have adopted this antiquated doctrine as a part of the common law in that State. But so far as concerns its application to sales by one out of possession, the Legislature have annulled it. The Revised Code of 1846 (page 262) enacts that "no grant or conveyance of lands, or interest therein, shall be void for the reason that at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely."

From this enactment it is plain that the possession of the Minnesota Mining Company, under claim of title, and Cooper's knowledge of it when he purchased, cannot affect the validity of the deed of Williams to him. Although the testimony, which is the subject of this exception, was evidently offered with a view only to raise the question as above stated, the counsel for the plaintiff in error have endeavored to maintain in this court that the court below erred in rejecting it, because

if received it would have shown the contract between Cooper and Bacon, and the deed from Wilson, to be void for champerty. This offence seems to have been originated by the statutes passed in the time of Edw. I and Edw. III. (See 15 Viner's Abr., 149, tit. Maintenance.) It is defined (Hawkins's Pl., 84) as the "unlawful maintenance of a suit, in consideration of an agreement to have a part of the thing in dispute, or some profit out of it;" and by Chitty as "a bargain to divide the land (*campum partire*) or thing in dispute, on condition of his carrying it on at his own expense." In some States these statutes are held to be obsolete. But it seems that the case of Backus *v.* Byron (4 Mich. Rep., 535) has declared that they still retain their force in Michigan. That was an action by an attorney against his client on a contract, by which the attorney agreed to carry on a suit for a share of the land in case of success, and in case of failure to have nothing.

But in this case there was no offer to prove that Cooper had agreed to carry on the suit in consideration of receiving a share of the land in case of success; on the contrary, the offer was to show that he "purchased stock" in a mining corporation; that the legal title to the land was conveyed to him in trust for himself and the other stockholders; and as a consequence of the legal title being vested in him, the suit was necessarily brought in his name. It needs no argument to show that such a transaction has none of the characteristics of champerty, and that the court below was right in rejecting testimony which would not, if admitted, tend to show a valid defence, and was therefore wholly irrelevant.

The judgment of the Circuit Court is therefore affirmed, with costs.

Mr. Justice DANIEL:

Whilst I concur entirely in the conclusion just declared by the court, that the case now decided is in its features essentially the same with that of Cooper *v.* Roberts, formerly before us, and reported in the 18th of Howard, p. 173, I am unwilling to place my own opinion upon the fact of the identity of the two cases, irrespective of the reasons or principles on which the former of those cases was determined. That case was elaborately discussed by counsel; was, as the opinion of the court evinces, deliberately considered; the theory and objects of the system adopted by the Government for the distribution of public lands carefully examined, correctly expounded, and properly sustained by the decision. In the reasoning of the court, the cherished objects aimed to be secured by that theory, viz: the advancement of "religion, morality, and knowledge,"

as indispensable for the existence of good government, and for the happiness of mankind; the obligation for the maintenance of schools and the means of education as necessary for the ends proposed, as declared in the third article of the ordinance of 1787, are prominently and correctly set forth as guides in the interpretation and application of the policy and system of the Government in disposing of the public domain. It seems scarcely to admit of rational doubt, that it was in pursuance of this policy, and as deemed best calculated for its successful accomplishment, that in the surveys made or to be made of the public lands, the sixteenth section of every township, being central, (and therefore more than any other section could be,) connected with the several interests of the township, was appropriated for the use of schools. Admitting these to be the policy and theory of the Government, designed as it has been declared to lay the foundation of social and political good, it would seem to follow that nothing short of the highest and most overpowering public considerations, or an absolute inability or want of power, should be permitted to defeat or in any degree to control them. Surely speculations for private emolument, and still less such as might be attempted through the exercise of irregular or doubtful authority, should not be permitted to affect them.

The power vested in the President to reserve from sale such portions of land as he should deem necessary *for public uses*, may be classed as one of those paramount considerations, constituting a public or national necessity, reaching even to the defence of the country by fortifications or arsenals. In the same category may be placed the sanctimony of the rights of property and possession existing and vested in territories anterior to their acquisition by the United States; rights guarantied by treaty stipulations. In the same light may be viewed the withholding temporarily from sale lands in which were minerals and salt springs. All these restrictions or reservations are exceptions merely, and should be carried no farther than their terms expressly or necessarily require. They can with no propriety be regarded as forming in themselves a system; much less as overturning a system designed to be as far as practicable general and uniform, and proclaimed from its origin to be founded in wisdom and in a solemn sense of public good, and as such to be fostered and sustained. Every new State has come and will come into the Union relying on the faith of this pledge; and even upon the concession of a power in the Government to violate that pledge, such a violation could be referred to no principle of justice, and should therefore never be imputed but upon proofs the most positive and unequivocal.

The sixteenth section of each township could not, it is true, be specifically designated and possessed anterior to a survey of the public lands; but the right to that section and its appropriation existed in contract or pledge by virtue of the ordinance and the laws of the United States, and the right of possession and enjoyment was matured by the execution of the surveys. It cannot be supposed that this right, so important, was destroyed or impaired by an agreement for temporary occupancy, made without reference to any survey or division of the lands, made, too, without legitimate authority; nor can such right be affected by any ordinary allowance of pre-emption, because the pledge of the Government is pre-existing, is express, and therefore paramount.

The State of Michigan was admitted into the Union under the pledge given her by the general land system of the United States; her right to the sixteenth section of each township was under that pledge fully recognised. It could not therefore, consistently with good faith, be displaced by an arrangement irregular in its origin, and temporary in its character, in its tendencies and operation conflicting with a preceding, general, and beneficial system of policy. No effectual adversary rights could grow out of such an arrangement. Upon the views herein expressed, I am in favor of an affirmance of the judgment in this cause, not merely on the ground that this cause is essentially the same with that already decided between these parties, as reported in the 18th of Howard, p. 173, but also because the opinion of this court upon the law and the facts of the last-mentioned cause commands my entire approbation.

ALFRED INGRAHAM AND GEORGE READ, ASSIGNEES IN TRUST OF THE GRAND GULF RAILROAD AND BANKING COMPANY, APPELLANTS, *v.* HENRY S. DAWSON, ADMINISTRATOR OF MOSES GROVES, DECEASED, JOSIAH STANSBROUGH, AND JOHN R. MARSHALL.

Where there were proceedings in a State court between a bank, one of its creditors, and one of its debtors, and the bank having failed, assigned its assets to trustees, who intervened in the dispute between the other two parties, the judgment of the State court against the intervenors must be considered final, and a bill filed by them in the Circuit Court of the United States must be dismissed.

If there were irregularities in the proceedings of the State court, it was for that court to correct them, had complaint been made at the proper time.

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

The facts in the case are fully stated in the opinion of the Circuit Court, which the reader will find referred to in the opinion of this court, as constituting a part of the statement of this report. It is therefore transcribed from the record, and was as follows:

Opinion of the Circuit Court.

The facts of this case are, that in May, 1841, the Grand Gulf Railroad and Banking Company, of Grand Gulf, Mississippi, recovered two judgments against Moses H. Groves, for the aggregate sum of twenty-two thousand six hundred and thirty-eight and forty-three hundredths dollars, with arrears of interest and costs.

Prior to this event, the bank had suspended specie payments, and in February, 1842, made a general assignment of its effects to the plaintiff, Ingraham, and one Lindsay, (of whom the plaintiff, Read, is the assignee or successor,) to be collected and appropriated—1st, to the expenses of the trust; 2d, to pay off judgment creditors; 3d, to indemnify and save harmless the sureties or guaranties of any engagement for the bank; and 4thly, to make an equal distribution among the remaining creditors.

The trustees accepted their appointment, and in 1842 notified the curator of the debtor, Groves, (H. H. Groves,) that these judgments had been assigned to them.

In the month of June, 1843, the defendant, John R. Marshall, a bill holder of the bills of the Grand Gulf Banking Company, commenced two suits by attachment in the District Court of the parish of Madison, against that corporation, upon the bills of the bank, and recovered a judgment upon the two suits, (which, during their progress, had been consolidated,) for the sum of four thousand three hundred and ninety-five dollars, with arrearages of interest and costs.

The sheriff (among other property) attached the two judgments against Groves by an entry of the fact upon the attachment, and by notice to H. H. Groves, administrator.

The Grand Gulf Banking Company appeared to the said suit, and defended it, and Ingraham and Read intervened, claiming through their assignment the property attached, and "opposing the plaintiff's demand to claim the property attached."

To the intervention Marshall answered, denying the authority of the bank to make an assignment, and averring that the assignments were fraudulent and void, designed to favor a portion of the creditors, and insisted upon the right of the attaching creditor to dispose of the effects seized, notwithstanding the assignment.

A suspensive appeal was taken, immediately after the signature of the judgment, to the Supreme Court of the State, by the bank and the assignees, (intervenors,) and a judgment of affirmance was rendered in that court. This was entered upon the minutes of the District Court for Madison, in November, 1845. In December thereafter, an execution issued to the sheriff, and, in due course of law, these judgments were sold, in April, 1846, at public sale, when Marshall, the plaintiff, became the purchaser. He transferred his title to his codefendants by a public act, in February, 1847.

To a full understanding of the facts and arguments, it is proper to set forth the proceedings in the Circuit Court of Claiborne county, Mississippi, to enforce a forfeiture of the charter of the bank. In September, 1845, a judgment of partial forfeiture was entered, reserving the right to sue, and collect debts, with a view to the settlement of the affairs of the bank; and on the 17th April, 1846, a final judgment in that court, forfeiting the whole charter, was entered.

This was suspended by appeal, and affirmed in the Supreme Court, in 1848, shortly before this suit was commenced.

This suit was commenced to enforce the rights of the assignees, under their assignment, to the judgments rendered against Groves in 1841. The jurisdiction of chancery is asserted as a consequence of the destruction of the legal character of the corporation, and upon the allegations, that the judgment of Marshall was obtained with a full notice of the title of the assignees, and that the parties who claim those judgments have acted fraudulently and collusively in obtaining a title to them through the action of the courts of Louisiana.

The jurisdiction of the court was supported by my predecessor in this court in 1850, in determining the demurrer to the bill.

The case then rests upon the respective titles exhibited in the bill and answers. There is no support for the allegations of fraud or collusion in the evidence. The only questions to be considered are, whether the proceedings upon the attachment of Marshall divest the title of the bank to the judgments in favor of the defendants, and whether the plaintiffs have confirmed that title by their conduct at the sale.

The bank and the intervenors were parties to the proceedings and judgment of the attaching creditor. They appeared for their respective interests in the subject of the suit, and contested the validity of the creditor's claim to his debt and satisfaction from the property. Whatever judgment was rendered in that suit is conclusive upon them.

The judgment entry recites that a jury was empanelled,

the evidence closed, the case argued, the jury retired to deliberate upon their verdict, returned into court with their verdict, which was read, agreed to, and ordered to be recorded.

The verdict is for the plaintiff, against the defendant, for his debt and interest. It proceeds to declare that the intervenors have established no evidence of their claim to the property as set forth in their petition. Thereupon the court gives judgment, that the plaintiff recover of the defendant his debt and interest, specially setting out the items composing both.

"It is further ordered, that the property, rights, and credits attached be sold, according to law, to satisfy the judgment and cost of suit; and that the plaintiff have a preference and privilege thereon; and that the demand of the intervenors be rejected, with cost of suit."

This, it was said, was "done and signed in open court, this 9th May, 1844, after overruling the motion for a new trial.

E. R. MILLSON, *Judge.*"

It will hardly be contended that this is not a final judgment on the merits, conclusive between the parties. (Keene *v.* McDonough, 8 La., 187.) The parties who are now before this court, were parties to the record in that suit. The plaintiffs here, were there, claiming to have a better title to the money, due upon the judgments of Groves, than Marshall, the attaching creditor, by virtue of their deed of assignment from the bank. The bank was before the court, affirming the title of their assignees; Groves was before the court as a stockholder; Marshall was before the court, claiming his preference. This preference is declared, the judgments are ordered to be sold, and the claim of the plaintiff is dismissed. It is the title of Marshall and his assigns, under this judgment, that is now impeached, and impeached as inferior to the claim then rejected. All the conditions required by the code to give force to this judgment, as a *res judicata*, appear here, (C. C., 22, 65.) But the plaintiff insists that this is not the judgment rendered in the cause. He produces evidence to show that the entry on the minutes contains the words "as in case of nonsuit," after the words of rejection of the intervenors' claim, and with the addition of those words, there is no *res judicata.*

The authorities of the Code of Practice of the decisions of the Supreme Court are clear, that the minute entry is not a judgment. The Supreme Court will not entertain an appeal from a judgment which has not been transferred to the book of judgments, and signed by the judge; and the courts of original jurisdiction are not authorized to issue an execution upon such an one.

The judgment entries on the minutes do not form *res judicata*. They cannot be looked to to impeach, vary, or in anywise to affect the judgment, signed by the judge, in any collateral proceedings. (The State *v.* McDonald, 17 La. R., 485; *Ex parte* Nichall, 4 Ran., 52; 1 Am., 206; 3 Am., 62.) Considering the records of the District Court of Madison only, there can be no question that the only operative judgment is that I have first described.

The question which arises upon the record of the Supreme Court is one of more difficulty. In the transcript placed before that court, upon the appeal of the intervenors and the bank, the judgments were copied from the minute entry, and the signature of the judge superadded. It appears there, that the claim of the plaintiff (intervenors) was rejected with costs, "as in case of nonsuit," and no mention is made of the refusal of a new trial.

In the Supreme Court, the case was disposed of upon its merits. The court does not notice the objections to the rejection of the evidence of the intervenors, (the deed of assignment,) upon which their title depended, and without which the title of the assignees must necessarily fail, on their intervention in the District Court. The Supreme Court takes no notice of the fact that the assignment was not admitted as evidence upon the trial in the District Court. It treats the assignment as a part of the evidence, and allowed the plea of prescription against the claim of the attaching creditor to impeach it, to be filed in that court. It is difficult to refer the opinion to the case made on the record.

It may be, as is suggested at the bar, that the case was submitted with a knowledge of the condition of the judgment in the District Court, and with a view to a decision on the merits; or that the Supreme Court regarded the words "as in case of nonsuit," added to a judgment, when there had been a trial and verdict, without significance; or that the court, finding there had been a trial, a condemnation of the property attached to be sold, and the preference and privilege of the creditors declared, supposed them sufficient to modify the import of those words, and that it understood the judgment to conclude the parties, at least to the extent of this debt, leaving the rights unimpaired as to other parties. I should have great difficulty with the case, were there no other circumstances to affect it.

The general rule in Louisiana is, no matter what form of action or proceeding, whether by petition, or exception, or intervention, the question may have been presented, if the same question once judicially decided between the same parties be again agitated, it is sufficient to create the presumption resulting from the thing adjudged, and forms a complete bar.

Plecque *v.* Perrett, 19 Lou., 328. I agree that "the reasons for the judgment" given by the Supreme Court, and spread upon the record, in accordance with the Code of Practice, (art. 909,) are not to be taken as the judgment. But when the import of the judgment is equivocal or ambiguous, the opinion is important in determining the limits of the *res judicata.* (Plecque *v.* Perrett, 19 Lou., 328; 5 Am., 200; 3 Am., 202; 6 Ala. R., 141.) But, to determine the value of the title of the respondents, we must not confine our observation to the record of the Supreme Court.

The Code of Practice prohibits the issuing of an execution upon judgments from that court; whether the judgments there be of affirmance or reversal, the execution is devolved upon the court of original jurisdiction. It directs that the judgments shall be recorded in the court of original jurisdiction before they are executed, and the order to record the judgment must be moved for in open court, by the party desirous of execution, and after that an order for execution may be obtained from that court. (Cod. Pr., 615, 617, 618, 619, 623.)

These acts were performed in this case. The record from the Supreme Court consisted of the opinion, such as I have described it, where the merits of the title through the assignment are carefully examined, and pronounced insufficient to defeat the attachment, and concluding with the announcement that "the judgment of the District Court is therefore affirmed with cost," and thereupon an order for execution was made by the District Court.

What was then the condition of the record of the District Court? The original judgment for the attaching creditor against the bank and intervenors, finding a debt, condemning the property attached to be sold, declaring a preference and privilege in favor of the creditor, and rejecting the claim of the assignees, bearing the signature of the judge, was there, and from that an appeal had been allowed.

Then, there was an opinion vindicating that judgment, by a careful examination of the assignment of the bank, and pronouncing its invalidity as against the attaching creditor. Then came the confirmatory order, which the District Court could refer to nothing but the judgment above described, and finally the order of execution.

There was nothing to indicate a variance between the transcript in the Supreme Court and the legal entry of judgment in the District Court. No inquirer could apply the confirmatory order to other than this judgment.

Upon this condition of the record, the execution under which the sale was made was levied, the property appraised and sold.

The seizure notice to the defendant's attorney and the appraisement were within the legal delays, and the sale, after the return day of the execution, was permissible. (Dorsey *v.* Carrolton Bank, 5 Am., 237; Rowley *v.* Kemp, 2 Am., 361.) The inquiry remains, what title did the purchaser take by the sale and conveyance of the sheriff? The purchaser is not bound to look beyond the decree, when executed by a conveyance, if the facts necessary to give the court jurisdiction appear on the face of the proceedings, nor to look further back than the order of the court. If the jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a competent jurisdiction. (10 Pet. S. C. R., 450, 478.) The defendant, Marshall, was a creditor, pursuing what he considered to be his legal right, what the courts had pronounced to be a legal right, to satisfaction for his debt from judgments standing in the name of his debtor upon the records of the court where his suit was commenced. By his purchase, he cancelled his debt against the defendant, and assumed the burden of paying the costs of the suit. I have no evidence of fraud or collusion in the sale, or of any inadequacy of price. But there is evidence that the sale was open and public, and fairly conducted. Nearly a year after, he conveyed to other purchasers. They were required to see the judgment on the records of the District Court, and there was nothing there, except what inspired confidence in the title they undertook to purchase. They saw an absolute and unqualified judgment, rejecting the claim of the assignees of the bank, and condemning the effects attached to sale. They saw no entry to annul or modify that judgment, but, on the contrary, one affirming it in all its parts, with reasons of its propriety, convincing to the highest court of the State.

The questions, whether the attachment had been legally levied, or whether the property seized was a subject for the satisfaction of the attaching creditor's demand, were involved in the issues tried, and the order for an execution of the judgment was given after a review of all the claims of the bank or its assigns. The subject for sale were judgments on the records of the court that gave the order, and all persons entitled to oppose it were before the court. The purchaser was entitled to make the purchase, with an assurance that his title would be respected.

Nor were the purchasers advised, by any act of the assignees, that there was peril in the act of purchase, or that the sale was a derogation of their rights.

The evidence is satisfactory that the principal assignee was at the sale, and before, and at the time, encouraged purchasers to buy. The assignees were interested in this, for the claim of the attaching creditors was a charge upon the assets that might come to their hands, and its payment was a diminution of the debts they were required to pay.

Three years elapsed from the entry of the unconditional and unexplained order of affirmance of the judgment of the District Court, upon the records of the District Court, before this suit was commenced. No effort was made during that time to harmonize the conflict in the various and discrepant entries in the courts of original and appellate jurisdiction, by direct applications to them.

No effort has been made by the assignees to enforce the judgments they claim in the court where they were rendered, and which has assumed to dispose of them, nor to correct the irregularities of the officers of which they now complain.

The titles which have been granted under the orders of the court, and the acts of the officers, are impeached in a court of an independent and separate organization, and in a collateral proceeding.

The attempt is made, not by an application to the ordinary jurisdiction of the court, but to its extraordinary powers, powers which do not become active against conscience or public convenience, and when there has not been good faith and reasonable diligence.

My conclusion is, that the plaintiffs have not made such a case as authorizes the interposition of a court of equity for their relief.

The record shows a final judgment of the court of original jurisdiction against their title. That upon their own appeal an erroneous transcript of that judgment was carried to the Supreme Court, and is to be found there with the rest of the case. But that this was not carried to the book of records of the Supreme Court, nor copied into its opinion, nor recited in its final order, nor do the reasons for the judgment in the Supreme Court depend upon its restricted language of the judgment exhibited in the transcript, nor does the decretal order of the Supreme Court recite or relate to it.

But the opinion of the court depends upon a judgment, such as existed on the record of the District Court, and the confirmatory order was addressed to that judgment.

This opinion and this confirmatory order were spread upon the records of the District Court, and form the basis of the executory orders and proceedings. Rights have attached under those proceedings and orders, not only without opposition, but

with the solicitation and consent of the plaintiffs. This court does not feel at liberty to disturb them, by an inquiry into the supposed errors or irregularities which may be found in the various entries and proceedings of the State tribunals.

Bill dismissed with costs.

(Signed) J. A. CAMPBELL,
Assoc. Justice S. C. U. S.

It was argued in this court by *Mr. Strawbridge* and *Mr. Reverdy Johnson* for the appellants, and by *Mr. Benjamin* for the appellees.

Mr. Justice CATRON delivered the opinion of the court.

This is a suit, by bill in equity, that was prosecuted in the eastern district of Louisiana, by Ingraham and Read, as assignees in trust of the Grand Gulf Railroad and Banking Company, against Dawson, administrator of Moses Groves, John R. Marshall, and Josiah Stansbrough. The cause was pending in the court below for several years, and in its various details is complicated, but the point presented for our consideration is a narrow one.

According to the practice in Louisiana, the Circuit Court delivered a carefully-prepared opinion on the final hearing there, setting forth the facts and reasons why that court dismissed the bill. The opinion will be found in the preceding report of this cause. We briefly restate the facts on which our judgment proceeds:

In May, 1841, the Grand Gulf Bank recovered two judgments against Moses Groves, in the District Court of the parish of Madison, in the State of Louisiana, amounting in the aggregate to more than twenty-two thousand dollars. Groves died without having satisfied those judgments, and the assignees by this bill seek to enforce payment of the debt from the estate of Groves, in the hands of his administrator.

The Grand Gulf Banking Company having failed, in February, 1842, assigned its assets in trust to Ingraham and Lindsay, including the two judgments against Groves. Lindsay afterwards died, and Read is his successor. This is the title relied on by the complainants. The defence set up depends on the validity of a sale of said judgments by legal process against Groves.

Marshall was the owner of a large amount of bank notes put in circulation by the Grand Gulf Company. In June, 1843, he instituted a suit against the bank on these notes, by attaching the judgments the bank had recovered against Groves, (and also judgments against other persons.) The suit was

prosecuted in the District Court of the parish of Madison, in Louisiana. To this proceeding the present complainants, Ingraham and Read, as assignees of the bank, intervened and set up their title by the assignment of the judgments, for the purpose of defeating the attachment of Marshall, and of having their claim as trustees established as the better title. Marshall responded to this allegation of the intervenors, that the deed of assignment was void: first, because it was contrary to the express law of Mississippi, prohibiting such assignments; and secondly, that it was void, because it was made for the purpose of defrauding a portion of the bank's creditors, and in order to favor others. The parties really contesting were Marshall and the intervenors. They went to trial before a jury on the law and facts. The verdict found, first, that the debt was due to Marshall from the bank; and, secondly, (says the record,) "we of the jury find the intervenors in the case have established no evidence of their claim to the property, as set forth in the petition."

The judgment recites that the verdict was in favor of the plaintiff, Marshall, and against the defendants and intervenors; declares the amount due to the plaintiff; adjudges a preference and privilege upon the property, rights, and credits attached; orders them to be sold, according to law, to satisfy the plaintiff's judgment. "And it is further ordered and decreed, that the demand of the intervenors be rejected with costs."

This judgment was affirmed in the Supreme Court of Louisiana on appeal, prosecuted on the part of the bank and the intervenors. The judgment as affirmed was duly entered in the District Court, which proceeded to execute the same.

The bill seems to have been founded on the supposition that the intervention was rejected, and the intervenors nonsuited in the District Court; and that therefore they were not concluded, and at liberty to pursue their claim on the deed of assignment made to them by the Grand Gulf Bank.

The assumption that the intervenors were nonsuited in the State court is founded on a supposed record furnished to the complainants by the clerk of the District Court, which probably might bear this construction; but it appears that no such *record* exists in that court, and that a copy of a memorandum, kept in a book to refresh the memory of the clerk from which the record signed by the judge was made, is the writing relied on. The memorandum has no value in this cause. The judgment above recited defeated the assignment set up by the complainants in their petition of intervention, and in terms bound the property attached; nor could a court of the United States, in a suit by bill in equity, call in question the informalities, if

any exist, that may have occurred in executing the judgment of the State court. It was the duty of that court to correct any misconduct or mistake on the part of the sheriff in conducting the sale of the judgments, had complaint been made in time and proper form.

We concur with the Circuit Court, that the bill must be dismissed, and so order.

JOHN SIGERSON, PLAINTIFF IN ERROR, *v.* EDWARD MATHEWS.

Where the endorser of a promissory note, in conversation with the agent of the holder, before its maturity, dispensed with a presentation of the note and demand of payment, and promised to pay it, or provide for its payment, at maturity, he could not, when sued, set up as a defence that the note was not presented for payment, and demand made therefor when it was due, and that no notice of its dishonor was given.

If, after the maturity of the note, the endorser promised the agent of the holder to pay the same, having, at the time of making such promise, knowledge of the fact that the note had not been presented for payment, and no demand made therefor, or notice of non-payment, he could not, when sued, set up as a defence a want of such demand or notice.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

The facts are stated in the opinion of the court.

It was argued by *Mr. Cushing* and *Mr. Gillet* for the plaintiff in error, and by *Mr. Blair* for the defendant.

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

First. The note in question was not an accommodation note, made for the defendant.

The evidence shows that there could be no pretence that the note in question was made for the accommodation of the defendant; but that it was, in fact, a regular business note, taken by defendant on the sale of real estate, without security. And that when, at a subsequent day, the property was re-deeded, and the remainder of the notes given up, the defendant credited this particular note on another debt (account) due him from James Sigerson, the maker. When it was given, and when it was transferred, the defendant must have confidently expected that it would be paid by the maker. When he took back the property, and credited the note to the maker, he clearly relied upon its being paid by the maker, or he would not have given him credit for it until he had actually taken it up, or he have been discharged from it as endorser.

Second. Unless the defendant agreed, unconditionally, after the note became due, and after he knew that the note had not been presented for payment, to pay said note, he was not liable therefor.

The note not having been made for the defendant's accommodation, he could only be made liable by presentation at the bank, demand of payment, and notice of non-payment. His liability depended upon the holder taking the steps required by law to charge him. If they had been taken, his liability became fixed by them, but otherwise not. If he supposed they had not been taken, and that he had been made liable, and acted under a mistake in relation to the facts, he would not be bound by such action when the real facts are developed. If he made any promise, on misapprehension of the facts, he is not bound by it, because the inducement to make it was unreal, and was not what it appeared to be. A promise under such circumstances has nothing to stand upon. There is no evidence that the note had been presented to the bank, or that any steps whatever had been taken to charge the endorser; nor does it appear that the defendant had been informed of the true state of the facts in relation thereto at the time of the conversation, which is now claimed to be a promise of payment.

In Thornton *v.* Wynn, 12 Wheat., 183, it was held that where the promise or agreement was not unequivocal, it would not authorize a recovery.

Third. An agreement to pay the debt of a third person by an endorser, where the note was not presented at the time and place of payment, and notice of non-payment duly given, unless made and signed by the party to be charged, upon a consideration specified therein, is not binding, and cannot be enforced.

Fourth. The suggestion by the defendant to the plaintiff's agent, that he need not prove the note against the estate of James Sigerson, and that it would be paid at maturity, created no liability on the part of the defendant.

The liability of the defendant did not depend upon the probating of the note, nor did the remark that it would be paid at maturity amount to a promise to pay. It implied that there would be funds ready to take it up at the time and place of payment, and nothing more. The inference was, that the means would be supplied by those whose duty it would be to provide for the payment.

Nor did the suggestion to Elder tend to show that a presentation, demand of payment, and notice of non-payment, were dispensed with. The remark that the note would be paid at maturity seems to imply that the defendant expected the note

would be paid at maturity, on being presented in the usual course of business. It clearly implied that it was expected, when it matured, it would be presented somewhere to be paid; and as no place or person was named, the time and place named in the note must have been intended. It follows, that there was no waiver by the defendant of the condition of presentation, demand, and notice of non-payment, prior to its falling due.

The defendant did not occasion the omission of that necessary duty in order to create a liability on his part. Nothing was said on that subject. The plaintiff's agent was left to take such steps as his principal directed, or that he deemed expedient, and the plaintiff must abide the consequences.

Fifth. The court erred in instructing the jury upon questions not raised by the evidence.

Mr. Blair said:

The principle declared by the court amounts only to this, as has been said in a similar case, (that of the Taunton Bank *v.* Richardson, 5 Pickering, 436,) that a party may dispense with conditions for his benefit; and it has been applied in many cases similar to this. (See Dinkwater *v.* Tibbatts, 5 Shepley, p. 16; Boyd *v.* Cleveland, 4 Pickering; Marshall *v.* Mitchell, 35 Maine, 221; Thornton *v.* Wynn, 12 Wheat., 183; and the Union Bank of Georgetown *v.* Magruder, 7 Pet., 287. See also Story on Bills, 389, 390, 499 to 507; Jones *v.* Foles, 4 Mass., 245, 253; Farmers' Bank *v.* Waples, 4 Harring., 429; Hoadley *v.* Bliss, 9 Geo., 393; Lary *v.* Young, 8 Eng., 402; 5 Pickering, 436; 8 ib.; 1 Har. and J., 531; 2 N. H., 340; 1 Hill S. C., 411; 3 Met., 434.)

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court for the district of Missouri.

An action was brought by Mathews against John Sigerson, as endorser on a note of James Sigerson, now deceased, dated the 10th of March, 1852, for the payment of the sum of two thousand dollars, two years after date, at the Bank of the State of Missouri, with interest from the date.

It was proved on the trial that, in 1851, Mathews advanced largely to John Sigerson on some transactions in pork, whereby Sigerson became indebted to him in the sum of two thousand dollars; that Sigerson wanted two years' time, on which Mathews required a mortgage on real estate as security; but Sigerson offered to give the note of his brother James, endorsed by himself, instead of the mortgage; and he repre-

sented that his brother James was the owner of a valuable real estate near St. Louis; which offer was accepted, and the note was given.

Some time in the fall of 1852, Joseph E. Elder, a witness, received the note from Mathews for collection, soon after the death of James Sigerson, and before the note became due. Witness called on John Sigerson, and asked him if he should have the note protested against the estate of James Sigerson. He replied, that the witness need not do so, and that the note should be paid at maturity. The witness then placed the note in his portfolio, where it remained until after due. After it was due, witness called on John Sigerson, and informed him that he had neglected to put the note in bank for collection, and asked him what he was going to do; he said he would see witness in a few days, and arrange it. Afterwards Sigerson said to the witness that he did not consider himself liable as endorser, as the note had not been protested.

In February, 1852, John Sigerson sold his interest in the farm near St. Louis, which was one-half of it, and which contained about one thousand acres, to James Sigerson, who was to pay off the encumbrances on the land, which amounted to about sixteen thousand dollars. James executed twenty notes for two thousand dollars each, payable in six, twelve, and eighteen months; and John Sigerson made him a deed. In July, 1852, James reconveyed the land to John, and the bargain was rescinded. This was done because James had not fulfilled his contract. Nineteen of the notes were given up, but the note now in suit was not surrendered, and for which the account of James was credited on the books of John. James, on his decease, left no property.

On the above facts, the court charged the jury, "if they believe, from the evidence, that, before the maturity of the note, in conversation with the agent of the plaintiff, the defendant dispensed with a presentation of the note and demand of payment, and promised to pay it or provide for its payment at maturity, he cannot now set up as a defence to this suit, that the note was not presented for payment, and demand made therefor, when it was due, and that no notice of its dishonor was given."

That, "if, after the maturity of the note, the defendant promised the plaintiff or his agent to pay the same, having at the time of making said promise knowledge of the fact that the note had not been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the defendant cannot now set up, as a defence to said note, a want of such demand or notice."

"If the defendant dispensed neither with the presentation of the note and notice, nor promised to pay the same, having knowledge as above stated, the plaintiff cannot recover."

Exception was taken to these instructions.

Certain instructions were asked by the defendant, which were refused; but it is unnecessary to state them, as they are substantially embraced in those given by the court.

As there was no formal demand of payment, nor protest for non-payment and notice, those requisites must have been waived by the defendant, to make him responsible as endorser; and to this effect were the instructions of the court; and we think the testimony not only authorized the instructions given, but also the verdict rendered by the jury. Before the note was due, the defendant said to Elder, the agent of Mathews, and who held the note, that he need not take steps to collect it from the estate of his brother James, as it should be paid at maturity. This was an assurance which could not be mistaken, and it was relied on by the agent. He placed the note in his portfolio, where it remained until after it became due. After this, the agent called on the defendant, and informed him that he had neglected to take measures for the collection of the note, and asked him what he was going to do; he answered, that in a few days he would see the witness, and arrange it. This was an unconditional promise to pay the note, which no one could misunderstand, and which he could not repudiate at any subsequent period.

A promise by an endorser to pay a note or bill, dispenses with the necessity of proving a demand on the maker or drawer, or notice to himself. (Pierson *v.* Hooker, 3 Johns., 68; Hopkins *v.* Liswell, 12 Mass. Rep., 52.) Where the drawer of a protested bill, on being applied to for payment on behalf of the holder, acknowledged the debt to be due, and promised to pay it, saying nothing about notice, it was held, that the holder was not bound to prove notice on the trial. (Walker *v.* Laverty, 6 Manf., 487.) An unconditional promise by the endorser of a bill to pay it, or an acknowledgment of his liability, and knowledge of his discharge by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawee, acceptor, or maker. (Thornton *v.* Wynn, 12 Wheat., 183; Bank of Georgetown *v.* Magruder, 7 Pet., 287.) We think the instructions of the court were correct, and that, consequently, the judgment must be affirmed, with costs.

JAMES MARKS, PLAINTIFF IN ERROR, *v.* MICHAEL DICKSON AND ELIZABETH M. DICKSON.

In May, 1830, Congress passed an act (4 Stat. at L., 420) which gave the right of pre-emption to settlers on the public lands, but made null and void all assignments and transfers of the right of pre-emption prior to the issuance of patents. This act was to remain in force for one year.

In January, 1832, another act was passed, (4 Stat. at L., 496,) supplementary to the former, allowing certificates of purchase to be transferred, and patents to be issued in the name of the assignee.

In June, 1834, another act was passed, (4 Stat. at L., 678,) reviving the act of 1830.

The true construction of this act of 1834 is, not that it restored the prohibitory clause of 1830, but that it revived the supplement, together with the original act; and that, consequently, an assignment was good and legal before a patent was issued.

But it was necessary to enter the land at the land office, before the right of assignment accrued; and, therefore, assignments made before such entry were assignments of floats, and void.

A power, however, although executed before the location, was sufficient to justify an assignment made after the location, there being a tacit affirmance of the power, when it might have been set aside.

THIS case was brought up from the Supreme Court of Louisiana, by a writ of error issued under the twenty-fifth section of the judiciary act.

The facts are stated in the opinion of the court.

It was argued by *Mr. Benjamin* for the plaintiff in error, and by *Mr. Taylor* for the defendants.

Mr. Benjamin made three points:

I. The policy of Congress has been fixed and invariable, not to allow the beneficent purposes of the pre-emption laws to be defeated, nor its objects perverted to the profit of land speculators. Whether wise or unwise, this is the unmistakable policy of the law.

Under this point, *Mr. Benjamin* contended, that although the deed from Butler's attorney was dated after the location, yet the power to make it was executed before the location, whilst the interest was yet nothing but a float; and that such an arrangement was a mere device to elude and evade the law. For example: the power to sell, locate, and transfer, was executed on 17th July, 1840. The location was made on the 8th August, 1840. The deed to Dickson was executed on 25th November, 1840.

Mr. Benjamin reviewed several acts of Congress and cases, to show that such a device as this power, given prior to the location, was against the whole policy of the law.

II. The court erred in determining that when Congress, in 1834, revived the act of 1830, it also revived that of 1832.

An opinion to that effect was given in 1835, by Mr. Attorney General Butler, (2d Opinions, 701;) but no reasons are given for it. He simply says, "that the revival of the original law is to be considered as embracing the provisions engrafted thereon by the supplementary act of 23d January, 1832."

It is submitted that this opinion is utterly untenable.

It is not true that the act of 1832 engrafted any provision on that of 1830. On the contrary, the act of 1832 was a partial repeal of that of 1830.

The act of 1830 prohibited assignments of pre-emption rights prior to issuance of patents. The act of 1832 repealed this prohibition so far as to permit the assignment of certificates of purchase or final receipts.

In 1834, Congress re-enacts the law which prohibited assignments before issuance of patents. By what possible train of reasoning can it be shown that this act of 1834 is also to be controlled by that of 1832? The whole of the subsequent legislation shows the contrary. Every law since passed by Congress repeats the prohibition, as already shown.

The act of 1834 is to be construed just as if the entire act of 1830 had been copied into it. If this had been done, would any one pretend that the act of 1832 could control its interpretation?

III. The act of 1832, however, can have no possible application to the case before the court. That act, in its very terms, applies only to persons who purchased before its passage. It says, in words, that "persons who have purchased under the act of 1830," may transfer their certificates of purchase, and patents may issue to assignees.

The act of 1830 had expired by its own limitation on the 29th May, 1831. Nobody who had acquired rights under it could sell or assign before the issuing of the patents. On the 23d January, 1832, Congress, speaking of this expired law, says that those who have purchased under it may assign their certificates of purchase, notwithstanding the prohibition.

The law applied to a certain class of pre-existing cases. When those cases were settled, the law was *functus officio*.

Now, Butler was not a person who had purchased under the act of 1830. His pre-emption was established in 1836, under the act of 1834.

To apply the act of 1832 to his case, is to violate the language of the law, the rules of grammar, and the legislative intention as exhibited in long-continued and repeated expressions of the will of Congress.

Mr. Taylor made the following points:

The judgment of the court of the first instance in Louisiana was against the plaintiff, and in favor of the defendants. Upon an appeal to the Supreme Court of that State, this judgment was affirmed, on the ground that the revival of the act of 1830, by the act of 19th of June, 1834, was "to be considered as embracing the provisions engrafted thereon by the supplementary act of the 23d of January, 1832," "under the construction put upon the Congressional acts on this subject by the Attorney General of the United States;" for, say the court, "the officers of the Government appear to have uniformly acted on this construction," and "this construction, it appears to us, expresses the manifest intention or will of the law maker."

The only point before the court for review upon the writ of error to the Supreme Court of Louisiana in this case, is this:

Is there any error in the judgment of that court, based upon this construction of the acts of Congress, under which the land in controversy has been separated from the public domain, to satisfy a right of pre-emption growing up in virtue of settlement and cultivation prior to the 19th of June, 1834?

The defendants say there is no error, because—

I. The act of the 29th of May, 1830, and the supplementary acts of January 23d, 1832, and July 14th, 1832, constituted but one act; and any revival of the act of the 29th of May, 1830, in the absence of any declaration to the contrary, would necessarily carry with it the supplementary acts. (Sedgwick on Statute and Constitutional Law, pp. 247, 251, 255; 1st Cranch, 299.)

This view confirmed by the act of June 22d, 1838, which is cited by plaintiff's counsel for a different purpose. And,

II. The administration of the land system of the United States is vested in the Executive department of the Government, and the officers charged with the disposal of the public domain under the authority of acts of Congress are required and empowered to determine the construction of those acts so far as it relates to the extent and character of the rights claimed under them, and to be given, through their action, to individuals. This is a portion of the political power of the Government, and courts of justice never interfere with it. (Cousin *v.* Blanc's Ex., 19 How., 206, 209; 2 Pet., 253; 12 Pet., 511; 9 How., 154.)

The decision of the Attorney General, and the action of the Land Department for a long series of years in conformity with it, is conclusive as to the right of a pre-emptor to sell the land embraced in his entry before the issuing of the patent.

A different conclusion would unsettle a vast number of titles,

and overthrow rights acquired upon the faith of the settled practice of the Land Department of the Government, dating back to the spring of 1835; and for what? To give success to an operation by which one seeks to obtain an unjust advantage over his neighbor, by dealing, with as full knowledge as was ever yet disclosed to the observation of a court of justice, with one who stands confessed as the perpetrator of an attempted fraud.

Mr. Justice CATRON delivered the opinion of the court.

This cause is brought here by a writ of error to the Supreme Court of Louisiana, which, by its judgment, construed the acts of Congress of 1830, 1832, and 1834, securing pre-emption rights to actual settlers on the public lands.

The facts giving rise to the questions decided are these: John Butler and Elkin T. Jones resided on the same quarter section of land, lying in the parish of Claiborne, Louisiana; and having duly proved their residence on the land, as required by the acts of Congress, were allowed to purchase jointly at the proper land office the quarter section on which they resided.

Being entitled to additional land, Jones and Butler obtained a certificate, known as a float, authorizing them to enter a quarter section. Butler sold his float to Murrill in 1837; Murrill sold to Wood in 1838, and Wood sold to Dickson in 1839. The land was located in August, 1840, in Butler's name, by Bullard, who held a power from Butler to locate and sell it.

And in November, 1840, Butler, by his attorney in fact, Bullard, conveyed to William Dickson. In April, 1843, a joint patent issued in favor of Butler and Jones for the quarter section. In 1851, Butler again sold his undivided moiety of the land to James Marks, and conveyed to him in due form. The Supreme Court of Louisiana held, that the assignment made in August, 1840, to William Dickson, was lawfully made, and that Marks had no equity to sustain his petition, in which he demanded partition and possession. His petition was dismissed in the State courts.

If the assignment of the entry to Dickson was valid, then the judgment below must be affirmed; on the other hand, if the assignment made by Bullard, as Butler's attorney in fact, was made in violation of the acts of Congress, then it cannot be set up as a defence against the deed made to Marks in 1851. This is the only question that can be revised here on this writ of error to the proceeding in the Supreme Court of Louisiana. Its decision depends on the true meaning of the acts of Congress referred to.

The act of 1830 (sec. 3) provides that all assignments and

transfers of the right of pre-emption given by that act, prior to issuing of the patent, shall be null and void.

In 1832 a supplementary act was passed, which recites the act of 1830, and declares that all persons who have purchased under the act may assign and transfer their certificates of purchase, or final receipts, anything in the act of 1830 to the contrary notwithstanding.

The act of June 19, 1834, revived the act of 1830, and continued it in force for two years without referring to the act of 1832. If this act was made part of that of 1830, then the revival of the latter carried with it no incapacity in the pre-emptor to assign his certificate of purchase.

A difficulty arose in the General Land Office, as to the effect of the revival of the act of 1830 by the act of 1834; and whether the act of 1830, as revived, included the provision of the act of 1832. The Commissioner referred the matter to the Secretary of the Treasury for his decision; and this officer presented the question to the Attorney General for his official opinion, who decided that the acts of 1830 and 1832 stood together as one provision; and being revived by the act of 1834, the intention of Congress was to confer on the purchaser the power to sell before the patent issued.

This opinion was given in March, 1835, and has been followed at the General Land Office ever since; and as Butler's claim originated under the act of 1834, it was governed at the land office by that decision.

We think the construction then given was, in effect, the true one. Before the prohibition was made by the act of 1830, the purchaser, when he had obtained his final certificate, acquired with it a right to sell the land he had purchased in all cases, nor has that right ever been questioned by Congress, where entries had been made in the ordinary operations of the land office; so that the act of 1832 *repealed* the prohibition imposed on those having a pre-emption, and placed those who purchased under it on the footing of other purchasers.

The act of 1832 provided that patents might issue to assignees; but this provision does not affect the present case, as the transfer of the entry was valid, and bound Butler from its date, and vested his equitable title in Dickson and his heirs, which was not defeated by the patent. Such would have been the rights of the parties, had the prohibitory clause not been passed, and so their rights stood after its repeal.

The object of the Legislature is manifest. It was intended to prevent speculation by dealings for rights of preference before the public lands were in the market. The speculator acquired power over choice spots, by procuring occu-

pants to seat themselves on them, and who abandoned them as soon as the land was entered under their pre-emption rights, and the speculation accomplished. Nothing could be more easily done than this, if contracts of this description could be enforced. The act of 1830, however, proved to be of little avail; and then came the act of 1838, (5 Stat., 251,) which compelled the pre-emptor to swear that he had not made an agreement by which the title might inure to the benefit of any one except himself, or that he would transfer it to another at any subsequent time. This was preliminary to the allowing of his entry, and discloses the policy of Congress, but it has no application in this cause, as this claim was founded on the act of 1834.

The contract preceding the entry made by Butler with Murrill was merely void; and so were the agreements of Wood and Dickson for the float before its location. But after the land was entered by Butler, he had power to affirm his contract of sale at his option, by conveying the land, and which sale bound Butler, and concludes Marks.

We order that the judgment of the Supreme Court of Louisiana be affirmed, with costs.

FRANCIS SELDEN, APPELLANT, *v.* LAWRENCE MYERS, PHILIP PIKE, WALTER LENOX, AND JAMES C. MCGUIRE.

A person dealing with an unlettered man who can neither read nor write, and taking from him a promissory note for the payment of money and a deed for property, in trust, to secure the payment, is bound to show, when he seeks to enforce them, that they, or the material parts of them, were read and fully explained to the party before they were executed, and that he fully understood their meaning and effect.

If this fact is established by positive and unimpeached testimony, parol evidence cannot be received, to show that the contract was different from that expressed in the writings, or that nothing was at that time due from the party who executed the instruments.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

It was a bill filed by Selden, under the circumstances particularly stated in the opinion of the court. The Circuit Court dismissed the bill, and Selden appealed to this court.

It was argued by *Mr. Coxe* and *Mr. Webb* for the appellant, and by *Mr. Bradley* for the appellees.

As this was a case depending entirely upon testimony, where no general principle of equity jurisprudence was involved, the arguments drawn from that testimony are omitted.

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

This is an appeal from the Circuit Court for the District of Columbia.

It appears that the appellant, for some years before the execution of the instruments hereinafter mentioned, kept a restaurant in the city of Washington, and had considerable dealings with Lawrence Myers & Company, who are merchants in New York, and who, from time to time, had supplied him with liquors for the use of his restaurant. On the 31st of December, 1846, the appellant gave his promissory note for $1,246.68 to Lawrence Myers & Company, payable with interest on the 1st of January, 1849, for value received; and on the same day he executed a deed to Walter Lenox, of the city of Washington, which recites that he is indebted to Lawrence Myers and Philip Pike, of the city of New York, trading under the name of Lawrence Myers & Company, in the sum of $1,246.68, for which sum they held his promissory note, dated the 31st of December, 1846, drawn to the order of the said Lawrence Myers & Company, payable on the 1st of January, 1849, and that the appellant was desirous to secure the payment of the said debt, and all interests and costs that may accrue thereon; and then proceeds to convey certain real property in the city of Washington to the said Lenox, in trust; that in case the appellant should fail to pay the said debt, or any part thereof, or any proper costs or charges that may accrue thereon, then, at the request of the holders of the said note, due and unpaid, to sell the said premises, (or such part thereof as the trustee may deem necessary to pay so much of the debt as shall be then unpaid,) in such manner, after such notice, at such time and place, and upon such terms and conditions, as the trustee shall deem most convenient for the interest of all concerned, and convey the same in fee simple to the purchaser.

This deed was duly acknowledged by Selden, according to law, before two justices of the peace for the county of Washington, and recorded among the land records of the county.

Some years after the expiration of the credit mentioned in these instruments—that is to say, in 1853—the trustee, at the request of Lawrence Myers & Company, advertised the premises to be sold on the 18th of July in that year; and thereupon Selden filed this bill to obtain an injunction to stay the sale.

The bill states, that in 1846 the appellant had a settlement of accounts with Lawrence Myers & Company; and after the

settlement, Myers, in order to enable him to carry on his business, agreed that the company would make advances to him from time to time in goods or money, as he should need them, provided he would give them his note for $1,246.68, payable on the 1st of January, 1849; that he accepted the proposition, and thereupon executed the promissory note above mentioned; and afterwards, at the request of Myers, executed the deed of trust to Lenox.

The bill further charges, that it was the distinct understanding of the parties that advances should be made to the amount set forth in the note; but that only a small advance of about two hundred dollars had afterwards been made, and that sum diminished by sundry payments made by appellant; that the property conveyed by him in trust was of much greater value than the amount of the note; that he can neither read nor write; and when he executed the deed, did not know that the whole of said property was included, and was under the impression that it conveyed only a portion of it.

The bill further charges, that Lawrence Myers & Company persuaded him to execute the deed with the intention to defraud him, and since its execution had refused to make advances to him in money or goods; that the west half of the lot conveyed in trust was advertised for sale by the trustee, and if the sale was allowed to proceed he would be injured and defrauded.

The members of the firm of Lawrence Myers & Company, and Lenox, the trustee, and McGuire, the auctioneer, were made parties defendants to the bill.

The answer of Lawrence Myers, who answers separately, denies that the note was given for the purpose stated in the bill, and states that it was given upon a settlement of accounts for goods before that time sold to the appellant, and for the amount which the appellant acknowledged to be then due; that the deed was executed voluntarily, and with full knowledge of its contents, and after it had been read and explained to him, and denies all fraud charged in the bill.

The respondent also denies that the property conveyed was more than sufficient to pay the debt; that the east half of it had been previously mortgaged, and had since been sold to pay that debt, and the remaining half is not more than sufficient to pay the debt due to the defendant. He admits that the appellant is entitled to a credit of $119.70, with interest from the 11th of September, 1845, on account of so much money received on a note of a certain William Walker, assigned by the appellant to Lawrence Myers & Company.

The answer of Philip Pike, the other partner in the firm, is

substantially the same with that of Myers, as far as he has knowledge. But he was not in Washington when the note was taken and the conveyance made, and had therefore no personal knowledge of that transaction.

And the answer of Lenox, the trustee, states that he prepared the deed, at the request and according to the instructions of Lawrence Myers; that Selden and Myers met together at his office, on or about the day of the date of the deed; that he laid the note and deed before the parties; that he cannot charge his memory that the entire deed, word for word, was read to the parties, but avers that the description of the property conveyed, and the nature and purport of the deed, were made known and explained to each of the parties, and so much read as was necessary for that purpose; that the transaction was the subject of conversation between the parties in his presence; and that Selden showed a clear knowledge of its character and purpose, and that it was declared by both parties that it was a settlement between them of past dealings and accounts; and that the note and deed were prepared by him, and strictly conformed to the views of both parties, as made known to him by each of them. They were not signed in his presence, but taken away by Myers, in company with Selden. And he denies all fraud and deceit charged in the bill.

Testimony was taken on both sides. On the part of Selden several witnesses were examined, who state that, from conversations between Selden and Myers, at which they were present, about the time when the note and deed were executed, or shortly before the advertisement for the sale, they understood that Selden owed nothing to Myers & Company when they were given, and that they were intended to secure future supplies which Myers & Company were to furnish. But none of these witnesses were present when they were executed, and none of them know whether they were or were not read and explained to the parties before they were signed. And, certainly, parol testimony is altogether inadmissible to show that the contract was different from the one reduced to writing, unless it can also be shown that the party was fraudulently deceived and misled as to the contents of the written instruments.

It is true that Selden is an unlettered man, and can neither read nor write. He makes his mark to the instruments he executed; and, dealing with such a person, it is incumbent on Myers & Company to show, past doubt, that he fully understood the object and import of the writings upon which they are proceeding to charge him; and if they had failed to do so, the above-mentioned testimony offered by the appellant, as to

the state of the accounts between them at the time, would have furnished strong grounds for inferring that he had been deceived, and had not understood the meaning of the written instruments he signed. But the testimony offered by Myers & Company is conclusive on this point. Lenox, who was necessarily made a defendant in these proceedings, was, by consent of parties, examined as a witness on the part of Myers & Company, and in his testimony he confirms the statement made in his answer in every particular. He proves that the parties were together at his office; that they talked of their accounts while there, and that Selden admitted that the balance due from him at that time to Myers & Company was the amount for which the note was given. He says, "I read so much of it (the deed) to the parties as explained its object, the amount of the note, and the description of the property, and the purposes; and it was admitted by both parties that it was right, and received from me as such by them together, and they left my office for the purpose of executing it." The testimony of this witness is not impeached, nor his statement of facts contradicted by any witness for the appellant, and is therefore a decisive answer to the allegations in the bill of the appellant.

Nor is there any ground for supposing that Selden, in his ignorance of accounts, was deceived or imposed upon as to the balance actually due. The accounts of the dealings between the parties up to that time have been produced by Myers & Company, and proved to be correct by the clerks who were at that time in their employment, and whose duty it was to keep them; and these accounts show that the balance then due was the amount for which the note was taken.

In this view of the subject, it is unnecessary to examine particularly the testimony of the different witnesses produced by the complainant. They no doubt speak to the best of their recollections; but every one knows how liable a party is to be led into mistakes who hears casual conversations about accounts in which he has no interest, and how liable they are to be mistaken, when some years have elapsed, both as to the particular time when the conversation took place and the precise language used by the speaker. And the strong probability is, that the conversations of which they speak, and in which they understood Myers to admit that he had been paid, related to the small transactions which took place after these instruments were executed; for it appears that liquors were supplied by Myers & Company after this settlement, and for which Selden made some payments; and this account, it appears, was not adjusted and balanced when the property was advertised for sale, and there was some controversy about it. The deposi-

tions of these witnesses were taken many years after the instruments of writing were executed, and after these conversations are supposed to have passed, and the accuracy of their recollection in such a matter can hardly be relied on as to time or language; and they, as well as Selden, who is an unlettered man, and incapable of keeping accounts, and who does not appear to have had any regular books kept by a clerk, would most likely have but a confused recollection of these conversations, and might, without any evil intention, confound what had been said in relation to dealings subsequent to the note with conversations which passed at the time it was executed.

And this view of the subject is strengthened by the fact, that although Selden states in his bill that he had a settlement with the company of all accounts at that time standing unsettled between him and the firm, he does not state that nothing was found due from him on that settlement, nor does he say that the balance against him, if any, was paid. His statement of a settlement is no doubt true; but it is evident from the testimony that, upon that settlement, the sum claimed by Lawrence Myers & Company was found to be due, and the note and deed given to secure it.

We see no reason, therefore, for disturbing the decision of the Circuit Court dismissing the bill; and the decree must be affirmed, with costs.

JOHN N. AHL, APPELLANT, *v.* ROSWELL B. JOHNSON.

Where there was a contract for the sale of a lot of ground, partly on time, and the vendee entered into possession; and the vendor did not formally demand the payment of the balance when due, but merely said he was ready to make a deed when the money was paid; and after the time of payment had elapsed, the vendee made a tender of the sum due, which the vendor refused to receive; these and other circumstances show that time was not of the essence of the contract, and the vendee was entitled to relief upon a bill for a specific performance of the contract.

THIS was an appeal from the Supreme Court of the Territory of Minnesota.

It was a bill filed by Ahl, under the circumstances stated in the opinion of the court.

It was argued by *Mr. Cooper* for the appellant, and *Mr. Bradley* for the appellee.

The principal point in the case was, whether time was of the essence of the contract. *Mr. Cooper* contended that it was not:

III. Because time in this case was not of the essence of the contract, as is manifest from the contract itself, as well as from the conduct of the defendant, in demanding the residue of the money since the exhibition of his bill by the said complainant, without ever pretending that he had a right to rescind the contract, or re-enter into possession of the said premises. (See pages 13, 16, and 17. Taylor *v.* Longwood, 14 Pet. R., 174, 175; 3 Hor. Pa. R., 429, 438; 6 Wheat., 528; Wyson *v.* Morgan, 7 Ves., 202; Radcliffe *v.* Warrington, 12 Ves., 326; Irvine *v.* Reminton, 2 Harris, 145; Decomp *v.* Feay, 5 S. and R., 323, 326; 4 Adol. and Ellis, 599; 3 McLean, 148.)

Mr. Bradley contended that the parties meant to make *time* of the essence of the contract: 1st. Because of the stipulations in respect to the payment of the purchase-money. 2d. Because of the purposes contemplated in the sale, &c.

IV. It was competent for the parties to make time of the essence of the contract; and if that intention clearly appears, a court of equity will not assist him who is in default. (Sugden on Vendors, ch. 8, sec. 3, pl. 32 to 36 inclusive; see Note 2 to Harrington *v.* Wheeler, 4 Ves., 689; see cases collected in note (a) same case, p. 686, American notes; Lloyd *v.* Collett, 4 Bro. Ch., 469, and American notes.)

V. The facts that he went into possession and improved the property, and paid part of the purchase-money, do not relieve him from his default, if time was of the essence of the contract. Nor do they aid in arriving at the intent of the parties.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal from the Supreme Court of the Territory of Minnesota, in a suit in chancery to compel a specific performance of a written contract to convey a certain parcel of land described in the bill of complaint, and situated in the village of Stillwater, and county of Washington, in that Territory. The bill was presented to the district judge at chambers, in the first place, where an order was passed for an injunction, and it was then duly filed in the office of the clerk of the District Court, and on the same day the writ of injunction was issued, returnable to the District Court at the May term next ensuing, and was duly served on the respondent. On the 29th day of November, 1851, the respondent, by his solicitors, filed his answer to the bill of complaint, and on the 30th day of June, 1852, the complainant filed the general replication, and testimony was subsequently taken by both parties, under a regular commission issued in pursuance of the order of the court. After the testimony was taken, the temporary injunction was

dissolved, and the cause was set down for hearing on the 6th day of October, 1853, upon bill, answer, replication, and proofs; and after the hearing, the District Court decided in favor of the complainant, and entered a final decree against the respondent for a specific performance of the agreement set forth in the bill of complaint. An appeal was taken by the respondent to the Supreme Court of the Territory, and the Supreme Court, at the January term, 1856, reversed the decree of the District Court, and entered a final decree against the complainant, dismissing the bill, with costs; whereupon, the complainant appealed to this court.

A brief statement of the pleadings will be sufficient to give a clear view of the nature of the controversy between the parties to the suit. On the part of the complainant, it is alleged that the respondent, being seized in fee simple of the parcel of land described in the bill of complaint, entered into a treaty with the complainant for the purchase of the same on the 15th day of June, 1850, for the price of one hundred and ninety dollars, with interest, to be paid on the 1st day of May, 1851, and that he agreed to accept that sum for the consideration; and that an agreement in writing was entered into between them to that effect, and the bill of complaint sets forth the agreement, which is of that date, and is signed and sealed by the parties. By that agreement, the respondent contracted to sell and convey the premises by deed of warranty, provided the complainant should pay him the sum of one hundred and sixty-five dollars on the 1st day of October then next, or the sum of one hundred and ninety dollars by the 1st day of May, 1851, and the complainant agreed to purchase and pay for the premises in the manner, and to the amount specified. They also thereby mutually agreed to build a wharf suitable for a steamboat landing—the complainant on the land contracted for, and the respondent on his lot adjoining—and it was stipulated between them that either party was to be at liberty to commence the building of the wharf on his own lot, but neither was to be obliged to continue or complete it, unless the other upon notice did the same in a reasonable time. And the complainant further alleges that the respondent delivered up the possession of the premises to him about the time of the execution of the agreement, and that he has ever since remained in the occupation of the same; that he paid the respondent sixty dollars on the 2d day of July, 1850, in part performanee of the agreement; and the respondent, on the 7th day of September, 1850, endorsed on the agreement thirty dollars and thirty-three cents more, in part performance of the same, being the amount awarded to him as damages under a reference between the

parties of a claim he presented against the respondent on account of a misrepresentation made by him, at the time of the execution of the agreement, in respect to the western boundary of the land; and that since he entered into the possession of the premises, under the agreement, he has laid out large sums of money upon the land, in erecting a valuable dwelling-house, and in making other improvements thereon; and that he has tendered to the respondent the whole sum of the balance of the purchase-money, with the interest, and has always been ready and willing to perform the agreement on his part, according to its terms, upon having a proper title made out, and a proper conveyance executed to him of the premises therein described; and that he has demanded the deed of the respondent, and he had hoped that he would specifically perform his part of the agreement, as in justice and equity he ought to do. And the bill of complaint charges that the respondent, combining and confederating with persons unknown, refuses to perform his part of the agreement, and at times falsely pretends that he is entitled to more than the sum stipulated between the parties; and at other times, that the complainant had not performed his part of the agreement, whereas it is alleged he has performed his part of the agreement, and that the respondent is entitled to no more than the balance due and unpaid of the sum stipulated, and the interest thereon, and that the whole of that sum, with interest, is now ready and unproductive in the hands of the complainant; and that he is seriously embarrassed and injured by reason of not having a good and sufficient title to the premises, which is contrary to equity; and the complainant prays for discovery and general relief, and that the respondent may be decreed specifically to perform the agreement upon being paid the balance so due, with interest, and for an injunction to restrain the respondent from conveying, transferring, or in any manner disposing of the title to the premises.

The answer admits that the fee simple title was in the respondent at the time mentioned, and that there was a negotiation between the parties respecting the purchase and sale of the premises, and that the agreement was made and executed at the time it bears date, and that the complainant paid the sum of sixty dollars, as alleged in the bill of complaint, but expressly denies that the respondent delivered the possession of the same to the complainant, or that he ever consented to his taking the possession in any manner, as is stated, unless he should pay the purchase-money, with interest, except and save for the purpose of building the wharf; and the answer also denies that any misrepresentation was made respecting the

western boundary of the lot, or that the respondent ever admitted that he made it, as is charged in the bill, or that the complainant was ever injured by any representation made by him in that behalf, though the answer admits that the complainant did express some dissatisfaction with that boundary, and that for the purpose of cultivating and sustaining friendly relations with him, as a citizen and neighbor, in the same community where they resided, he did agree to refer the matter, whether he ought to make any deduction from the price agreed, and that the referees did determine that he should deduct the sum of thirty dollars and thirty-three cents from the same; and he further admits, that the complainant has made improvements upon the premises by erecting a dwelling-house thereon, which has greatly enhanced the value of the same, but he denies that any improvements were ever made by his consent, or that the complainant had any right to make them, and also denies every allegation in the bill that the complainant was ever ready and willing to perform his part of the agreement, or that he has performed or ever offered to perform the same. On the contrary, the answer avers the fact to be, that at the time the purchase-money became due and payable, he called upon the complainant, and demanded of him the sum due, and told him he was ready and willing to execute and deliver to him the deed, upon being paid the balance of the money, which he refused to pay, alleging as an excuse that he had not the means. And it is further averred, that the respondent at different times, afterwards, called upon the complainant, and informed him of his ability and readiness to deliver the deed upon being so paid, and urged the payment, which was refused on every occasion when the demand was made; and the respondent says he has suffered great pecuniary embarrassment and injury in his business, from the refusal of the complainant to perform his part of the agreement. He admits, however, that the solicitor of the complainant, on or about the first day of November, 1851, did demand the deed of him, and offered to pay him a sum of money which the solicitor informed him was the balance of the sum of one hundred and ninety dollars and interest at seven per cent.; but what sum of money was so offered he does not know, nor whether that money is now ready in the hands of the complainant and unproductive, but he does not believe such to be the fact; and he denies all manner of fraud, combination, and confederacy.

There is not much dispute about the facts of the case, whether we look to the testimony on the one side or the other. The agreement was admitted in the answer, and was made, as is alleged in the bill, on the fifteenth day of June, 1850, and it is

fully proved that the complainant shortly after entered into the possession of the premises, and has continued in the possession of the same to the present time, and there is not an intimation in the proofs exhibited in the case that the respondent ever demanded the surrender of the premises, or that he ever manifested any intention to rescind the agreement, except so far as it arises from his refusal on the first day of November, 1851, to accept the balance remaining unpaid when it was tendered to him by the solicitor of the complainant. On the contrary, it appears from his own witness, William H. Morse, that in the fall of 1851 he requested payment of the balance then due and unpaid; and when the complainant replied to his request, that he had a good many debts out, and as soon as he could collect the money he would settle up with him, he told the complainant he was ready to make him a deed whenever he was paid the balance due on the lot. The precise time when this conversation took place does not appear; but the witness says he was in the employment of the respondent from the twentieth day of October to the eighteenth day of November, 1851, and that within that time he heard the respondent ask the complainant two or three times for the balance due on that lot, and it was in some one of those conversations that he told the complainant that he was ready to make the deed whenever the balance was paid; and we infer from the testimony of the witness, though it is not very clearly expressed in the deposition, that the last interview between the parties, when that remark was repeated, must have taken place only a few days before the tender was made by the solicitor of the complainant. Whether so or not, it is plain, as well from the language of the request as from that employed by the respondent in reply to the reasons assigned by the complainant, why he could not make the payment as requested; that the object of the respondent on the occasion was more to hasten the action of the complainant, and prompt him to an early compliance, than to make any formal demand of the money with the view to terminate the agreement, or to impair the right of the complainant to make the payment at a future time. Such, unquestionably, was the impression that the conversation at the interview was calculated to produce upon the mind of the complainant; and considering all the circumstances under which the interview took place, and the relation of the parties to each other in respect to the matter now in controversy, we think it was the only reasonable construction which could be put upon the language used by the respondent, consistent with fair dealing on his part, and rectitude of intention; and that view of the conversation derives strong confirmation in the fact that

the deed subsequently tendered to the complainant had not then been prepared, and no allusion was made to a conveyance on the part of the respondent, except in connection with the promise of the complainant to settle and make the payment as soon as he could collect the means.

Nothing further transpired between the parties, in respect to the subject-matter of the controversy, till after the tender was made by the solicitor of the complainant. There is not a word of proof, other than what has been mentioned, that has the least tendency to show that the respondent, prior to the tender made by the complainant, ever formally demanded the payment of the sum due as is alleged in the answer, or ever notified the complainant, or even intimated to him that he should insist upon a rescission of the agreement, unless the payment was made at the time, or in the manner specified, or that he ever expressed so much as a wish that the possession of the premises should be surrendered up because the payment had not been made, or in any manner signified to the complainant that he was unwilling that he should remain in possession, and continue his occupation and improvement of the same, as he had done, throughout nearly the whole period after the agreement was made. The proofs are clear and full that the complainant entered into the possession shortly after the agreement was made, and that he had built a valuable dwelling-house on the premises, and if the wharf was not completed, he had at least commenced the building, and made considerable progress in the work, and had otherwise made expenditures in levelling and grading the grounds, and in various ways had greatly improved the premises and enhanced their value, and that all these improvements had been carried forward at large expense, while the respondent resided in the same village, and under circumstances which show, beyond controversy, that he must have had full knowledge of their progress, and daily opportunities to have manifested his dissent if he had desired to do so, or if such had been his intention; and yet, he never expressed the slightest dissatisfaction while the works were progressing, or intimated to the complainant, so far as appears, that in case he failed to make the payment at the time specified in the agreement, he should claim that the improvements had been made of his own wrong, and at his own risk, and without any liability, on his part, to allow any compensation either for the labor, materials, or money expended, in making them. On the contrary, he suffered the improvements to go on, silently acquiescing in the right of the complainant to make them, until they were nearly completed; and when the tender was made by the solicitor of the complainant, and he found he

could no longer conceal his real position with respect to the failure to make the payment at the time specified in the agreement, he then declined to accept the money, and refused to execute the deed.

The tender on the part of the complainant was made by Frederick R. Bartlett, his solicitor, on the 1st day of November, 1851, at Stillwater, where the land is situated, and in the office of H. L. Morse, the solicitor of the respondent. A sum sufficient to pay the whole balance due, with interest, was formally tendered on the occasion, and the deed demanded, and the respondent notified that the sum so tendered would be always in readiness to be paid by the solicitor, at his dwelling house in Stillwater, where both parties resided. According to the testimony of the solicitor, the respondent refused to accept the money, and got up and went out of the office, and did not take it, and did not offer to execute a deed; and it does not appear that he gave any explanation whatever, as to the grounds of his refusal. His omission to explain why he refused to accept the money, which, not many days before, he had requested the complainant to pay, indicates an inconsistency in his acts not altogether reconcilable with the idea that the previous request for payment had been made in good faith, or at a time and under circumstances when he either anticipated or desired that the complainant might be able to obtain the money to comply with the request; and it is calculated also to throw some light upon his subsequent conduct, in selecting a moment to demand the money and tender the deed to the complainant, when there is much reason to think that he must have known that a compliance could not be expected, on account of the absence of the solicitor, in whose hands the money was deposited. He was then reminded by the complainant that the money had been deposited with his solicitor, and informed that he was absent, and told that he must wait until the solicitor returned. These facts are established by the testimony of several witnesses introduced by the respondent, and it is worthy of remark, that this attempt to demand the money and tender the deed was not made till more than a year after the bill was filed, and nearly six months after the respondent had formally answered to the suit. It occurred at the dwelling-house of the complainant on the premises; and it appears, from the testimony of Elijah A. Bissell, that the respondent called upon the complainant at the time mentioned, and told him that he understood that he, the complainant, had a sum of money for him on the account of the lot, and that he was ready to give him a deed of the premises, upon the receipt of the money which he then demanded, and called the witness

to notice the same, and the witness put a private mark on the deed, which is annexed to his deposition, and makes a part of the case. According to the testimony of that witness, the complainant said that the money which he was supposed to have, had been paid away, but the witness admits that he referred to the money deposited with his solicitor, as that which was designed to pay the respondent.

Three days afterwards the same thing was repeated, when the complainant was called into the office of the solicitor of the respondent, unattended by any friend or legal adviser, and a second demand was made of him for the money, and the same deed was again tendered. His explanation on this last occasion, as given in the testimony produced by the respondent, is full and satisfactory, and we refer to it as affording a perfect solution of the whole transaction. After the demand was made, he replied that he could not pay the money, as he had not enough to pay his taxes; that he had left the money with his solicitor, who had once tendered it to the respondent, and that he ought then to have taken it; that his solicitor was now away from home, and the respondent must wait until he returned. Three depositions were taken by the respondent to establish this last demand, and each of the witnesses proves the substance of this explanation, and we think it is not of a character to require any extended comment, as the transaction speaks its own construction. More than a year before that demand was made, the complainant had tendered the money to the respondent, and deposited it in the hands of his solicitor, and notified the respondent that it would always be in readiness to be paid whenever he would accept it; and he well knew that he had never asked for it, or in any manner signified his willingness either to receive the money or to execute the deed. These considerations furnish a complete answer to any supposed defence upon that ground, wholly irrespective of any question which might otherwise arise, involving the rectitude of the transaction, or the motives of those who were concerned in making the demand, and consequently remove all necessity for any farther remarks upon this branch of the case. Looking to the whole evidence, we think it is satisfactorily proved that more than half of the consideration was paid in advance of the time when it fell due; that valuable improvements were made on the premises by the complainant, under the agreement; and that the possession of the premises was continued by him after the time elapsed for payment, with the knowledge and approbation of the respondent, which, in some cases, has been held sufficient of itself to entitle the party to relief, where, in all other respects, it

appeared that he was without fault. (Waters *v.* Travis, 9 John., 466.)

Suppose it were otherwise; it can make no difference in this case, as it also appears, and the proof on this point is equally satisfactory, that the tender of the balance of the purchase-money was duly made while the complainant was in possession of the premises, under the agreement, and before any act had been done by the respondent disaffirming it, or any notice or intimation given by him that he did not intend to insist upon its performance. Readiness to perform is distinctly alleged in the bill of complaint, and is as distinctly denied in the answer, and therefore it becomes important to inquire how the fact was, according to the evidence in the case. What occurred between the parties, in respect to the delay which had ensued prior to the interview at the dwelling-house of the complainant, does not appear by the testimony on either side, and consequently it is reasonable to conclude that, so far as that period is concerned, it was not the subject of dispute; and it seems quite probable that it had been arranged by mutual consent. That such was the fact, though not directly proved, is clearly inferable, as well from the conduct as the conversation of the parties at the time the interview took place. They met at the time in a friendly way, and the respondent asked for the money, and in turn the complainant asked for some forbearance till he could collect the means; and apparently it was granted, without objection or any imputation of any prior remissness. No demand was made of the money, or any intimation given, that if it was not paid immediately, the delay would be regarded in any manner as impairing the right of the complainant to make it at any time. It was a mere ordinary request of a creditor to a debtor, and embraced not only what was due on the agreement, but also a balance due on account, and was not intended as anything more than an offer to settle and a request for payment, which applied quite as much to the account as to the agreement; and there is good reason to infer that the respondent himself had not been ready to execute the title prior to that time, as he took occasion to inform the complainant that he was ready to make the deed when he was paid; whereas, if the business had been delayed, contrary to his wishes, there would have been no necessity for that notification. However that may have been, the circumstances we think abundantly show that the delay, prior to that time, was not the subject of complaint; and therefore it is dismissed from any farther consideration. Time may be, and often is, of the essence of a contract for the purchase and sale of real property, so that courts of equity will not interfere in behalf

of either party. It may be made so by express stipulations of the parties, or it may arise by implication from the nature of the property, or the avowed objects of the seller or purchaser; and even when it is not so, expressly or impliedly, if the party seeking redress has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the mean time, been a material change in the circumstances affecting the rights, interests, or obligations of the parties, in all such cases courts of equity will in general refuse to decree a specific performance, upon the plain ground that it would be inequitable and unjust. On the other hand, the general doctrine on this point is expressed in the maxim, "that time is not of the essence of a contract in equity;" and except in cases like those already mentioned, or in those of a kindred character, courts of equity, as a general rule, have always claimed and exercised the right to decree specific performance of agreements, in respect to the purchase and sale of real property, in their discretion, and usually to a more liberal extent in favor of purchasers than those who contract to sell such properties. (Taylor *v.* Longwood, 14 Pet., 174; 2 Story's Eq. Jur., sec. 771 to 776; Adams Eq., ch. 2, p. 263.)

The authorities cited will suffice for the present occasion, as the cause depends very much upon the facts exhibited by the parties, and upon certain obvious principles of justice and equity, universally admitted wherever courts of equity exist. There was no negligence or delay of performance on the part of the complainant prior to the tender of the money on the 1st day of November, 1851, except what is reasonably and satisfactorily accounted for on the ground of acquiescence or waiver on the part of the respondent; and after that time the fault was entirely his own, and neither the rules of common justice nor equity will allow him to take advantage of his own wrong. He can derive no benefit from his subsequent attempt to tender the deed, as it was then too late to impair the right of the complainant to insist upon performance; and we attach no importance whatever to his demand of the money, as he well knew at the time that the amount was deposited in the hands of the solicitor of the complainant, and that he could have it the moment he returned.

It is a case of clear equity on the part of the complainant. He has been guilty of no negligence or fraud, and he was admitted into possession of the premises under the agreement, and suffered to make valuable improvements, without any notice to desist; and now, when he cannot be made whole in any other way, it is his right to insist that the agreement should

be performed, and a court of equity is the proper tribunal to enforce his right.

On the whole case, we are of the opinion that the Supreme Court of the Territory of Minnesota erred in the order and decree made in this cause. The decree, therefore, of that court is reversed, and the cause remanded for further proceedings, with directions to enter a decree affirming the decree of the District Court, with costs.

DAVID MORELAND, PLAINTIFF IN ERROR, *v.* JEREMIAH PAGE.

This court has not jurisdiction, under the twenty-fifth section of the judiciary act, to review the judgment of a State court, where the question involved merely related to the proper boundary between two tracts of land, although the owners of both had valid grants from the United States.

THIS case was brought up from the Supreme Court of the State of Iowa, by a writ of error issued under the twenty-fifth section of the judiciary act.

The case is stated in the opinion of the court.

It was argued by *Mr. Badger* and *Mr. Carlisle* for the plaintiff in error, and by *Mr. Bradley* for the defendant.

Mr. Justice GRIER delivered the opinion of the court.

In a court which is not bound by law to ignore all species of actions, and use only the generic name, this would be called an action of ejectment. Plaintiff's statement alleges that "he is owner of certain adjoining quarter sections of land, and that the northern boundary thereof is a line surveyed by Joel Baily, as per diagram annexed, and that plaintiff claims the line A B to be the true line, while defendant claims that the line C D is the proper line between them. The defendant, by his plea or answer, denies that A B is the true line, and avers that C D is. On this issue the parties went to trial without a jury, and the court decided in favor of plaintiff. But, on appeal to the Supreme Court of Iowa, the judgment below was reversed, and judgment entered for defendant, establishing the line C D as the true line between the respective patents, according to a survey made by Edward James, "a copy of a plat of which is on file in the case, from the original deposited in the office of the surveyor general."

We have searched this record in vain to discover any authority for this court to assert its jurisdiction to review the judgment of the State court under the power granted by the twenty-

fifth section of the judiciary act. The record does not show that it draws in question any treaty, statute, or authority, exercised under the United States; or the validity of any State statute, for repugnancy to the Constitution of the United States; or the construction of any clause of the Constitution; or of a treaty or statute commission held under the United States. It is a mere question of boundary between two neighbors, both admitted to have valid grants from the United States. It is a question of fact, depending on monuments to be found on the ground, documents in the land office, or the opinion of experts or surveyors appointed by the court or the parties. If the accident to the controversy that both parties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involve the inheritance, partition, devise, or sale of it, may, with equal propriety, be subject to the examination of this court in all time to come.

This question is not new; it was decided in the case of McDonough *v.* Millaudon, 3 How., 693, where this court refused to entertain jurisdiction to review the judgment of a State court, ascertaining the boundaries between complete grants under the French Government, as it did not call in question either the construction or the validity of the treaty, or the title to the land held under it. (See also Kennedy *v.* Hunt, 7 How., 593.)

It is therefore ordered that this case be dismissed for want of jurisdiction.

ENEAS MCFAUL, PLAINTIFF IN ERROR, *v.* JAMES C. RAMSEY.

Where the only bills of exception were to the refusal of the court to grant a continuance and change the venue, the judgment of the court below must be affirmed, as these matters are not the subjects of review by this court.

The laws of Iowa permitting a demurrer only when the petition by a fair and natural construction does not show a substantial cause of action, a demurrer to part of the petition in this case was properly overruled.

THIS case was brought up, by writ of error, from the District Court of the United States for the district of Iowa.

The case is stated in the opinion of the court.

It was argued by *Mr. Reverdy Johnson* and *Mr. Reverdy Johnson, jun.*, for the plaintiff in error, and by *Mr. Norris* for the defendant.

Mr. Justice GRIER delivered the opinion of the court.

Ramsey, the plaintiff below, instituted this suit in the Dis-

trict Court of the United States for the district of Iowa. The parties have been permitted by that court to frame their pleadings, not according to the simple and established forms of action in courts of common law, but according to a system of pleadings and practice enacted by that State to regulate proceedings in its own courts. This code commences by abolishing "all technical forms of actions," prescribing the following curt rules for all cases, whether of law or equity:

"Any pleading which possesses the following requisites shall be deemed sufficient:

"1st. When to the common understanding it conveys a reasonable certainty of meaning.

"2d. When, by a fair and natural construction, it shows a substantial cause of action or defence.

"If defective in the first of the above particulars, the court, on motion, will direct a more specific statement; if in the latter, it is ground of demurrer."

If the right of deciding absolutely and finally all matters in controversy between suitors were committed to a single tribunal, it might be left to collect the nature of the wrong complained of, and the remedy sought, from the allegations of the party *ore tenus*, or in any other manner it might choose to adopt. But the common law, which wisely commits the decision of questions of law to a court supposed to be learned in the law, and the decision of the facts to a jury, necessarily requires that the controversy, before it is submitted to the tribunal having jurisdiction of it, should be reduced to one or more integral propositions of law or fact; hence it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defence into certain writings called pleadings. These should clearly, distinctly, and succinctly, state the nature of the wrong complained of, the remedy sought, and the defence set up. The end proposed is to bring the matter of litigation to one or more points, simple and unambiguous. At one time, the excessive accuracy required, the subtlety of distinctions introduced by astute logicians, the introduction of cumbrous forms, fictions, and contrivances, which seemed only to perplex the investigation of truth, had brought the system of special pleading into deserved disrepute, notwithstanding the assertion of Sir William Jones, that "it was the best logic in the world, except mathematics." This system is said to have come to its perfection in the reign of Edward III. But in more modern times it has been so modified by the courts, and trimmed of its excrescences, the pleadings in every form of common-law action have been so completely reduced to simple, clear, and unambiguous forms, that the

merits of a cause are now never submerged under folios of special demurrers, alleging errors in pleading, which, when discovered, are immediately permitted to be amended. This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts.

The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice. In the case of Randon *v.* Toby, (11 Howard, 517,) we had occasion to notice the operation and result of a code similar to that of Iowa. In a simple action on a promissory note, the pleadings of which, according to common-law forms, would not have occupied a page, they were extended to over twenty pages, requiring two years of wrangle, with exceptions and special demurrers, before an issue could be formed between the parties. In order to arrive at the justice of the case, this court was compelled to disregard the chaos of pleadings, and eliminate the merits of the case from a confussed mass of *fifty* special demurrers or exceptions, and decide the cause without regard to these contrivances to delay and impede a decision of the real controversy between the parties. In the case of Bennet *v.* Butterworth, (11 Howard, 667,) originating under the same code, the court were unable to discover from the pleading the nature of action or of the remedy sought. It might, with equal probability, be called an action of debt, or detinue, or replevin, or trover, or trespass, or a bill in chancery. The jury and the court below seem to have labored under the same perplexity, as the verdict was for $1,200, and the judgment for four negroes. In both these cases this court have endeavored to impress the minds of the judges of the District and Circuit Courts of the United States with the impropriety of permitting these experimental codes of pleading and practice to be inflicted upon them. In the last-mentioned case, the Chief Justice, in delivering the opinion of the court, says: "The Constitution of the United States has recognised the dis-

tinction between law and equity, and it *must* be observed in the Federal courts." In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those States where the courts of the United States administer the common law, they *cannot* adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either.

We have made these few introductory remarks before proceeding to notice the merits of the controversy, as developed by the record, in order that the bar and courts of the United States may make their records conform to these views, and not call upon us to construe new codes and hear special demurrers or pleadings, which are not required to conform to any system founded on reason and experience. To test such pleadings by the logical reasoning of the common law, after requiring the party to disregard all forms of action known to the law under which he seeks a remedy, would be unwarrantable and unjust.

The plaintiff's petition sets forth his grievances in plain, intelligible form, if not with technical brevity and simplicity.

1st. He alleges a contract with defendant to deliver to him eight hundred hogs, on or before a certain day; in consideration whereof, the defendant agreed to pay plaintiff $5.50 per hundred pounds net. He avers that he did deliver according to contract, at the time and place, the number of eight hundred hogs; that defendant refused to receive over five hundred and fifty of them, or pay for the remainder.

2d. He complains that defendant refused to receive and butcher the hogs in accordance with the agreement, and, thus caused by his delay, that the plaintiff was put to expense in feeding the hogs, and exposed to a great loss in the *net weight.*

3d. That defendant did not make a true return of the net weight, but defrauded plaintiff on that behalf.

4th. That he slaughtered twenty-four more hogs than he accounted for, and improperly cut off parts of others to reduce their weight.

5th. The plaintiff alleges, in what might be called a second count, another contract to deliver fourteen hundred hogs to defendant, at $5.60 per hundred net.

He avers delivery according to contract, and charges defendant with delay in slaughtering them; causing great loss in the weight, and expense to plaintiff in feeding them in the mean while.

6th. He charges defendant with taking one hundred other hogs of plaintiff, for which he refused to account.

7th. That in consequence of delay in receiving, many of the hogs died, to the great loss of plaintiff.

8th. That defendant returned false weights of these fourteen hundred, and cut off parts before weighing.

9th. The plaintiff also sets up a third contract for five hundred hogs, which were delivered, and avers the same delay and consequent injury to plaintiff; and the same frauds in weighing, &c.

To this catalogue of grievances the defendant, in his answer, pleads thirty-three distinct denials of the averments in the petition. A jury was called to try these thirty-three issues, and found a verdict for plaintiff, and assessed his damages.

No exception was taken on the trial to the admission or rejection of evidence; no error is alleged in the charge of the court; and a regular judgment was entered on the verdict.

The only bills of exception were to the refusal of the court to grant a continuance and change the venue; both of which were matters of discretion in the court below, and not the subject of review here.

The cavils to the sufficiency of the plaintiff's statement, under the name of a special demurrer, were overruled by the court below, and justly, because the code permits a demurrer only when the petition "by a fair and natural construction does not show a substantial cause of action." As we have already shown, it contains a dozen.

The judgment of the court below is affirmed, with costs.

JOSEPH D. BEERS, USE OF WILLIAM A. PLATENIUS, AS ADMINISTRATOR OF JAMES HOLFORD, DECEASED, PLAINTIFF IN ERROR, *v.* THE STATE OF ARKANSAS. WILLIAM A. PLATENIUS, ADMINISTRATOR OF JAMES HOLFORD, DECEASED, PLAINTIFF IN ERROR, *v.* THE STATE OF ARKANSAS. WILLIAM A. PLATENIUS, ADMINISTRATOR OF JAMES HOLFORD, DECEASED, PLAINTIFF IN ERROR, *v.* THE STATE OF ARKANSAS.

Under the Constitution of the State of Arkansas, the Legislature passed a law allowing the State to be sued.

According to this law, a suit was brought upon some of the State bonds; and whilst the suit was going on, the Legislature passed another law, requiring the bonds to be filed in court, or the suit to be dismissed.

The suitor refusing to file his bonds, the suit was dismissed; and the case was carried to the Supreme Court of the State, where the judgment was affirmed.

The case, being brought to this court under the twenty-fifth section of the judiciary act, must be dismissed for want of jurisdiction.

The permission to bring the suit was not a contract whose obligations were impaired by the passage of the subsequent law.

THESE three cases depended upon the same principle, and are therefore classed together. The report in the first-named case will apply to them all. It was a case which was brought up from the Supreme Court of the State of Arkansas, by a writ of error, issued under the twenty-fifth section of the judiciary act.

The case is stated in the opinion of the court.

It was argued by *Mr. Pike* for the plaintiff in error, and by *Mr. Hempstead* for the defendant.

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

This was an action of covenant, brought in the Circuit Court for Pulaski county, in the State of Arkansas, to recover the interest due on sundry bonds issued by the State, and which the State had failed to pay according to its contract.

The Constitution of the State provides, that "the General Assembly shall direct by law in what courts and in what manner suits may be commenced against the State." And in pursuance of this provision, a law was accordingly passed; and it is admitted that the present suit was brought in the proper court, and in the manner authorized by that law.

The suit was instituted in the Circuit Court on the 21st of November, 1854. And after it was brought, and while it was pending in the Circuit Court, the Legislature passed an act, which was approved on the 7th of December, 1854, which provided, "that in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the State, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon; and might then be withdrawn, cancelled, and filed with the State treasurer, by order of the court, but not otherwise." And the act further provided, that in every case in which any such suit or proceeding had been or might be instituted, the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity, or whether by original or cross bill, require the original bond or bonds to be produced and filed; and if that were not done, and the bonds filed and left to remain filed, the court should, on the same day, dismiss the suit, proceeding, or cross bill.

Afterwards, on the 25th of June, 1855, the State appeared to the suit, by its attorney, and, without pleading to or answering the declaration of the plaintiff, moved the court to require him to file immediately in open court the bonds on which the

suit was brought, according to the act of Assembly above mentioned; and if the same were not filed, that the suit be dismissed.

Upon this motion, after argument by counsel, the court passed an order directing the plaintiff to produce and file in court, forthwith, the bonds mentioned and described in the declaration. But he refused to file them, and thereupon the court adjudged that the suit be dismissed, with costs.

This judgment was afterwards affirmed in the Supreme Court of the State, and this writ of error is brought upon the last-mentioned judgment.

The error assigned here is, that the act of December 7, 1854, impaired the obligations of the contracts between the State and the plaintiff in error, evidenced by and contained in each of the said bonds, and the endorsement thereon, and was therefore null and void, under the Constitution of the United States.

The objection taken to the validity of the act of Assembly cannot be maintained. It is an act to regulate the proceedings and limit the jurisdiction of its own courts in suits where the State is a party defendant, and nothing more.

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Arkansas, by its Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is, that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and

no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the Legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power, the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.

Nor has the State court, in the judgment brought here for review, decided anything but a question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought, nor the obligations it created, or the rights of parties under it. It has decided, merely, that it has no right under the laws of the State to try these questions, unless the bonds given by the State are filed. The plaintiff refused to file them pursuant to the order of the court, and the case was thereupon dismissed, for want of jurisdiction in the court to proceed further in the suit. There is evidently nothing in the decision, nor in the act of Assembly under which it was made, which in any degree impairs the obligation of the contract, and nothing which will authorize this court to reverse the judgment of the State court.

The writ of error must therefore be dismissed, for want of jurisdiction in this court.

The two cases of William A. Platenius, administrator of James Holford, against the State of Arkansas, in covenant, are the same in all respects with the one above decided, and must also, for the same reasons, be dismissed for want of jurisdiction.

THE PRESIDENT AND DIRECTORS OF THE BANK OF WASHINGTON, AND HENRY S. AND FREDERICK S. HOLFORD, ADMINISTRATORS OF JAMES HOLFORD, DECEASED, PLAINTIFFS IN ERROR, *v.* THE STATE OF ARKANSAS, AND HENRY L. BRISCOE, SANDFORD C. FAULKNER, AND JAMES H. WALKER. SAME *v.* THE STATE OF ARKANSAS AND THE BANK OF THE STATE OF ARKANSAS.

A bill in chancery, purporting to be a cross bill, filed under the same law of Arkansas which was mentioned in the preceding case of Holford's Administrator *v.* The State of Arkansas, comes under the decision in that case, and must be dismissed for want of jurisdiction in this court.

THESE two cases depended upon the same principle, and a report of the first will apply equally to the second.

It was brought up from the Supreme Court of the State of Arkansas by a writ of error issued under the twenty-fifth section of the judiciary act.

The case is stated in the opinion of the court.

It was argued by *Mr. Pike* for the plaintiffs in error, and by *Mr. Hempstead* for the defendants.

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

This is a bill in equity, brought in the Chancery Court of the State of Arkansas, to recover the money due on or which had arisen from, certain bonds issued by the State, to which the complainants claimed to be entitled. The bill is drawn out very much at length, and states particularly the bonds and contracts on which the complainants are proceeding, and also certain laws and acts of the State, which the bill alleges impaired the obligation of these contracts, and were forbidden by the Constitution of the United States.

It is unnecessary, however, to state at large the contents of the bill, or the particular contracts and bonds to which it refers, because the decision of the State court dismissing the bill has no relation to the validity of these contracts, or to the rights and obligations which they created. The bill was dismissed by the State court upon the same ground with the common-law actions above mentioned; and the appeal to this court must be disposed of upon the principles upon which we have dismissed the writs of error.

The bill was filed in November, 1854, and in February, 1855, the attorney for the State moved the court to dismiss it, unless the bonds upon which the complainants were proceeding were forthwith filed according to the provisions of the act of December, 1854. The complainants put in written objections to the motion, and finally refused to file the bonds. The court overruled the objections as insufficient, and dismissed the bill.

The complainants call their bill a cross bill. The bill filed by the State, and which gave rise to this, is not set forth in full in the transcript. The appellants in their bill refer to it, and state that it was filed by the State for itself and in behalf of all the creditors of the Real Estate Bank; and that it claims for the State a right to share with other creditors of the bank in certain assets of the bank in the hands of trustees, although the bonds issued by the State, which furnished the capital for the bank, had not been paid; and many of these bonds were held by the appellants, who were creditors of the bank as well as of the State.

But this is not a cross bill in the chancery sense of the words; the complainants, according to their own statement, were not defendants in the suit brought by the State. They cannot, therefore, file a cross bill, nor be regarded as defending themselves in that form of proceeding against the suit of the State. Their bill is evidently a suit against the State and others, to enforce the payment of money due on certain contracts made by the State, and the State is made a party defendant in the suit. And for the reasons assigned in the aforegoing cases at common law, the judgment of the State court dismissing the bill is not open to revision here. Like the cases at common law, it was dismissed by the State court for want of jurisdiction to proceed further, after the passage of the act of December, 1854.

The appellants have not sought to come in under the bill filed by the State for itself and all the creditors of the Real Estate Bank, and to share with the State the assets in the hands of the trustees, who are assignees of the bank. Nor, indeed, could they do so upon the allegations made in their bill; for they do not claim a common interest with the State in the fund they are pursuing, but an adverse interest, and deny the right of the State to share in it, and could not, therefore, come in and associate themselves as complainants with the State in its creditor's bill when they denied that the State was a creditor of the fund.

The laws and proceedings on the part of the State may have operated harshly and unjustly upon the appellants. But it is not the province of this court to decide that question. Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State; and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State, and the courts of the United States are expressly prohibited from exercising such a jurisdiction.

The case must be dismissed for want of jurisdiction in this court; and the case of the Bank of Washington et al. against the State of Arkansas, and the Bank of Arkansas, being confessedly an original bill, must be disposed of in like manner.

JAMES BARTON, PLAINTIFF IN ERROR, *v.* ROBERT FORSYTH

Where there was an affidavit made, after verdict and judgment, that the affiant was the real party in interest, and prayed to be substituted for, or admitted with, the defendant, and the court overruled the motion, an exception to this ruling will not bring up the points which were raised at the trial; nor will it bring up the ruling upon the motion.

Exceptions must be taken or the points reserved whilst the jury are at the bar.
Evidence of the sale of property under certain proceedings of a State court was properly received in the Circuit Court, where the proceedings of the State court were duly certified, and it had competent jurisdiction over the subject-matter.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the northern district of Illinois.

The case is stated in the opinion of the court.

It was argued by *Mr. Ballance* and *Mr. Reverdy Johnson* for the plaintiff in error, and by *Mr. Williams* for the defendant.

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

This action was brought in the Circuit Court of the United States for the district of Illinois, to recover a certain lot in the town of Peoria, described in the plaintiff's declaration.

In that suit, Forsyth, the defendant in error, was plaintiff, and Barton, the plaintiff in error, was the defendant; and upon the trial, the judgment of the Circuit Court was in favor of the plaintiff, Forsyth, and thereupon Barton brought the case here by writ of error.

It appears from the record that the title was a very disputed one, and sundry questions of much nicety and difficulty were raised in the trial and decided by the court. But, from the manner in which the case has been brought up, none of these questions are open for revision here; for no exception to them appears to have been taken or reserved by Barton while the jury were at the bar.

The record shows, that after the trial, and after verdict and judgment for Forsyth, Charles Ballance filed an affidavit, stating that he was the landlord of Barton, and the real party in interest, and thereupon moved the court to substitute him for Barton, as defendant; or if, in the opinion of the court, that could not be done, that he might be admitted as co-defendant with Barton, and that Ballance might proceed with the suit in his own name. But the court overruled the motion, and refused to permit said Ballance to become a defendant in the suit. "*To all which decisions, rulings, and instructions, defendant then and there excepted, and prayed that this bill of exceptions be sealed, signed, and made a record, which is done.*" And this has been relied on here as an exception to all the points which the transcript shows to have been raised at the trial, and decided by the court. But this is no valid exception to anything, according to the well-settled and established principles of law. It has been repeatedly ruled by this court, as will appear by the cases reported, that no instruction to the jury, given or refused by the court below, can be brought here for revision by writ

of error, unless the record shows that the exception to it was taken or reserved while the jury were at the bar.

This is required by the statute which authorized the exception, and cannot be dispensed with. If the party does not reserve the exception at the time at which the law requires it to be done, he acquiesces in the decision, and cannot bring up the point upon writ of error.

But in this case, the exception was not proposed to be reserved until long after the trial was over, and the verdict and judgment had been entered; for the affidavit of Charles Ballance, upon which his motion was made, appears to have been sworn to on the 22d of July, 1856, after judgment, and his motion was not overruled until August 6th, on which last-mentioned day he for the first time took his exceptions. Such an exception is clearly unauthorized by law, and the decisions and rulings to which it refers cannot be considered upon this writ of error.

There is but one exception legally taken, and that is upon the admission as evidence of the legal proceeding under which the lot in question was sold as the property of a certain Michael La Croix, to pay his debts, and at which sale Morrison was the purchaser, under whom Forsyth claims title.

Barton objected to the admissibility of this evidence, and the judges of the Circuit Court were divided in opinion; and thereupon the evidence was allowed to go to the jury, and the defendant excepted. Upon this point, therefore, the plaintiff in error is entitled to the consideration and judgment of this court.

But we think that there was no error in admitting the evidence objected to. The documents appear to be duly certified, and the proceedings under which the sale was made to have been before a court of competent jurisdiction. If there were any irregularities or errors in the proceedings after they were instituted, they were not open to examination in the Circuit Court, coming in, as they did, collaterally as evidence of title. Being the proceedings of a judicial tribunal which had jurisdiction over the subject-matter, the Circuit Court had no right to take upon itself the functions of an appellate court, and inquire whether the debts claimed were really due from La Croix, nor whether the proceedings were conducted and the decision rendered in good faith by the tribunal which authorized the sale.

This being the only point legally before this court, and there being no error in it, the judgment of the Circuit Court must be affirmed, with costs.

JOHN S. WILLIAMS, ADMINISTRATOR OF JAMES WILLIAMS, DECEASED, APPELLANT, *v.* ROBERT M. GIBBES AND CHARLES OLIVER, SURVIVING EXECUTORS OF ROBERT OLIVER, DECEASED; AND ROBERT M. GIBBES AND CHARLES OLIVER, SURVIVING EXECUTORS OF ROBERT OLIVER, DECEASED, APPELLANTS, *v.* JOHN S. WILLIAMS, ADMINISTRATOR OF JAMES WILLIAMS, DECEASED.

Where an assignee of a claim upon a foreign Government, holding it under an assignment supposed to be good, but afterwards adjudged invalid, prosecuted the claim to a successful result, and was subjected to costs and expenses in protecting the fund from rival claimants, and thereby preserving it, he was entitled to a reimbursement of these costs and expenses by the true owner, upon a final settlement of accounts between them.

Being placed in the position of a trustee, it was his duty to defend the title, and the expenses for so doing were properly chargeable to the estate.

The assignee ought also to have been allowed a compensation for his trouble and personal exertions in the prosecution of the claim; and under the special circumstances of this case, the Circuit Court having allowed thirty-five per cent. of the sum realized, this court are not prepared to say it is too much.

An objection, that the executors of the assignee had distributed a portion of the money in the regular course of administration, should have been made when the cause was before this court upon its merits. After a mandate has gone down, and the cause came before the Circuit Court for a settlement of accounts, the objection comes too late.

No objection can be made to the Circuit Court allowing a supplemental answer to be filed when the mandate went down. It was like a petition to bring before the court the facts, which were proper to be known before instructions were given to the master as to the mode of settling the accounts.

THESE were cross appeals from the Circuit Court of the United States for the district of Maryland. In the report, the first case only will be mentioned, viz: that of Williams against Oliver's executors.

The case was formerly before the court, and is reported in 17 How., 239.

The facts are stated in the opinion of the court.

It was argued by *Mr. Davis*, *Mr. Dulany*, and *Mr. Martin*, for Williams, and by *Mr. Reverdy Johnson* and *Mr. Campbell* for Oliver's executors.

The decree was for $9,686.33 in money, and $19,215.95 in stock, instead of $22,866.94 in money, and $32,847.77 in stock, as claimed by the appellant.

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.

A bill was filed in the court below by Williams, the present appellant, to recover of the defendants the proceeds of the share

of complainant's intestate in what is known as the Baltimore Company, which had a claim against the Mexican Government, that was awarded to it under the treaty of 1839. The proceeds of the share amounted to the sum of $41,306.41. The history of the litigation to which the award under the treaty gave rise, in the distribution of the fund among the claimants or the assignees composing the Baltimore Company, will be found in the report of four of the cases which have heretofore come before this court. (11 How., 529; 12 ib., 111; 14 ib., 610; 17 ib., 233, 239.) That of Williams *v.* Gibbes, in 17 How., contains the report of the present case, when formerly here. This court then decided that the claim of the executors of Oliver to the share of Williams was not well founded; that the interest of Williams in the same had not been legally divested during his lifetime; and that his legal representative then before the court was entitled to the proceeds. The decree of the court below was reversed, and the cause remanded for further proceedings, in conformity with the opinion of the court. Upon the cause coming down before that court on the mandate, the defendants, the executors of Oliver, set up several charges against the fund, which it was claimed should be received and allowed in abatement of the amount.

1. For certain costs and expenses to which they had been subjected in resisting suits instituted against it by third parties. The history of these suits will be found in the cases already referred to in this court, and need not be stated at large.

2. For services and expenses of Oliver, in his lifetime, in the prosecution of the claim of the Baltimore Company, as its attorney and agent before the Government of Mexico, from the year 1825 down to the time of his death, in 1834.

The court below allowed to the executors the costs and expenses to which they had been subjected in defending the suits mentioned, and also thirty-five per cent. of the fund in question for the services of Oliver.

The case is one in many of its features novel and peculiar.

James Williams, the intestate, and owner of the share in the Baltimore Company, became insolvent in 1819, and took the benefit of the insolvent laws of Maryland, and in 1825 the insolvent trustee of his estate sold and assigned to Robert Oliver the share in question in this company; and from thence down to the year 1849, Oliver in his lifetime, and his executors afterwards, did not doubt but that a perfect title to the share had passed by virtue of this assignment. In that year, the Court of Appeals of Maryland decided, in a case between the executors and an insolvent trustee of Williams, that no title passed to Oliver by this assignment; and, as a legal conse-

quence, it was held by this court, in 17 How., that the interest remained in Williams at his death, and of course passed to his legal representative, the complainant.

All the services and expenses, therefore, of Oliver, in his lifetime, in the prosecution of the claims of the Baltimore Company against the Government of Mexico, and of the litigation since encountered by his executors in respect to the share, have resulted in securing the proceeds of the same to the estate of Williams, the original shareholder. Williams in his lifetime, and his legal representatives since, down till the fund was in court awaiting distribution, had taken no steps for its recovery, nor had they been subjected to any expense. The whole of the services had been rendered, and expenses borne, by Oliver and his executors; and the question is, whether, upon any established principles of law or equity, the court below were right in taking into the account in the settlement between the parties these services and expenses. We are of opinion they were.

By the judgment of the Court of Appeals of Maryland, Oliver was at no time the true owner of this share, as, notwithstanding the assignment by the insolvent trustee, it still remained in Williams. Oliver thereby became trustee, instead of owner, of the share and of the proceeds, as did also his executors, and they must be regarded as holding this relation to the fund from their first connection with it. In that character the executors have been made accountable to the estate of Williams, and have been responsible since the fund came into their possession for all proper care and management of the same. In defending these proceeds, therefore, against suits instituted by third parties to recover them out of the hands of the executors, they have done no more nor less than they were bound to do, as the proper guardians of the fund, if they had known at the time the relation in which they stood to it, and that they were defending it for the benefit of the estate of Williams, and not for that of Oliver. The services rendered and expenses borne could not have been dispensed with, consistent with their duties as trustees.

But it is said that these suits were defended by the executors, while claiming the fund in right of their testator, and hence for the supposed benefit of his estate; that the defence was not made in their character of trustees, and cannot, therefore, be regarded as a ground for charging the estate of Williams with the costs of the litigation.

The answer to this view is, that although in point of fact the defence was made under the supposition that the fund belonged to the estate of Oliver, yet, in judgment of law, it was made

by them as trustees, and not owners, as subsequently judicially ascertained; and as the costs and expenses were properly incurred in the protection and preservation of the fund, it is but just and equitable they should be made a charge upon it.

The misapprehension as to the right cannot change the beneficial character of the expense, when indispensable to its security.

The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned, and the expenses are properly chargeable in his accounts against the estate. (2 Story Eq. Juris., sec. 1275.)

Another principle which we think applicable to this case is to be found in a class of cases where a *bona fide* purchaser, for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner, on account of some latent infirmity in the title. It is well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity. (2 Story Eq., secs. 799 and 7996; 6 Paige R., 403, 404; 1 Story Rep., 494, 495.)

A kindred principle is also found in a class of cases where there has been a *bona fide* adverse possession of the property tacitly acquiesced in by the true owner. The practice of a court of equity, in such cases, does not permit an account of rents and profits to be carried back beyond the filing of the bill. (8 Wheat., 78; 27 E. L. and E. Rep., p. 212; 7 Ves., 541; 1 Ed. Ch., 579.) This principle is applicable where the person in possession is a *bona fide* purchaser, and there has been some degree of remissness, or negligence, or inattention, on the part of the true owner, in the assertion of his rights.

Courts of equity, it would seem, do not grant active relief in favor of a *bona fide* purchaser, making permanent meliorations and improvements by sustaining a bill brought by him against the true owner, after he has succeeded in recovering the property at law. (6 Paige R., 390, 403, 404, 405; 1 Story R., 495; 8 Wh., 81, 82.)

The civil law in this respect is more liberal, and provides a remedy in behalf of the purchaser, even beyond an abatement of the rents and profits for such expenditures as have enhanced the value of the estate, (cases above;) and, indeed, generally applies the principle in favor of any *bona fide* possessor of property who has in good faith expended his money for its preser-

vation or amelioration; otherwise, it is said, the true owner appropriates unjustly the property of another to himself. (Touillier, 3 B., tit. 4, ch. 1, secs. 19, 20.)

Now, in the case before us, Oliver, in 1825, purchased this share in the Baltimore Company for the consideration of $2,000, its full value at the time. The purchase was made from the insolvent trustee of Williams, whom all parties concerned believed had the power to sell and transfer the title. Williams, down till his death in 1836, set up no claim to it, nor did his representative after his death till August, 1852, when this bill was filed. Oliver and his executors had been in the undisturbed possession, so far as respects any claim under the present right, for the period of twenty-seven years. And although it may be said in excuse for any remissness, and by way of avoiding the consequences of delay, that Williams, and those representing him, had no knowledge of the defect in the title till the decision of the Court of Appeals of Maryland; it may be equally said, on the other hand, that Oliver and his executors were alike ignorant of it, and had in good faith expended their time and money in recovering the claim against the Government of Mexico, and afterwards in defending it against a long and expensive litigation.

It is difficult to present a stronger case for the protection of a *bona fide* purchaser from loss, who has expended time and money in enhancing the value of the subject of the purchase, or a case in which the principle more justly applies, that where the true owner seeks the aid of a court of equity to enforce such a title, the court will administer that aid only when making compensation to the purchaser. We are, therefore, of opinion that the court below was right in allowing in the account the costs and fees paid to counsel by the executors in the defence of the suits.

In respect to the thirty-five per cent. allowed for the prosecution of the claim against the Government of Mexico, it stands, in principle, upon the same footing as other services and expenses incurred in protecting and preserving the fund after possession was obtained. The amount of compensation depends upon the proofs in the case as to the value of the service, and which must, in a good degree, be governed by the usual and customary charges allowed for similar services and expenses. As this claim was prosecuted with others by Oliver when he supposed and believed that he was the owner, and that he was acting on his own behalf, and not as trustee for Williams, the rate of compensation must rest upon all the facts and circumstances attending the service. There could have been no agreement as to the compensation. And for the same reason, it cannot

be expected that an account of the service and expenses was kept so as to enable the court to arrive with exactness at the proper sum to be allowed, as might have been required, if Oliver had been chargeable with notice of the trust. The proofs show that Oliver appointed agents to represent him at the Government of Mexico as early as March, 1825, and that these agencies were continued from thence down till his death in 1834; and that during all this time he kept up an active correspondence with them and others, and with our ministers at Mexico, and with his own Government, on the subject. The justice of these claims had been acknowledged by the Government of Mexico as early as 1823–'4, but no provision was made for their payment. They were regarded as of very little value, from the hopelessness of their recovery; and it is perhaps not too much to say, upon the evidence, that in the absence of the vigorous and efficient prosecution of them by Oliver, they would have been worthless. In the result, for the share in question, which was sold in 1825 for $2,000, there was realized from the Government of Mexico, under the treaty of 1839, the sum of $41,306.41. The estate of Williams has never expended a dollar towards recovering it; nor has Oliver ever received any compensation for his servicess. The amount may seem large, but we cannot say the court below was not warranted in allowing it upon the proofs in the case of the great service rendered, and of the customary charges in similar cases.

It has been urged by the executors of Oliver, that they had paid over three-eighths of the fund in the distribution of the estate before the filing of the bill in this case, and that they are not, therefore, liable for that portion of the fund. It is claimed that it was shown before the master that this portion was paid over in the regular course of administration, and as in duty bound by the laws of the State of Maryland. If this had appeared when the cause was heard upon the merits, and the question as to the right to this fund was determined, the ground now taken might possibly have been a good defence to that portion of the fund; and the complainant would have been sent to the distributees to recover it. This, however, may not be entirely certain; for there is authority for saying, that a trustee having notice that it is doubtful if the trust fund should be distributed according to the trusts under which he holds it, he should apply to the court for its direction before he executed the trust, by paying over the fund. (27 E. L. and Eq. R., p. 302.) In this case, the executors of Oliver had notice of the defect of the title of their testator after the decision of the Court of Appeals. But be this as it may, we think the question of liability, to the extent of the whole of the fund,

was disposed of in the case when before us on the merits, and was not reserved for the hearing on the adjustment of the accounts before the court below, on the coming down of the mandate. (17 How., 257.)

An objection has been made by the counsel for the appellant, Williams, in respect to the order of the court below, permitting a supplemental answer. We suppose this question rather a matter of practice than otherwise, resting in the discretion of the court below, and as a matter of convenience preparatory to the taking of the account before the master. The answer—and, for aught we see, the object in view might as well have been attained by a petition to the court, stating the facts—was put in for the purpose of bringing to the notice of the court the matters relied on in the adjustment of the accounts, and by way of charges to be deducted from the amount claimed. The proceeding enabled the court to give in advance directions to the master in making the settlement, and thereby narrow the grounds of controversy before him, and facilitate the hearing. It could work no prejudice to either party, for no claim by way of abatement of the account thus set up in the answer or petition should be allowed by the court, but what was pertinent to the subject of examination before the master.

Upon the whole, we are satisfied the decree of the court below was right, and ought to be affirmed.

Mr. Justice GRIER dissented.

WILLIAM PINKNEY WHYTE, ADMINISTRATOR DE BONIS NON OF JOHN GOODING, DECEASED, APPELLANT, *v.* ROBERT M. GIBBES AND CHARLES OLIVER, SURVIVING EXECUTORS OF ROBERT OLIVER, DECEASED; AND ROBERT M. GIBBES AND CHARLES OLIVER, SURVIVING EXECUTORS OF ROBERT OLIVER, DECEASED, APPELLANTS, *v.* WILLIAM PINKNEY WHYTE, ADMINISTRATOR DE BONIS NON OF JOHN GOODING, DECEASED.

Where the defendant appeared to a bill in chancery, and defended the suit, and no want of jurisdiction appeared in the record, and then the complainant died, an objection that the defendants were citizens of another State comes too late when made to a bill of revivor, which is only a continuance of the suit.

Moreover, a plea to the jurisdiction comes too late after a mandate has gone down from this court to the court below.

THESE were cross appeals from the Circuit Court of the United States for the District of Maryland, and were argued together with the preceding case by the same counsel.

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 in principle is similar to the case of Williams *v.* The Executors of Robert Oliver, in which the opinion has just been delivered, with the exception of a question made upon a bill of revivor.

The suit was originally brought by John Gooding, jun., administrator *de bonis non* of the estate of John Gooding, sen. After the determination of the cause by this court, reversing the decree below, and sending it back with directions to enter a decree for the complainant, and to take an account, the complainant died. Thereupon, Whyte, the present complainant, was appointed administrator *de bonis non*, and filed a bill of revivor of the original suit, and presented a petition to the court, praying that, as the defendants were residents of the city of New York, the subpœna may be served upon the counsel of the defendants in the original suit, which was granted. The defendants appeared, and filed an answer to the bill of revivor under protest, and insisted that the court had not jurisdiction of the original suit, as the complainant in that suit was a citizen and resident of Virginia, and the defendants were residents of New York. There does not appear to have been any order of the court upon the question presented in this answer; but the cause proceeded before the master, where it was pending at the time of filing the bill of revivor and answer to the same.

The point is now taken, that as it appears the defendants were citizens and residents in New York at the time of the filing of the original bill, and also the bill of revivor, the court below had no jurisdiction in the case.

The answer to this objection is, that no want of jurisdiction appeared on the face of the original bill, and the defendants appeared and defended the suit; and, as the bill of revivor is but a continuance of that suit, the residence of the parties at the time it was filed is altogether immaterial.

This question arose in the case of Clarke *v.* Matthewson et al., (12 Peters, 164,) and was decided in conformity with the rule above stated.

In respect to the other objection, that the court had not jurisdiction in the original suit, we may add, in addition to what we have said, it comes too late after the mandate has gone down to the court below. (3 How., 413.)

The decree of the court below affirmed.

Mr. Justice GRIER dissented.

THOMAS A. SNOW AND OLIVER PALMER, MANAGERS OF THE OCEAN TOW-BOAT COMPANY, CLAIMANTS AND OWNERS OF THE STEAM TOW-BOAT "STAR," AND OLIVER PALMER, APPELLANTS, *v.* CHARLES HILL ET AL., OWNERS OF THE SHIP "OCEAN QUEEN," AND GEORGE LAW, MARSHALL O. ROBERTS, AND BOWES R. MCILVAINE, TRUSTEES OF THE UNITED STATES MAIL STEAMSHIP COMPANY, CLAIMANTS AND OWNERS OF THE STEAMSHIP "CRESCENT CITY."

Where a tow-boat was descending the Mississippi river with a vessel fastened to each side, and another at the stern, and a collision ensued between one of the vessels thus lashed and an ocean steamer ascending the river, the evidence shows that the latter was in fault, and must pay for all the damage.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

On the night of the 5th November, 1852, a collision occurred at about midnight, in the Mississippi river, at a point about twenty miles below the city of New Orleans, between the steamship Crescent City and the ship Ocean Queen, then in tow of the steam tow-boat Star. The Crescent City was at the time ascending the river, bound for New Orleans. The tow-boat Star was descending the river, having in tow, on her starboard side, the ship Charles and Jane, on her larboard side the ship Ocean Queen, and astern the brig Telegraph. The ships on either side of the tow-boat were firmly lashed to the latter, their bows projecting some distance beyond those of the tow-boat—the brig was about forty fathoms astern. The effect of the collision was to cause damage to both the colliding vessels—and to the ship Ocean Queen, to such an extent as to compel her to return to New Orleans, take out her cargo, and there undergo extensive repairs.

The owners of the Ocean Queen libelled both the tow-boat Star and the steamship Crescent City. The owners of the Crescent City libelled the Ocean Queen and the tow-boat Star, to recover the damages they had sustained. The owners of the tow-boat Star libelled the steamship Crescent City, for the damages she sustained in the collision.

The cases were by consent consolidated and tried together.

The cause having been brought to a hearing before the Hon. T. H. McCaleb, judge of the District Court, on the 4th March, 1854, he pronounced a decree declaring that the collision was attributable to the improper position in the river and the bad management of the tow-boat Star; and he ordered a reference to a commissioner, to ascertain and report the amount of damage sustained by the Ocean Queen.

On the 18th May, 1854, the report of the commissioner was confirmed, and a decree was made in favor of the owners of the Ocean Queen against the stipulators of the tow-boat Star for $19,465.79, with interest from the 10th January, 1853, and costs.

The libel against the Crescent City was dismissed, with costs.

On the 25th May, 1852, the Ocean Tow-boat Company appealed to the Circuit Court, from the decree in favor of the owners of the Ocean Queen.

On the 8th June, 1854, the owners of the Ocean Queen appealed to the Circuit Court, from that part of the decree of the 18th May which dismissed the libel against the Crescent City, with costs.

In November, 1854, these appeals were argued before the Circuit Court; and on the 18th June, 1855, a decree was made, affirming that of the court below, in favor of the owners of the Ocean Queen, against the tow-boat Star, for the aforesaid sum of $19,465.79, with interest from the 10th January, 1853, and costs.

It further ordered the United States Mail Steamship Company to pay the costs of the action of the owners of the Ocean Queen against the Crescent City.

It was referred to a commissioner to ascertain the entire damage arising from the collision, and to apportion it between the United States Mail Steamship Company, claimant of the Crescent City, and the Ocean Tow-boat Company, claimant of steamboat Star, according to the admiralty rule, where there has been mutual fault, each company to bear its own costs.

On the 29th of June, 1855, the Ocean Tow-boat Company appealed to this court from this decree.

The owners of the Ocean Queen appealed to this court from so much of the decree of the Circuit Court as discharged the owners of the Crescent City from liability to them.

In November, 1857, the commissioner made his report of the entire damages occasioned by the collision to the several vessels, and the parties to the several actions, by their respective proctors, having filed their written consent to the entry of a decree confirming the report, on the 21st November, 1857, a final decree was entered in the said actions in favor of Charles Hill and others, owners of the Ocean Queen, against Thomas A. Snow and Oliver Palmer, managers of the Ocean Tow-boat Company, and Oliver Palmer, their surety, the sum of $19,465.79, with interest at the rate of five per cent. per annum, and costs of suit.

It further decreed that the Ocean Tow-boat Company, upon the payment of the said last-mentioned sum, should recover

from the United States Mail Steamship Company, and Arnold Harris and Frederick Fisher, their sureties, the sum of $9,732.89, the one-half of the amount of the damages sustained by the Ocean Queen, with interest, at the rate of five per cent., and one-half of the costs of the suit.

There were other points in the decree, which need not be mentioned.

There were then three appeals pending before this court, viz:

CHARLES HILL ET AL., IMPLEADED WITH THE STEAMSHIP CRESCENT CITY, *ads.* OCEAN TOW-BOAT COMPANY.

CHARLES HILL ET AL. *v.* THE UNITED STATES MAIL STEAMSHIP COMPANY.

CHARLES HILL ET AL. *ads.* THE UNITED STATES STEAMSHIP COMPANY.

The cases were finally narrowed down to the one which is at the caption of this report, and which was argued by *Mr. Cushing* on behalf of the Ocean Queen, *Mr. Cutting* on behalf of the Crescent City, and *Mr. Benjamin* on behalf of the Ocean Tow-boat Company, owners of the Star.

The arguments upon both sides were chiefly drawn from the evidence in the case, which was somewhat contradictory. A summary of that portion of it upon which the judgment was based, will be found in the opinion of the court.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in admiralty from the Circuit Court for the eastern district of Louisiana.

Hill and others, as claimants, in their libel, state that the Ocean Queen, being duly enrolled, registered, and equipped, left the port of New Orleans on a voyage to Liverpool, England, having a cargo of about 2,780 bales of cotton; that on the 5th of November, 1852, about half past nine o'clock, P. M., under the tow of the tow-boat Star on the larboard side, the ship Charles and Jane on the starboard, and a brig in tow astern, were proceeding down the river Mississippi for the Balize; that at about midnight on the same evening, twenty miles below New Orleans, the steamship Crescent City, then ascending the river, came in collision with the Ocean Queen on her larboard bow, cutting her to the bends, breaking her planking, timbers, and knees, and so injured the ship as to

disable her from the prosecution of her voyage, and compelled her to return to New Orleans to refit; and that the costs of repairs and expenses amounted to the sum of twenty-five thousand dollars; and a lien on the Crescent City and the Star, for the above sum, is jointly and severally claimed.

The answer of the United States Mail Steamship Company, a body corporate, owner, says, the Crescent City was ascending the Mississippi river to the port of New Orleans, and was at a point in the river just below the English Turn, when, at about midnight, the pilot and crew discovered a tow-boat, which proved to be the Star, with the Ocean Queen and two other vessels, a short distance in front, and close to the eastern bank of the river; that there was not sufficient room to pass between the tow and the bank; that the tow-boat and her tow were out of the usual course of vessels descending the river, and that the Crescent City was in her proper position; that the Ocean Queen had not a light set in her rigging or elsewhere, visible to those on board the Crescent City; that the tow-boat failed to ring her bell or stop her engines and float, in the manner pointed out by law; that the Crescent City had slowed her engines on approaching the tow-boat, and receiving no signal that she was descending the river, put the helm of the Crescent City to the starboard, so as to pass outside of and clear of the Star and her tow; that she was heading to the western bank of the river, and as they approached her the Crescent City stopped her engines, and then backed, and was backing when the Ocean Queen and the tow-boat Star ran into the starboard bow of the Crescent City, striking her about twelve feet from her stern, and causing great damage.

That the pilot, officers, and crew, of the Crescent City, managed their boat with great care and skill; that the collision was caused by negligence and want of care of the tow-boat Star and the Ocean Queen, in not keeping their proper position on the river, in not ringing their bell, &c.

The answer of the Tow-boat Company to the libel was filed, denying the allegations it contained, and charging the fault on the Crescent City.

As the decision of the court must be governed by the evidence, it is not important to refer to the other pleadings in the case.

David Kelly, a witness, after describing the tow-boat and the other vessels fastened to her, as stated in the libel, said, when they started from New Orleans the Ocean Queen had one of her own men at the helm; afterwards the Star sent a man who took charge of it. They proceeded down the river, as near the middle as possible. In about an hour, one of the

men from the tow-boat Star came on board and set the wheel again. They continued about the middle of the river until twelve o'clock at night. At this time the witness was on the lookout, when he saw the Crescent City ascending the river at a great distance. The tow was about the middle of the river, a little nearer the western than the eastern shore. The night was clear, so that one could see all over the river. Witness stood on the forecastle, forward, waiting for the Crescent City, supposing that she would keep clear of them, as there was plenty of room on the larboard side; but she approached so near that witness hailed her, and the tow-boat stopped her engines and rang her bell, but to no purpose; the Crescent City did not alter her course; she came so close that witness could see all over her forecastle forward, where her lookout should have been, but he saw no one on the lookout. He staid in his position until the Crescent City struck the ship Ocean Queen on her larboard bow. Witness then jumped off the forecastle and ran aft, but returned in a few minutes, and saw, for the first time, one or two men on the forecastle of the Crescent City. She struck the Ocean Queen on her larboard bow, and stove everything in forward; carried away the larboard cathead entirely, so that the anchor went down the full length of the chain, and parted all the fastenings of the Ocean Queen to the tow-boat, carried away the guards of the Star, and bent her smoke-pipe. The tow-boat brought the Ocean Queen back to the city. The witness was the only person on watch on the Ocean Queen. There were no lights hung out on the vessel, but he supposes her lights in the cabin must have been visible through the windows. Witness knew the river well; took particular notice, and is confident, when the Crescent City approached the tow, it was about the middle of the river. The Star did not alter her course. When he first saw the Crescent City, she was about half a mile distant; when he first hailed her, she was about four or five times her length from the tow. Witness thinks, when the Crescent City struck, she was going ahead fast. The tow-boat Star stopped her engine, and rang her bell; her light hung between the smoke-pipe and her forward fires.

John Marston was standing on the deck of the Ocean Queen when he first saw the Crescent City; she was about five times her length off. The night was clear, and he could distinctly see both shores. The tow-boat was heading down the river, as near the middle of it as possible. She was running about seven knots an hour; he thinks the Crescent City was running some eight or ten knots an hour when she struck the Ocean Queen. There were two signal-lights on the Star.

Henry Crowell, a witness, was on the deck of the Ocean Queen; saw the Crescent City half a mile off; as she approached, he hailed her. The tow was in the middle of the river, rather nearer to the western than the eastern shore; of this he is confident. Richard Matthews was master of the Ocean Queen. The night was clear and starlight; could see both shores. The Ocean Queen was nearer the western than the eastern shore. Soon after the collision, she drifted to the western shore.

Henry J. Whitney was master of the tow-boat; he has been engaged in that business eight or ten years; heard the bell ring; came immediately on deck; ran aft, and directed the hawser of the brig to be let go, in order that he might back. The tug was near the middle of the river, nearest to the western shore. He is positive as to this fact.

Witness has heard Captains Disney, Chapman, Brown, Laplace, Phillips, and others, say that Captain Foote, the pilot of the Crescent City, is not considered as a pilot, and especially among masters of tow-boats. Peter Curran was pilot of the Star, and on duty when the collision occurred. The Star had her full complement of men; was nearer to the western than the eastern shore. On seeing the Crescent City coming, he rang the bell to stop the engines; then rang the big bell hard, three or four times. The Crescent City seemed to come towards them, on the larboard side, till she got nearly abreast the ship's bow; then she hauled, as witness thought, nearly square across, until she hit the ship between the cathead and the stern, and hove her over on the guards of the tow-boat, which were broken. The bow of the Ocean Queen was a little ahead of the tow-boat. Witness watched the lights of the Crescent City when she turned her bow westward. At that time she was about a mile and a half from the tow. She appeared to be heading all the time westward, till she came abreast of the Ocean Queen, when she seemed to turn suddenly, as if she had her helm hard a-starboard to turn towards the western shore.

Asa Payson corroborates the above witnesses as to the tow being in the middle of the river, and the direction taken by the Crescent City across the river.

Foote, the pilot of the Crescent City, says he was ascending the river as near the eastern bank as it was prudent and usual to run. He descried the tow-boat, being on the lookout, from the top of the pilot-house; there was a man on the watch forward, Mr. Ranshaw, and also one on the deck. When he first saw the light, it was about a point on his port bow. He told the man at the helm there was a tow ahead, and to keep close

in to the eastern bank, for that was his position. As he approached the tow, an order to slow the engines was given, and at the same time witness said there was a tow ahead, either bound up or at anchor. The engines were slowed. The wheelsman said he could see no opening between the tow and the shore. Witness then directed him to put his helm to the starboard, and go outside of the tow. As soon as witness perceived the tow was descending the river, the engines were ordered to be stopped and backed. This order was obeyed, but it did not prevent the collision. The Crescent City was not going with force when the collision occurred. Captain Davenport appeared just after the collision, when the bows of the boats were still together. This was, he thinks, about twice the length of the boat from the eastern bank. He is confident, when he first saw the tow, it was not in the middle of the river. If he could have seen between the tow and the eastern shore, he should have kept near the shore; but not seeing an opening, he took a western direction, which was his proper course.

Several witnesses were examined who were on board the Crescent City, all of whom, more or less, corroborated the impression of the pilot, that they were very near the eastern shore, and that between the tow and that shore there was not room for the Crescent City to pass.

From what has been stated in the pleadings and testimony, it will be seen that in this, as in other cases of collision, the theories of the respective parties are in conflict. Both cannot be true; and if either be so to the extent claimed, the right and the wrong are established.

The claimants allege that the Ocean Queen in charge of the steam tow-boat Star, with two other vessels, was descending the river Mississippi, about twenty miles below New Orleans, being near the middle of the river, rather nearer to the western than the eastern bank, was run into by the Crescent City, and injured as described.

Some eight or ten witnesses called in behalf of the claimants—some of them experienced pilots, and well acquainted with the river—being on board the Star tow-boat, or one of the boats fastened to it, and several of them witnessed the collision, a part of whose testimony is above stated, and they all conduce to establish the allegations in the libel. They show that the tow-boat was in her proper course in the middle of the river, or rather nearer to the western than the eastern shore, and this all the witneses admit was the usual and proper course. They also show that the Star had lights, and that there was no want of care in her management. Her course down the middle of the river was continued, and on the approach of the

Crescent City, so as to threaten a collision, the hawser which fastened the brig to the stern was thrown off, so that the tow-boat might back; the engines were stopped, and the approaching boat was hailed, the bells rang, and the Star was inclined still further to the western shore. More than this could not be done, nor required of the tow-boat with her towage. Being in her right position, the Star had no reason to apprehend a collision until the danger became imminent. And when this was apparent, nothing more could be done by the tow-boat than was done. It would be a strange rule of navigation to require a boat descending in the middle of a river, more than twenty-four hundred feet in width, to keep out of the way of a vessel ascending the river close to the shore, a thousand feet from the descending boat, which should change its course to a direction across the river, out of its proper course, and with the view of crossing the bow of the descending boat. No stronger case could be put or imagined, to show fault in the ascending boat.

The theory of the Crescent City is unreasonable, and is unsustained by the evidence. It was ascending, as alleged, the eastern shore of the river, as near to it as could safely be navigated, until the light of the tow-boat was discovered, which was directly ahead, and so close to the shore as not to give room for the ascending boat to pass between it and the shore. This is untrue, if the facts be true as to the position of the tow-boat.

The position of the tow-boat is proved by experienced pilots and river men, well acquainted with the river for many years, and whose character for truth has not been questioned. They say that they could see both shores, and that from their knowledge of the river they cannot be mistaken.

To counteract this proof, there is nothing but the statements of the pilot of the Crescent City, who is proved to be ignorant and incompetent, and two or three witnesses on board that vessel, who were not shown to have a knowledge of the river. The pilot directed the helm to the starboard, with the view of passing the tow on the western side. And this course was continued until the collision occurred, by striking the larboard bow of the Ocean Queen. This bow was a little in advance of the Star.

Whilst one or two of the witnesses speak favorably of Foote, the pilot, the greater number speak of him as ignorant of his duties, and not fit for a pilot. And in addition to this, it seems he was not acquainted with the river. This is shown to some extent, as he seems to have relied more on the opinion of the man at the helm, than on his own knowledge and judgment.

The place of collision, as appears from a survey of the river, is 2,420 feet wide; and if the tow was in the middle of the river, there were twelve hundred and ten feet between the tow and the eastern shore, which afforded room for three vessels to pass abreast, of the capacity of the Crescent City.

The statement of Foote is conclusive against his theory. He starboarded his helm, to pass the western side of the tow. His approach was seen by those on board the Star and the other vessels connected with her, some time, and preparations were made to avoid the collision. This shows that Foote was mistaken as to the position of the tow, and this mistake was fatal. Whether it resulted from his ignorance of the course of the river, or of his duties as a pilot, or from both, is immaterial. It shows that the Crescent City was in fault, as the colliding vessel.

It is alleged that the Ocean Queen had no lights, and that on the approach of the Crescent City the Star did not stop her engines and float, as the statute of Louisiana requires of the descending boat. The Ocean Queen was passive, following in the tow of the Star; her lights were not required to be hung out. The tow-boat Star was responsible for her safe navigation, so far as skill and knowledge of the river were concerned; but it was not responsible for the wrongs of other boats, which could not, reasonably, be avoided.

The statute of Louisiana referred to, we think, is not in the case; from the facts proved, its requirements could have had no application.

The Ocean Queen was bound to a foreign country; the Crescent City was carrying on an intercourse between New Orleans and the Atlantic States. The agency of the tow-boat did not change the character of the commerce in which the vessels were engaged. The Ocean Queen was propelled by steam, and whether the power be located in the tug or in the ship, can be of little or no importance. It was subject to the admiralty jurisdiction, and to the rules applied to vessels having the same motive power.

The Circuit Court decreed against the Tow-boat Company in *solido*, the sum of $19,465.79 damages, with interest thereon at the rate of five per cent. per annum from the 10th of January, 1853, till paid, and costs of suit; and that the Tow-boat Company, upon the payment of the above sum, shall have and recover from the Mail Steamship Company, &c., $9,732.89, the one-half of the sum decreed as above.

In this decree we think there is error. The tow-boat was not in fault. Her equipments and crew were such as the law required, and the usage of the service. In nothing did the

tow-boat fail, which in the least conduced to the disaster. The Crescent City was wholly in fault, and the decree for the damages suffered by the Ocean Queen should have been against the colliding boat. The decree of the Circuit Court is therefore reversed, and the cause is remanded to that court, with directions to enter a decree for the above damage against the Mail Steamship Company, their sureties, &c., and also the sum of two hundred and eight dollars and ninety-seven cents for the damage done to the tow-boat, and also for costs.

WILLIAM HOLCOMBE, PLAINTIFF IN ERROR, *v.* JOHN MCKUSICK, JONATHAN E. MCKUSICK, CHRISTOPHER CARLE, HORACE K. MCKINSTRY, ELIAS MCKEAN, AND JOSEPH C. YORK.

Where there was a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations, a judgment upon the demurrer and motion to strike out was not such a final judgment as can be reviewed by this court.

THIS case was brought up, by writ of error, from the Supreme Court of the Territory of Minnesota.

The case is stated in the opinion of the court.

It was argued by *Mr. Bradley* for the plaintiff in error, upon which side there was also a brief filed by *Mr. Brisbin* and *Mr. Stevens*, and by *Mr. Cushing* and *Mr. Gillet* for the defendants.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Territory of Minnesota.

The suit in the court below was brought to recover damages for wrongfully entering the plaintiff's dwelling-house at Stillwater, Minnesota Territory, and doing great injury to the same, removing it from its foundations, damaging and destroying the personal property therein, &c.

The defendants, in their answer, set forth an act of the Legislature of the Territory of Minnesota, incorporating the city of Stillwater, and conferring upon the municipal authorities the usual powers for the well government of the inhabitants thereof; the organization of the government of the city under its charter, and the election of its officers, and, among others, that one of the defendants, J. E. McKusick, was elected marshal. The answer set forth, also, an ordinance passed by the city council, in pursuance of authority given by the charter, which, among other things, provided for the removal of ob-

structions in the public streets and landing places, and conferred authority upon the marshal to remove such obstructions. The answer then sets forth that the plaintiff's dwelling was erected upon Main street in the city, and obstructed the free use of the same, and had become a public nuisance; and that the marshal removed the said obstruction, in pursuance of the authority conferred upon him by the ordinance, which is the act complained of by the plaintiff; and that the other defendants were called in to his assistance in the performance of this duty. The answer then denies the special damage set up in the complaint.

The plaintiff, in reply to the new matter set forth in the answer, denies, according to the formula prescribed by the Minnesota code, the existence of the charter of the city of Stillwater, set forth in the answer, and avers that no act of incorporation was ever published, as prescribed by the laws of the Territory. The plaintiff then sets out at large a charter of the city, which was published according to law; denies the election of the municipal authorities under the charter, also the existence of any city ordinance passed by the city council; and the election of the defendant, McKusick, his qualification in the office, or that he ever entered upon his duties. The plaintiff also denies that his dwelling-house was erected on Main street, or that it obstructed the same.

There is also a long statement respecting the title to the land embraced within the corporate limits of Stillwater, which it is not material to set forth. The plaintiff further denies that, in making the removal of the dwelling-house, the defendants used proper care and caution to prevent unnecessary damage.

The defendants have demurred to all that portion of the reply which commences with denying the existence of the act of incorporation of the city of Stillwater, and including the charter set forth in the answer. They demur also to the allegation in the answer, stating that the dwelling-house was erected prior to the 12th day of September, 1848; and, also, to all that part of the answer relating to the title to the land embraced within the city of Stillwater.

The defendants also made a motion to strike out certain portions of the reply, which was granted, but it is not material to notice the portions particularly.

The District Court of the Territory sustained the demurrer of the defendants to the portions of the plaintiff's reply above referred to, with leave to the plaintiff to amend. No amendment having been made, judgment upon the demurrer was made absolute, with costs. An appeal was taken to the Su-

preme Court of the Territory, where the judgment below was affirmed, with costs. The case is now here on a writ of error to this court.

The portions of the reply demurred to, and also those stricken out on motion, must be regarded as disposed of, and it will be necessary to look at those portions left, which have neither been demurred to nor stricken out, and therefore remain unanswered. One portion of the reply in this predicament is as follows: "And the plaintiff denies that the said dwelling-house obstructed Main street, in the city of Stillwater, or that the same was kept or maintained as a public nuisance."

Another is, a denial of the existence of the ordinance of the city council of Stillwater, conferring authority upon the marshal to remove obstructions in the public streets; also a denial that the defendant, J. E. McKusick, was elected marshal, or had qualified as such; and, further, a denial by the plaintiff of the allegation in the answer, that the removal of the dwelling-house was made, doing no unnecessary damage, &c.

All these matters, in reply to allegations in the answer, constitute issues of fact upon the record, undisposed of; and it is quite clear, until disposed of in favor of the defendants, the plaintiff would be entitled to recover. They put in issue the authority of the defendants to remove the dwelling-house, which is set up in the answer; and also present a case, in which, if the general authority to remove obstructions from streets existed, it would not protect the defendants, as the dwelling-house was not within the limits of the street as claimed; also, if within it, unnecessary force was used, and unnecessary damage done to the building in the act of removal.

On the trial before the jury, the defendants would be obliged to meet these several issues, and maintain the allegations in their answer, before they would be entitled to a verdict, as either of them, if found for the plaintiff, would have displaced the justification set up in the answer.

The whole of the cause, therefore, in the court below, was not disposed of, and no final judgment rendered, upon which a writ of error from this court would lie. It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional, and does not authorize the court below to send up the case, unless all the matters between the parties to the record have been determined. The cause is not to be sent up in fragments. (11 How., 32; 21 Wend., 667.)

The statutes of Minnesota have provided for an appeal from

the District to the Supreme Court, on an interlocutory order affecting the merits. (Stat. Minn., p. 414, sec. 7.) It was, therefore, properly taken to the Supreme Court of the Territory; but that practice cannot govern this court in revising the judgments of the court below in this court.

We have rarely in our experience examined a case, which in its principles is common and readily understood, so complicated and confused by the mode of pleading which has been pursued, and which it is understood is in conformity with the system adopted in this Territory. The pleadings raise many immaterial and even trivial questions of fact and law, which have nothing to do with the substantial merits of the case, and seem, in practical operation, whatever may be the system in theory, to turn the attention of courts and counsel to small matters as of serious import, which are undeserving a moment's consideration, overlooking or disregarding the most material and controlling questions involved.

The demurrers are put in to detached statements in the answer, the statements thus demurred to loosely made, and often incongruous in themselves, and upon which no principle of law can be raised or applied to govern the decision.

The system is anomalous, and involves the absurd and impracticable experiment of attempting to administer common-law remedies under civil-law modes of pleading, and these very much perplexed and complicated by emendations and additions.

The case must be dismissed for want of jurisdiction, there being no final judgment in the court below.

THOMAS MCCARGO, PLAINTIFF IN ERROR, *v.* JOHN L. CHAPMAN.

An order of the Circuit Court to quash an execution, is not such a judgment as can be reviewed in this court by a writ of error.

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

The facts of the case are set forth in the opinion of the court.

It was argued by *Mr. Bradley* for the plaintiff in error, and by *Mr. Badger* for the defendant, upon which side there was also a brief by *Mr. Badger* and *Mr. Carlisle.*

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before us by a writ of error to the Circuit Court for the southern district of Mississippi.

On the 14th of May, 1855, the defendant moved to quash an execution issued in the above case, on two grounds: first, because the same issued more than seven years after a prior execution; second, because the same issued more than seven years after the return of the last preceding execution, in said cause.

On this motion the defendant read to the court the record of the judgment in the Circuit Court, which was entered for the sum of twenty-one hundred and nine dollars, and costs; on which an execution was issued the 15th of June, 1843, and was returned, no property found; and afterwards, an *alias fi. fa.* was issued, the 20th of April, 1855, which was levied on lots 3 and 6, section 35, township 14, range 6 west, as the property of the defendant, which was not sold for want of time.

It appeared that no other execution ever issued upon the above judgment, and the court sustained the motion and quashed the execution, to which an exception was taken. This writ of error is intended to bring before us the question, whether the motion to quash the execution was properly sustained. A preliminary question, however, arises, whether a writ of error can be maintained, on the decision of the above motion.

The judiciary act of 1789 authorizes this court to revise final judgments by a writ of error. And this court say, in Toland *v.* Sprague, 12 Curtis, 734, that a decision of the court upon a rule or motion is not of that character. And in Boyle *v.* Zacharie, 10 Curtis, the court say: "In modern times, courts of law exercise a summary jurisdiction, upon motion, over executions, and quash them, without putting a party to his writ of *audita querela;* but these motions are addressed to the sound discretion of the court, and their refusal is not a ground for a writ of error." In Mountz *v.* Hodgson, 2 Curtis, 124, it is said: "A refusal of the court below to quash the execution on motion, is, by some of the judges, supposed not to be a judgment to which a writ of error will lie. Others are of opinion that a writ of error will lie to that decision of the court; but that the writ of error is not to the judgment of the Circuit Court, but to that of the justices." In the case of Early *v.* Rogers et al., 16 How., 599, it is said: "Whether a court will quash an execution on account of proceedings against the debtor, as the garnishee of the creditor, is a question appealing to the discretion of the court below, and a court of error cannot revise its decision thereon."

In Brooks *v.* Hunt, 17 John., 484, a motion was made to the Supreme Court of New York to set aside a *fieri facias*, on the

ground that the party was discharged under the insolvent laws of the State. The court refused the motion; and, on error brought, the court of errors of New York quashed the writ of error. Mr. Chancellor Kent, on behalf of the court, assigned as one of the grounds of quashing the writ of error, that the rule or order denying the motion was not a judgment within the meaning of the Constitution or laws of New York.

And yet it is said in Co. Litt., 288, b, that a writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment, or execution in a suit. But it is added in the same authority, "without a judgment, or an award in the nature of a judgment, no writ of error doth lie." And the court say, in the case of Boyle *v.* Zacharie, "If, therefore, there is an erroneous award of execution, not warranted by the judgment, or erroneous proceedings under the execution, a writ of error will lie to redress the grievance."

Whatever discrepancies may be found in decisions on this subject, we think a writ of error will not lie on any judgment, under the act of 1789, which is not final, in whatever form it shall be given. This may be illustrated by the case before us. In this case, the Circuit Court quashed the execution; and, by a writ of error, we are called on to revise that decision. What will be the effect of an affirmance? May not the Circuit Court issue another execution on the same judgment? In short, is the action of the Circuit Court final as to anything except the particular motion before it? May it not be followed by another motion of the same import? If the writ of error may be allowed to one party, it cannot be denied to the other. And to what motions shall it be limited?

It has uniformly been held that error will not lie, without a statutory provision, on a motion for a new trial, to amend the pleadings, or any other motion which depends upon the discretion of the court.

If, in the language of this court in Boyle *v.* Zacharie, an execution should be issued not authorized by the judgment, the court, on motion, would set it aside or quash it; and should it refuse to do so, a mandamus would seem to be the proper remedy. It is a writ which may be issued to inferior courts and magistrates, to require them to execute that justice which the party is entitled to, and which, by law, they are enjoined to do, and where there is no other remedy.

This writ of error is dismissed, for want of jurisdiction.

JOHN R. IRVINE, APPELLANT, *v.* WILLIAM R. MARSHALL AND THOMAS BARTON.

At a sale of public lands in a Territory, an agent who purchased for another must account, as trustee, to his employer, although the statutes of the Territory have abolished all resulting trusts.

The United States, being the owner of the public lands within the States and Territories, have the right to say to whom, in what mode, and by what title, they shall be conveyed.

It promotes the public sales, that agents should be allowed to attend and purchase, under the usual responsibility of agents or trustees.

The control, enjoyment, and disposal, by the United States, of their own property, is independent of the locality of such property, whether it be situated in a State or Territory; nor are the contracts of the Government with respect to subjects within its constitutional competency, local, or confined in their effects and operation strictly to the sites of the subjects to which they relate.

Although a certificate may be the subject of bargain and sale, yet the United States can take care that the conveyance shall be made to him who is in good faith their vendee.

The jurisdiction of the courts of the United States as courts of equity is ample to enforce the performance of trusts under both the Constitution and laws.

The United States can declare by Congress what the law shall be with respect to the public lands, and enforce that law through the judiciary department.

Although the officers of the land department may in practice, and as a rule of convenience, have received the certificate of purchase as evidence of title, yet neither that practice nor the certificate itself can control the power either of the United States or of this court, to adjudge or to confirm the title to the land to the true owner.

THIS was an appeal from the Supreme Court of the Territory of Minnesota.

The facts are stated in the opinion of the court.

It was argued by *Mr. Cooper* for the appellant, and by *Mr. Bradley* for the appellee, upon which side there was also filed a brief by *Mr. Brisbin* and *Mr. Stevens.*

Mr. Justice DANIEL delivered the opinion of the court.

The proceedings in this cause, though in form somewhat anomalous and peculiar, may be regarded as presenting substantially the case of a bill for the specific performance of a contract; a demurrer to the relief sought by that bill, a decree (or what in the proceedings is called a judgment) sustaining the demurrer, although there is no express or formal direction or order for a dismission of the bill; and a general affirmance, by what is styled the judgment of the Supreme Court of the Territory, of the decision of the District Court.

The appellant, in his complaint in the District Court of the Territory, alleges, that at a sale of public lands which occurred on the 11th day of September, in the year 1854, at the land office at Stillwater, in the Territory of Minnesota, in pursu-

ance of the proclamation of the President of the United States, the appellee, Marshall, as the agent, and with the funds and under the authority of the complainant, and of the appellee, Barton, purchased for them the southwest quarter of section number seven, in township number twenty-eight north, of range twenty-three west, in the county of Ramsey, containing one hundred and sixty acres, at the price of one dollar and twenty-five cents per acre, making an aggregate of two hundred dollars for the entire purchase; the certificate for which purchase was, with the assent of the complainant and Barton, issued in the name of their said agent, Marshall. That notwithstanding the equality of interest in the land in the complainant and Barton, and the fact that the price was furnished by them in equal portions, viz: one hundred dollars by each of these parties, the appellee, Barton, has claimed the entire tract of land; and the agent, Marshall, in consequence, or under the pretext of this pretension, refuses to convey to the complainant his rightful portion, viz: one full undivided moiety of these lands.

The bill next charges, that Marshall is about to convey the whole of the land to Barton, in fraud of the complainant's rights, and concludes with a prayer that Marshall may be enjoined from executing such a conveyance to Barton, and may be compelled to convey to the complainant his full undivided half part of the land, in conformity with the terms and objects of the purchase; it contains also a prayer for general relief. To this complaint there was no answer; but the record of the District Court discloses the following entries:

"Territory of Minnesota, county of Ramsey. District Court, second district. John R. Irvine against William R. Marshall and Thomas Barton. Then came the defendants, by their attorney, and demur to the complaint of the plaintiff herein, and specify the following grounds of demurrer:

"First. The complaint does not state on its face facts sufficient to constitute a cause of action.

"Second. The complaint alleges that the defendant, Marshall, purchased the land mentioned therein, *in trust* for the plaintiff and the defendant, Barton. No trust arises or can grow out of the facts stated.

"Third. Admitting that a trust could arise upon the facts, the complaint does not show the plaintiff entitled to the relief sought, inasmuch as it does not specify the nature of the trust.

"Fourth. There is a defect of the parties defendants; it does not appear that the defendant, Barton, has any interest in the event of the action. It does not appear that the defendant,

Barton, has any interest 'in the event of the suit, adverse to the plaintiff.' "

Next follows the decision, judgment, or decree, by whichsoever of these titles it may be appropriately designated, in these words: "There is no allegation in the complaint that the conveyance was taken without the knowledge or consent of the complainant, nor that the purchase was made in violation of some trust. The complainant does not therefore bring himself within the provisions of sec. 9, p. 202, of the revised statutes, and the demurrer must be sustained. See also sec. 5, of the same chapter. I do not discover any defect of parties. The plaintiff has twenty days to amend, so as to bring his complaint within the provisions of sec. 9 referred to, if he shall be advised that the facts will warrant it."

There having been no amendment of the pleadings in the District Court, either proposed or allowed, the decision of that court must be regarded as final between the parties upon the case, as disclosed on the face of the record; and that decision having been taken by appeal to the Supreme Court of the Territory, the following transcript is certified as containing the proceedings of the latter tribunal in this cause:

"July 15, 1856. John R. Irvine, appellant, *v.* Marshall and Barton, respondents. This cause having been argued and submitted, after due consideration of the matters at issue herein, it appears to the court that in the order and judgment thereon in the court below, there is no error. It is therefore ordered that said judgment be in all things affirmed, with costs to respondents."

The omission in this latter decision of any statement of the particular grounds on which it has been placed, and the general reference made by it to the opinion of the District Court, not showing the principles and the authority on which the judgment of affirmance has been rested, lead necessarily to an examination of the opinion of the District Court as the true test of conclusions, adopting that opinion and relying upon it for their support. In such an examination, it would be unnecessary, and even irregular, to consider any points not ruled by the inferior court; as whatever has not been adjudged or passed upon by an inferior tribunal, cannot be embraced in a general judgment, either of affirmance or reversal, upon an appeal from its opinion.

The points intended to be ruled by the District Court, and affirmed by the Supreme Court of Minnesota, if sought for solely upon the face of the judgments of those courts, or even with the aid of the references to the Territorial statute furnished by the former judgment, it might be difficult to dis-

cover. Connecting those references, however, with the seventh and eighth sections of the statutes of Minnesota, (Rev. Stat., pp. 202, 203,) we may perceive in the decisions of these Territorial courts the design to assert and establish the following positions, viz: That in every instance of a grant or purchase, or of an agreement for the purchase of lands for a valuable consideration, in which the price or consideration shall be paid by one person, and the conveyance or the contract for title shall be to another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title and possession shall vest exclusively in the person named as the alienee in such conveyance or agreement. The position asserted by the court of Minnesota, in interpreting their statute, must be understood as broadly as it has just been stated, or it has no application to the case before us. It is a denunciation of everything like an equitable title or lien, or a resulting trust, with the exceptions contained in the eighth and ninth sections of the statute, of the interests of creditors of the equitable claimant, of instances in which the alienee or agent shall, without the knowledge and consent of him who paid the consideration, have taken the conveyance in his own name; or shall, in violation of some trust, have purchased the lands with moneys belonging to another person.

The authority and effect of the Territorial laws of Minnesota upon subjects within the legitimate bounds or cognizance of that Territorial Government, no person, it is presumed, will be disposed to question; but it seems equally clear that to respect the rights and interests which come not within the scope of that authority, but which are created by the Constitution and laws of the United States, imposes a duty as sacred as any which enjoins upon a State or Territory the obligation to protect and maintain whatever of power may justly belong to it. And it cannot without extravagance be supposed, that to secure these proper and necessary ends, the Territory should assume the power to control the acquisition or transmission of property never belonging to, and not acquired from, herself; to which, therefore, she could annex no conditions, much less conditions which might impair the interests of the citizens of every State, and of every State collectively in the Confederacy, and even of the United States, and render utterly worthless, and incapable of being disposed of, subjects in which the Territory has no legal right or property whatsoever. It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes,

and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States, and has heretofore been recognised and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining. Can this right co-exist with a power in a Territory (itself the property of the United States) to interpose and to dictate to the United States to whom, and in what mode, and by what title, the public lands shall be conveyed? If a person desirous of purchasing shall depute an agent to attend a sale of public lands, and if at such sale payment be made by the agent with the funds of his principal, and both agent and principal shall present themselves at the General Land Office, and mutually request a patent to be issued to the true owner, can it possibly be thought within the competency of a Territorial Legislature, either upon the suggestion, or upon proof of the fact, that a certificate of purchase was given to the agent in his own name, to interpose, and say to the Federal Government, *you shall not make a title to this person whom you know, upon the acknowledgment of all concerned, is the true and bona fide purchaser of the land, and if you do we will vacate that title?* Is it not for the increase of the revenue that the sales of the public lands should be as extensive as possible, and is it not obviously promotive of this end, that persons who can attend and bid at those sales by agent or attorney only, as well as those who can attend them in person, should have the power to purchase; and would not an inhibition of this privilege operate to restrict the sales of the public lands, and thereby injure the revenue of the Government? And *cui bono*, should this mischief be permitted? Simply to favor a visionary innovation for the destruction of resulting trusts and equitable titles, a class of titles resting upon the essential elements of all honest titles, *truth* and *justice*, and coeval with the very rudiments of equity law. And this innovation, too, to be extended not merely to cases which from contestation or from defective proof might be uncertain or hazardous, but to instances which shall forbid to persons willing and proffering the fulfilment of their duty, the power to do so. The power of being honest, a power surely not so often exerted as to merit being repulsed as obtrusive and ungracious.

1st. It has been argued that the subject of this controversy is situated within the limits of the Territory.

2d. That it is *property*, and may pass as such by devise or inheritance.

3d. That in some of the States and Territories, actions at law may be maintained on these certificates.

4th. It is asked under what head of jurisdiction, in the absence of express and particular statutory provision, the courts of the United States can recognise or enforce a resulting trust like that in the present case. The fallacy of the conclusion attempted from the first of the positions just stated, consists in the supposition, that the control of the United States over property admitted to be their own, is dependent upon locality, as to the point within the limits of a State or Territory within which that property may be situated. But as the control, enjoyment, or disposal of that property, must be exclusively in the United States, anywhere and everywhere within their own limits, and within the powers delegated by the Constitution, no State, and much less can a Territory, (yet remaining under the authority of the Federal Government,) interfere with the regular, the just, and necessary powers of the latter. Another error, inherent in the same position, is seen in the supposition that the contracts of the Government with respect to subjects within its constitutional competency are also local, confined in their effect and operation strictly to the *situs* of the subjects to which they relate. The true principle applicable to the objection just noted, and by which that objection is at once obviated, we hold to be this: That within the provisions prescribed by the Constitution, and by the laws enacted in accordance with the Constitution, the acts and powers of the Government are to be interpreted and applied so as to create and maintain a *system*, general, equal, and beneficial as a whole. By this rule, the acts and the contracts of the Government must be understood as referring to and sustaining the rights and interests of all the members of this Confederacy, and as neither emanating from, nor intended for the promotion of, any policy peculiarly local, nor in any respect dependent upon such policy. The system adopted for the disposition of the public lands embraces the interests of all the States, and proposes the equal participation therein of all the people of all the States. This system is therefore peculiarly and exclusively the exercise of a Federal power. The theatre of its accomplishment is the seat of the Federal Government. The mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone. Are these things in any degree compatible with the claim to prescribe to the United States the modes or the extent in which they may dispose of their own property, or with a denunciation of a forfeiture as the consequence of a departure from such a pretension?

With regard to the positions, that the right acquired by a purchase of a certificate, *bona fide* made, is property in the vendee, even before the emanation of the patent, and that some of the States have permitted suits at law to be instituted on certificates of purchase, (as several have permitted such suits on other equitable titles,) it is not perceived that the concession of either or both of these positions can in any degree impair the right of the United States to contract upon their own terms for the sale of their own property, or diminish their obligation in the fulfilment of their contract in good faith, to convey to their vendee the subject for which he has paid them. There certainly can exist nowhere a power to compel them to convey to any person, and much less to require of them the perpetration of a fraud in behalf of one in whom no shadow of a valid title is shown; and who, by the pleadings in this cause it is admitted, has acted dishonestly; whose admitted dishonesty indeed is the alleged and the sole foundation of the claim of the defendants.

When the engagements or undertaking of the United States, with respect to property exclusively and confessedly their own, from a period anterior to the existence of the Territorial Government, shall have been consummated; when the subject, and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the Territory, then indeed the Territorial regulations may operate upon it; but whilst these remain in the United States, or are affected by their rights, or powers, or duties, those rights, duties, or powers, can in no wise be influenced by an inferior and subordinate authority.

With regard to the fourth objection, of a want of jurisdiction in the courts of the United States, in the absence of express statutory provisions, to recognise and enforce a resulting trust like that presented by the present case, it is a sufficient response to say, that the jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States. Those courts are created courts of common law and equity; and under whichsoever of these classes of jurisprudence such rights or duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong.

By the language of the Constitution it is expressly declared, (art. 3d, sec. 2, clause 1,) that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties

made under their authority. By the statute which organized the judiciary of the United States, it is provided, that the Circuit Courts shall have jurisdiction of suits of a civil nature "at common law or in equity." (Vide 1 Stat. at L., p. 78, section 11.) In the interpretation of these clauses of the Constitution and the statute, this court has repeatedly ruled, that by cases at common law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognised, and equitable remedies are administered. (Vide Parsons *v.* Bedford, 3 Pet., 447, and Robinson *v.* Campbell, 3 Wheaton, 212.) That by cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence. (Vide the case of Robinson *v.* Campbell, just cited, and the United States *v.* Howland, 4 Wheaton, 108.) Here, then, is an exposition both of the Constitution and laws of the United States, with reference both to the jurisdiction and powers of their courts, and to the instances in which it is their duty to exercise those powers; and the inquiry forces itself upon us, who shall or can have the authority to deprive them of those powers and that jurisdiction? or can those courts, consistently with their duty, refuse to exert those powers and that jurisdiction for the protection of rights arising under the Constitution and laws, in the acceptation in which both have been interpreted and sanctioned?

With respect to resulting trusts, and the jurisdiction and duty of the courts of the United States to enforce them, the opinion of this court has been emphatically declared; and so declared in a case of peculiar force and appositeness, because it related to the acts of an agent in the entry and survey of lands, and is in its principal features essentially the same with the cause now under consideration. We allude to the case of Massie *v.* Watts, reported in the 6th vol. of Cranch, p. 143. This was a suit in equity in the Circuit Court of the United States for the district of Kentucky, to compel the conveyance of land from an agent to his principal, upon the ground that the agent had withdrawn an entry on lands made in the name of his principal, had caused an entry and survey to be made in his own name, and had thereby obtained a legal title to this land. In decreeing the relief sought by the complainant, this court, expounding the law by the Chief Justice, (pp. 169, 170,) said: "If Massie (*i. e.*, the agent) really believed that the entry of O'Neal, (his principal,) as made, could not be surveyed, it was his duty to amend it, or to place it elsewhere. But if in this he was mistaken, it would be dangerous in the extreme—

it would be a cover for fraud which could seldom be removed, if a locator alleging difficulties respecting a location might withdraw it, and take the land for himself. But Massie, the agent of O'Neal, has entered the land for himself, and obtained a patent in his own name. According to *the clearest and best-established principles of equity*, the agent who so acts becomes a *trustee* for his principal. He cannot hold the land under an entry for himself, otherwise *than as a trustee for his principal.*" This exposition of the equity powers of the courts of the United States as applicable to resulting trusts—a power inseparable from the cognizance over frauds, one great province of equity jurisprudence—is conclusive.

With respect to the power of the Federal Government to assert, through the instrumentality of its appropriate organs, the administration of its constitutional rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy.

In the case of Wilcox *v.* Jackson, reported in the 13th of Pet., p. 498, which presents an instance of an attempt to control, by the authority of the laws of the State of Illinois, the effect and operation of a right or title derivable from the United States to a portion of the public lands, this court thus emphatically declare the law: "It has been said that the State of Illinois has a right to declare, by law, that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, by descent, devise, or alienation. But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this, a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a State Legislature to say, that notwithstanding this, the title shall be deemed to have passed, the effect would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that

Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only; and the practical result in this very case would be, by force of State legislation, to take from the United States their own lands, against their own will and against their own laws. We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

It has been argued, that it is the practice of the officers of the land office to receive the certificate of purchase, as presenting upon its face the only evidence of title, and that those officers will recognise no other evidence of title but this certificate. Of the practice or the opinion of the officers of the land department, no evidence is exhibited upon this record. But supposing these to be in accordance with the above suggestion, they could by no means control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them; and this they must do, in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government. The reception of the certificate of purchase as evidence of title may be regular and convenient as a rule of business, but it has not been anywhere established as conclusive evidence, much less has it been adjudged to forbid or exclude proofs of the real and just rights of claimants. It is mere justice to the officers of the land department, to presume that they would respect the interpretation of the Constitution and laws promulged by those who are appointed to be their expositors; but upon a supposition, or even upon a conviction of the converse of this, the path of duty here is plain and direct, and must be followed without hesitancy or deviation. The judgment of the Supreme Court of Minnesota is reversed with costs, and this cause is remanded to that court, with instructions that it be remitted to the District Court, with permission to the defendant to answer over to the complaint of the plaintiff; and in the event of a refusal or failure of the defendant so to do, with direction to the District Court to render a judgment in favor of the plaintiff, in conformity with the law, as ruled by this court in this cause.

Mr. Justice CATRON, Mr. Justice GRIER, and Mr. Justice CAMPBELL, dissented, and concurred with Mr. Justice NELSON in the following dissenting opinion:

Mr. Justice NELSON:

In this case, Marshall bought at the request of Irvine and Barton a quarter section of land, at a land sale in Minnesota Territory, for which two hundred dollars was paid, and a patent certificate given to him in his name. One hundred dollars of the money was furnished by Irvine, and one hundred by Barton, and the land according to the arrangement was to be held in trust by Marshall, for their benefit. Barton, for some reason not explained, afterwards claimed the whole instead of an undivided half of the section, and demanded a conveyance of the same from Marshall, the trustee. Irvine afterwards applied to the trustee for a conveyance of his undivided half, which was refused, in consequence of the previous claim of Barton to the whole section. This suit is brought by Irvine, against Marshall, the trustee, to compel him to make the above conveyance.

The court below, on a demurrer to the complaint which contained the facts substantially as above stated, gave judgment for the defendant, refusing to compel the execution of the conveyance.

The question presented would be a very plain one at common or equity law upon the doctrine of trusts as administered by courts unaffected with any local legislation. The facts would present the case of a resulting trust for the benefit of the persons who had furnished the purchase-money, and the trustee compelled to convey accordingly the interest belonging to the respective parties.

But the Legislature of Minnesota have passed a law modifying the doctrine of uses and trusts, and especially in respect to resulting trusts of the character in question. It has provided, that when a grant is made for a valuable consideration to one person, and the consideration paid by another, no trust shall result in favor of the person paying the consideration, but the title shall vest in the person named as grantee, subject only to two exceptions: 1. In favor of the creditors of the person paying the consideration money; and 2. When the person taking the conveyance in his own name shall have taken it without the knowledge or consent of the party paying the consideration, or when the trustee shall have purchased, in violation of his trust, with moneys belonging to another person. (R. S. of Minnesota, pp. 202, 203, secs. 7, 8, 9.)

It is admitted that the present case does not fall within either

of the exceptions, and on this ground the relief in the court below was denied.

This provision in the laws of Minnesota will be found adopted in several of the States. This precise modification of a resulting trust was incorporated into the laws of the State of New York as early as 1830, and from which, as is said, it was taken and engrafted in the statutes of this Territory.

The object of the change is to prevent secret and fraudulent conveyances of property, with the view of defrauding creditors. A common and successful contrivance for this purpose, is by placing the title of the property in the name of a third person, while the whole of the beneficial interest is in another, thereby concealing it from the creditor, and embarrassing his remedy against the property of the debtor.

The provision is designed to deter parties from engaging in this contrivance, by subjecting the property, thus concealed in the name of another, to the peril of being claimed and held by him as his own. The question is one of State policy, in regulating the terms and conditions of holding and disposing of the property within the State, so as to encourage open and frank dealing with the same, and to prevent concealed and covenous trusts as a cover for defrauding creditors. It may be wise or unwise; that we suppose is a question with which courts have nothing to do, as the power of a State to regulate the subject is unquestionable, and in this respect the power in the Territory is the same.

It is insisted, however, that the nature or character of the property in question, impressed upon it by the law of Congress providing for and regulating the sales of the public lands, takes it out of the system of municipal law which, it must be admitted, governs and controls parties in dealing with property in general in the States and Territories. If this be so, it constitutes certainly a very important exception; for it is, perhaps, not hazarding too much in saying that in the new States, and in the Territories for many years after their organization, the largest portion of the real property owned and cultivated by the inhabitants is held and enjoyed under a title similar to that in question, namely, a patent certificate. And we may, I think, in respect to property in this predicament, ask, under what system of laws is it to be held and regulated, if the municipal laws of the State are to be set aside? It is true, the laws of Congress provide for and regulate the sale of the public lands, and, in doing so, provide for this inchoate title to be given to the purchaser, on paying the purchase-money. And, if any one undertakes to question this title, the law of Congress is called in as the highest evidence of it. Thus far the law of

Congress operates, of whatever nature or character that may be. But beyond this, whether A or B owns this inchoate title, whether A has made a good sale and transfer of it to another, or such a one as the municipal law will give effect to, are questions which do not concern the law of Congress or the Federal authorities. They are questions arising purely under the municipal laws. Whether the original purchaser who has received the certificate has himself settled on the section under it, or whether he has transferred it to another settler, are questions in which the Federal Government has no interest. They belong to the State within which the lands are situate. Indeed, the land department so determined at an early day, and in case of a dispute as to the ownership of the certificate, it gives the patent to the person named in it, leaving the parties to settle their disputes in the courts of law. The question in this case is not whether a title has been derived from the Federal Government under the act of Congress—that title is admitted, indeed it is that which gives value to the right in dispute—the question is, who has acquired the right to the property, after the title has been acquired from the Government; in other words, who owns this inchoate title secured by the patent certificate? That is a question depending upon local law. The point was well put by Judge Barbour, in delivering the opinion of the court in Wilcox *v.* Jackson, (13 Pet., 517.) "We hold," he observed, "the true principle to be this: that whenever the question in any court, State or Federal, is, whether the title to land which had been once the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever according to those laws the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed according to the laws of the United States."

Now, it is upon this principle that the lands held under the patent certificate have become property in the State, and subject to its legislation, that they are subject to judgment and execution against the owner; to conveyance by deed or devise; to descend to his heirs at law on his decease, or to sale by a court of probate to pay his debts. And it may well be asked, if the title is thus subject to the municipal laws concerning judgments and executions, deeds of conveyance, devises, of descent, and of administration in the probate court, how the title can be exempt from the law of trusts? The general principles of equity can no more be invoked in respect to them than in respect to either of the other matters referred to, when they have been the subject of regulation by the local law.

That law then becomes the rule of property to govern them, the same as it governs the inheritance, or any other lawful disposition made of it. We do not see the reason or propriety of setting aside the local law in respect to this class of property as to trusts, while it is admitted to regulate every other legal disposition made of it; and I must therefore, for the reasons given, dissent from the opinion of the majority of the court.

GEORGE R. SAMPSON AND LEWIS W. TAPPAN, DOING BUSINESS UNDER THE STYLE AND FIRM OF SAMPSON & TAPPAN, PLAINTIFFS IN ERROR, *v.* CHARLES H. PEASLEE, COLLECTOR OF CUSTOMS.

By the eighth section of the act of Congress passed on the 30th of July, 1846, (9 Stat. at L., 42, 43,) it is declared that if the appraised value of imports which have actually been purchased shall exceed by ten per centum or more the value 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 true construction of this section is, that the additional duty of twenty per centum is to be levied only upon the appraised value, and not upon charges and commissions added to it.

The day of the sailing of a vessel from a foreign port is the true period of exportation of goods. The Secretary of the Treasury so directed it to be done, as he had a right to do by law; and this court concurs with him in this, as being a correct exposition of the statute.

Where an importation was alleged to be an unit, but divided into two invoices for the sake of convenience, and entered of different values, each invoice must stand upon its own footing; and the whole cannot be averaged, so as to avoid the additional duty which is levied upon one invoice taken by itself.

Where an examination made by the merchant appraiser was such as is usually made in buying and selling hemp in bales, and was satisfactory to the merchant appraiser, it was not open to the importer to show that he adopted a mode of examination insufficient to detect fraudulent packing or diversities in the qualities of the different parts of the importation.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Massachusetts.

The facts are stated in the opinion of the court.

It was argued by *Mr. Griswold* and *Mr. Reverdy Johnson* for the plaintiffs in error, and by *Mr. Black* (Attorney General) for the defendant.

Mr. Justice WAYNE delivered the opinion of the court.

This case has been brought to this court by a writ of error from the Circuit Court of the United States for the district of Massachusetts.

It is an action for money had and received. It was sued out by the plaintiffs against the defendant, the collector of customs

for the port of Boston, to recover the sum of $14,206.10, with the interest thereon, which the plaintiffs allege was illegally exacted from them by the defendant in his official character, and which was paid by them under protest, as the law permits that to be done.

The aggregate amount sued for is made by several items:

First, $1,624.25, being an amount of duty exacted on an importation of Manilla hemp, over and more than the duty on the value declared on *the entry of it.* Second, the sum of $12,067.60, for an additional duty of twenty per cent., exacted under the eighth section of the tariff act of 1846, on *the appraised value* of one of the invoices of the hemp; and the sum of $524.25 on another invoice of hemp, which the plaintiffs allege to be a portion of the same importation.

The plaintiffs recovered in the Circuit Court the sum of $1,022.75 damages and costs of suit, but being dissatisfied therewith, and with the rulings of the court, have brought this writ of error.

The plaintiffs were engaged in trade with China, Manilla, and the East Indies. They wrote to their agents in Manilla, in March, 1854, to purchase, and ship by the ship Telegraph, four thousand bales of Manilla hemp. The agent bought the hemp, and began to ship it on board of the Telegraph, from lighters, on the 23d of June, 1854, the ship then being in the roadstead, three or four miles from the shore. Each lighter received a permit from the custom-house to be laden and to leave for the ship. The export duty to which the hemp was liable became due and payable as each lighter was laden, and before it could leave for the vessel. But when it is known that the shippers are in good credit, the export duty is allowed to remain unpaid until the whole cargo has been shipped. In this instance, the whole cargo had been shipped by the 29th June. On the 30th it was all on board of the ship and under deck, and a bill of lading was signed for two thousand five hundred and twenty bales of it. On the 1st July, a bill of lading was signed for the residue of the cargo. On the 1st July, the hatches of the ship were caulked down by noonday, and in the afternoon the ship was cleared at the custom-house and ready for sea, but not having the wind, did not sail; nor did she sail on the 2d July, the master of the ship having objected to do so on the Sabbath. On Monday, the 3d, the ship went to sea.

The cargo was bought with Brown Brothers & Co.'s credit, and paid for by bills on London. It is a common practice at Manilla, when the shipment is large, to make of the whole two or more invoices, it being difficult to negotiate a bill for a whole cargo when it is of a large amount, as they frequently are, and

as this cargo was, the hemp alone having cost over $80,000. When the cargo is divided into different invoices for the purpose of negotiating the bills by which it has been bought, the invoices for the separate parts are sent with a bill of lading with the bills intended to be negotiated.

The Telegraph's cargo amounted to more than $95,000. In conformity with the practice, and for the purpose just mentioned, it was separated into two invoices. One of them contained two thousand five hundred and twenty bales of hemp, and other merchandise, amounting to $58,772.69; it was dated June 30th, with bill of lading of the same date. The other invoice was for fifteen hundred and twenty-eight bales, and a quantity of loose hemp, amounting to $36,367.03; it was dated June 30th, with bill of lading dated July 1.

On Sunday, July 2d, the day that the captain of the Telegraph refused to sail, the overland mail from England arrived at Manilla; it brought news of the war with Russia. The consequence was, an immediate and material advance in the market price of hemp the next day, July 3d, that being the day when the Telegraph went to sea.

Upon the arrival of the Telegraph at Boston, the plaintiff entered her cargo; a part for consumption, and the residue on bond, *each invoice being separately entered* at the custom-house. It was appraised by the United States appraisers at $11 per picul, excepting eighty bales of red hemp and two hundred and eighteen and sixty-two hundredths loose piculs, which were appraised at $10.50 per picul. The collector, by the directions of the Secretary of the Treasury, informed the merchant appraiser and the general appraiser that the cargo was to be appraised with reference to what was its value at Manilla on the day that the ship sailed, that day being the period of its exportation to the United States. The act under which that direction was given is, "That in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares, or merchandise, imported into the United States, it shall be the duty of the collector, within whose district the same shall be imported or entered, to cause the actual market value or wholesale price thereof *at the period of the exportation to the United States*, in the principal markets of the country from which the same shall have been imported into the United States, *to be appraised, estimated, and ascertained;* and to such value or price shall be added all costs and charges, except insurance, and including in every case a charge for commissions at the usual rates, as *the true value at the port* where the same may be entered, upon which duties shall be assessed."

It also appears that the appraiser's valuation of the hemp

exceeded by ten per centum the value declared on the entry of the 2,520 *bales*, but it did not exceed by ten per centum the value declared on the entry of the 1,528 bales. Nor did it exceed by ten per centum the value of the aggregate of the two invoices, constituting, as the plaintiffs claimed, the importation of 4,000 bales. An additional duty of 20 per centum was assessed on the appraised value of the 2,520 bales, *also on the charges and commissions.*

Manilla hemp comes in bales about twenty inches square by three feet in length, pressed hard together, is covered with matting, and is bound closely with ratan bands at short distances apart.

The examination of the hemp for appraisement was made in this wise. Slits were cut in the matting, which covered the bales that were examined, so that different parts of the outside surface of the hemp could be seen, but the ratan bands holding the bales together were not cut. It is said, had they been cut, the appraisers could have examined the inside of the bales. The difficulty of binding the bales together again is the reason given by the appraisers for not cutting the ratan bands. Though slits were cut in the matting, the principal part of it was not removed; the slits disclosed only small parts of the surface of the bales, and no attempt was made to open the hemp for the purpose of ascertaining its quality beneath the exterior. In fact, no more than the surface was seen. However, *the merchant appraiser testifies that the examination was such as is usual in buying or selling hemp in bales.*

Upon this statement of the case, the plaintiffs' counsel contended that the appraisement was illegal and invalid, and insufficient to negative or displace the value declared on the entry, because the appraisers did not exercise any judgment or discretion in *regard to the period of the exportation of the hemp to the United States*, but merely obeyed the instructions of the Secretary of the Treasury, to take the date of the sailing of the vessel as the rule to guide them. And the court was asked to instruct the jury accordingly. The court refused to do so, but did instruct them, that if the period so prescribed by the Secretary was the true period of exportation, the objection was untenable; *and did further instruct the jury, that the date of the sailing of the vessel from the foreign port for her destination in the United States was the true period of exportation.* The plaintiffs excepted to this ruling.

The plaintiffs' counsel then moved the court to instruct the jury, that, upon the facts proved, all the hemp imported was to be taken to be one entire entry at the custom-house, for the purpose of declaring and appraising the value for the levy of duties.

The court refused, and did rule and instruct the jury, "*that each entry was to be deemed as a separate transaction for the purpose of appraisement and the assessment of duties thereon.*" To this ruling the plaintiffs excepted.

Then the plaintiffs offered to prove that hemp was of various qualities and values. That it was impossible to determine the qualities of all the packages by such an examination as was testified to by the merchant appraiser. That, for the last three years or more, much of the Manilla hemp imported has been "*muzzled*" in the bale, and that it was impossible to tell whether it was so or not, without cutting the bands and removing all of the matting, opening the bale, and examining the inside of it. That the outside of the bale sometimes appears to be and is of good and current quality, while the inside of it may be filled with refuse or inferior. That it is often so tangled or "*muzzled*," as to render the bale from ten to twenty per centum less valuable than if it were all of the same quality as the outside of the bale. That, besides being *muzzled*, there are usually three or more grades in the same bale, differing in value from one to three cents per pound. That, in order to determine the proportion of each, which makes up a bale, it is necessary to see and compare its contents in the inside of it with the rest. That it is the custom of the trade to make an allowance of from one to three cents per pound on all *muzzled* or inferior hemp found on opening the bale after purchase. But it was admitted that the examination made of the Telegraph's cargo, by the appraisers, was such as is usually made on buying or selling hemp. Upon this the court ruled, *that if the examination made by the merchant appraiser was that usually made in buying or selling hemp, and had been satisfactory to the merchant appraiser, it was not open to the plaintiffs to show that he adopted a mode of examination, for the levy of duties, insufficient to detect fraudulent packing or diversities in the qualities of the different parts of a bale of hemp.* To this ruling and instructions the plaintiffs also excepted.

One other ruling of the court was given upon the prayer of the plaintiffs, to which the *defendant excepted.* It was this: that so much of the additional duty of 20 per centum as was levied upon the *charges and commissions*, and paid by the plaintiffs under protest, was unauthorized by law. This ruling of the court is a correct interpretation of the eighth section of the act of July 30th, 1846, 9 Stat. at L., 42, 43. It declares, if the *appraised value* of imports which have actually been purchased shall exceed by ten per centum or more the *value 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.* In other words, the twenty per centum *ad valorem* is to be on the appraised value only, without being assessed upon the charges and commissions.

We now proceed to the other points in the case to which the plaintiffs excepted to the rulings of the court.

The first in order is, that the appraisement of the hemp was illegal and invalid, and insufficient to displace the value declared on the entry, because the appraisers were instructed to appraise and estimate the value of the hemp as of the 3d day of July, the day of the sailing of the vessel; whereas they should have estimated and appraised it *at the period of actual shipment*, or *date* of *bill of lading.* The point is stated as it was made by the counsel of the plaintiffs in his argument of the case in this court. But whilst it comprehends one subject of the prayer of the plaintiffs and the gist of the court's instruction, it omits a part of the first, which we do not think it immaterial to notice, to prevent in future the proposition which it involves, as to the independence of the appraisers of the customs, from being made again. The court was asked to instruct the jury, that the appraisement in this instance was invalid and illegal, for the reason that the appraisers did not exercise their judgment and discretion in regard to the period of exportation, but that they obeyed the instructions of the Secretary of the Treasury, to take the date of the sailing of the vessel as the rule to guide them. The court refused to give the instructiion as it was asked, but did instruct the jury, that if the period so prescribed by the Secretary was the true period of exportation, the objection was untenable, and that the date of the sailing of the vessel from the foreign port for her destination in the United States was *the true period of exportation.* We concur in the correctness of the instruction. Besides its having been made the duty of the Secretary of the Treasury from time to time to establish rules and regulations, not inconsistent with the laws of the United States, to secure a faithful appraisal of all goods and merchandise imported into the United States, the collectors and other officers of the customs are directed to execute the Secretary's instructions relative to the revenue laws; and his decision is declared to be binding and conclusive upon all of them, whenever a difficulty shall arise as to the true construction of those laws. (Sections 23, 24, Stat. at Large, 563.)

The court's ruling, also, that the date of the sailing of the vessel was the true period of exportation, is correct. The Secretary's interpretation of the act of the 3d March, 1851, is in conformity with the letter and spirit of it, and cannot be

controlled by different interpretations and instructions which may have been given by his predecessors to the words, "at the period of the exportation to the United States." Though, as we have read the circulars of the Secretaries of the Treasury in respect to those words in the revenue act, as to the time when duties shall be assessed upon the value of imports, we do not perceive any difference in them, which may not be readily accounted for by the different acts to which the instruction or direction to the collector was meant to be applied. The same remark may be made of the decisions made by this court, whenever it has been necessary for it to determine at what date duties should be assessed upon imported merchandise, subject to an *ad valorem* rate of duty.

Nor have we been able to bring ourselves to the conclusion—ingeniously put, and ably urged by the plaintiffs' counsel here—that Congress, in passing the tariff act of March 3, 1851, meant to use the words "period of exportation" in the sense in which they had been understood by the Treasury Department in its construction of previous revenue acts, and as that construction may have been sanctioned by this court. There had been uncertainties of opinion and in practice in the Treasury Department, and also in several ports of the United States, in respect to the time when the dutiable value of imported goods should be estimated. Some of the collectors made the estimate *at the date of the purchase*, whenever that may have been. Other collectors made their estimate at the date of the shipment. Mr. Secretary Walker, in his circular of July 6, 1847, meaning to establish a uniform rule, states the varying practice, and directs the valuation to be made "at the date of the shipment." He says it is the true construction of the law, long since declared by the Department, and adopted generally throughout the Union. He adds, that the proviso of the 16th section of the act of August 30, 1842, is clear and emphatic upon the subject, and prescribes the date, with reference to which the value is to be estimated, as the *period of exportation to the United States*. But Mr. Secretary Meredith, three years afterwards, in his circular of the 5th July, 1850, eight months before the act of the 3d March, 1851, was passed, observes, that the appraisers had been restrained in the discharge of their duties by the result of frequent appeals from their decisions. And in order to secure a just, faithful, and impartial appraisal of all goods, wares, and merchandise, imported into the United States, he declares—

1. That the period of the exportation of merchandise is the time at which the value of any article is to be fixed by the appraisers.

2. That in ordinary cases *the date of the bill of lading* may be regarded as the "period of exportation."

This court decided, in the cases Greely *v.* Howard, 10 How., 225, and in Maxwell *v.* Griswold, 10 How., 242, in the year 1850, before the act of the 3d March, 1851, had passed, that under the sixteenth and seventeenth sections of the tariff act of 30th August, 1842, 5 Stat. at L., 563, the value of merchandise *at the time of procurement* is to be ascertained, not its value *at the time of exportation.* Congress, with these differences in view, and particularly in consequence of the decision of this court in the cases just before cited, passed the act of March 3d, 1851. This court in 1855, in Stairs et al. *v.* Peaslee, 18th Howard, 521, 524, 525, in considering the act, uses this language, which is decisive of the time when the value of goods subject to an *ad valorem* duty is to be estimated: "The language of this act of Congress is general, and embraces all importations of goods that are subject to an *ad valorem* duty, and directs that their value shall be estimated and ascertained by the wholesale price at the period of exportation to the United States in the principal markets of the country from which they are imported. The time and the place to which the appraisers are required to look when making their appraisement are both distinctly specified in the law, the time being *the period of exportation*, and the place the country from which they were imported into the United States. It makes no reference to their value in the country of production or the time of purchase. And as there is no ambiguity in the language of the act, and it embraces all goods subject to an *ad valorem* duty, the court would hardly be justified in giving a construction to it narrower than its words fairly import." Though this extract was written with reference to the first point certified in that case, which was, whether the act of the 3d March, 1851, repealed so much of all former laws as provided that merchandise, when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles at the principal markets of the country of production and manufacture "at the period of the exportation to the United States," the court adds, that the law, taken by itself, will admit of but one construction; and that is, the appraisement must be made by the value of the goods in the principal markets of the country from which they are exported, at *the time of such exportation to the United States.*"

The case of Stairs *v.* Peaslee, considered in connection with what this court had decided under the revenue acts in Greely *v.* Howard, and in Maxwell *v.* Griswold, 10 How., 242, shows, whatever may have been the practice in computing the time

for the assessment of duties, that this court viewed the act of the 3d March, 1851, as having fixed the rule to be the time or date of the exportation, as that might be shown by the day of the vessel's sailing from the foreign port to the United States. Indeed, from the phraseology of the act, without reference to preceding acts upon the same subject, or what had been their construction, the same conclusion must be reached.

The word *period* has its etymological meaning, but it also has a distinctive signification according to the subject with which it may be used in connection. It may mean any portion of complete time, from a thousand years, or less, to *the period of a day;* and when used to designate an act to be done, or to be begun, though its completion may take an uncertain time, as, for instance, the act of exportation, it must mean the day on which the exportation commences, or it would be an unmeaning and useless word in its connection in the statute.

The ruling of the court upon the first prayer of the plaintiffs is not subject to the exception taken.

We proceed to the second exception taken by the counsel of the plaintiffs to the ruling of the court upon their prayer. It was, that the court would instruct the jury, upon the facts proved, that all the hemp imported by the plaintiffs was to be taken to be one entire entry, for the purpose of declaring and appraising the value for the levy of duties.

No facts in the case were proved, upon which such an instruction could have been given. The proof is, that the plaintiffs were purchasers in Manilla of four thousand bales of hemp, which were put by them into two invoices for their own convenience; one containing two thousand five hundred and twenty bales, the other one thousand five hundred and twenty, and a quantity of loose hemp; the first valued at $58,772.69, the second at $36,367.03, for each of which a separate bill of lading was taken. The plaintiffs entered them separately at the custom-house, and they were separately appraised without *any objection at the time from the defendant.* But it turned out, upon the appraisement, that the appraised value of the first exceeded by ten per centum the value of it declared upon the entry, which made it liable, under the eighth section of the act of the 30th July, 1846, to the additional duty of twenty per centum *ad valorem* on the appraised value. But the appraisement of the second invoice of one thousand five hundred and twenty-eight bales did not exceed by ten per centum the value declared on the entry of it; nor did the appraised value of the two invoices, constituting the importation of four thousand bales, exceed by ten per centum the aggregate of their separate values declared in the entries of them.

Now, the plaintiffs seek to be released from the twenty per cent. additional upon the appraised value of the first invoice, because the second invoice was not subject to it, and because the aggregate of the values of both, as declared upon the entries of them, were not exceeded by ten per cent. upon the appraisement.

Upon such a state of facts, the court rightly instructed the jury, that each invoice and entry was to be deemed and treated as a separate transaction for appraisement, and for the assessment of duties.

An importer of merchandise is bound by the law to make his entry at the custom-house according to his invoice, either by himself, the consignee, or their agent, and not otherwise than by invoice verified by oath, unless it shall be done conditionally, either under the tenth section of the act of March 1st, 1823, or under the second section of the same act, permitting entries to be made of imported merchandise, subject to *ad valorem* duties upon appraisement without invoice. (3 Stat. at L., 729.)

When an entry has been made, it is conclusive upon the importer as to the contents, and declared value of the invoice; and for all of those consequences which the law may impose upon the examination and appraisement of it, and for any deficiency or non-compliance with the revenue laws regulating the entries of imported merchandise, or for any violation or substantial departure from directions which may have been given by the Secretary of the Treasury for the entry and appraisement of foreign goods, and for the collection of duties upon the same. See general regulations under United States revenue laws, by Mr. Secretary Guthrie, of February 1, 1857.

As to the third exception taken by the plaintiffs to the rulings of the court, we think it was right in telling the jury, that if the examination of the hemp made by the merchant appraiser was such as is usually made in buying and selling the article, and was satisfactory to the merchant appraiser, it was not open to the plaintiffs to show that he adopted a mode of examination insufficient to detect fraudulent packing or diversities in the qualities of the different parts of the bales of hemp.

The importance of this case in respect to the collection of the revenue under the act of the 3d March, 1851, and under the regulations of the Secretary of the Treasury upon it, have induced us to give to the different points in the case our mature consideration, and we are of the opinion that the judgment of the Circuit Court should be affirmed.

It is ordered accordingly, and that the appellants shall pay the costs which have been incurred in the prosecution of their writ of error.

Mr. Justice GRIER dissented.

EX PARTE IN THE MATTER OF FRANKLIN RANSOM AND UZZIAH WEEMAN *v.* THE MAYOR, ALDERMEN, AND COMMONALTY, OF THE CITY OF NEW YORK.

Where there was an order of the Circuit Court to set aside a judgment upon payment by the defendant of the costs which had accrued up to that time, the plaintiffs' counsel, by not insisting upon the payment of such costs, thereby impliedly waived the condition upon which the judgment was to be vacated, and cannot proceed upon the judgment as being still in force.

Other circumstances lead to the opinion that it was the understanding of both sides that the judgment should be vacated.

This court therefore overrule a motion for a mandamus directing the court below to set aside the order vacating the judgment, or for a rule to show cause why a mandamus should not issue.

THIS was a motion made by *Mr. Keller* to issue to the Circuit Court of the United States for the southern district of New York a peremptory writ of mandamus, commanding it to carry into execution a judgment which had been entered upon the records of the court, or to issue an alternative writ of mandamus, commanding the judgment to be carried into execution, or cause to be shown why it was not done.

There were numerous affidavits filed in the case, to show the course pursued by counsel, and arrangements between them; but a brief statement of facts will serve to explain the ground upon which the motion rested.

On the 24th of December, 1856, a verdict was rendered in the Circuit Court in favor of Ransom and Weeman, against the corporation of New York, for twenty thousand dollars, and one thousand four hundred and fifty-eight dollars and twenty-five cents costs. The ground of recovery was the infringement of a patent right. During the trial, several exceptions were taken by the defendants to the rulings and charge of the court. Notes were taken by reporters, and a memorandum stated, that to set aside the verdict and obtain a new trial this case was made, with leave to convert the same into a bill of exceptions.

Things remained in this condition, without any very material change, until the 12th of December, 1857, when the plaintiffs entered up judgment for the amount of the verdict and costs. On that day, the judge, in consequence of an affidavit, ordered that all proceedings in the suit should be stayed till the 15th of December, and until the decision of any motion which may be then made, or at such other time as said court may direct, to vacate any judgment which may be entered in this action, and allow the defendants an opportunity to make a motion for a new trial therein.

On the 19th of December, the court, after argument, passed

an order to vacate the judgment on payment of the costs up to that time, and that the defendants have leave to turn the case into a bill of exceptions. The argument for a new trial was directed to take place by the 9th of January.

A few days afterwards, the case was settled by the judge who presided at the trial when the verdict was rendered. When the argument came on for a new trial, the motion was overruled, but leave was granted to the defendants to turn the case thus settled into a bill of exceptions, in order that it might come up to this court.

Thereupon the plaintiffs issued an execution upon the judgment, and placed it in the hands of the marshal for collection.

The defendants then moved that all proceedings founded on the judgment of the 12th December be stayed, and that the plaintiffs enter up a new judgment and file a new judgment record, so that the case might be brought to this court. The plaintiffs alleged that the payment of the costs by the defendants up to the 19th of December was a condition precedent to the vacating of the judgment; and as the costs were not paid during the term of the court, the condition was not complied with, and the judgment was revived without any further order of the court.

The court, on the 20th April, 1858, ordered that all proceedings founded on the judgment of 12th December be stayed; that the plaintiffs be required to enter up a new judgment and file a new judgment record, so that the case might, on such new judgment, be brought up to this court.

In this state of things, the motion was made in this court for a rule to show cause why a mandamus should not be issued, to direct the court to set aside the order vacating the judgment.

Mr. Justice NELSON delivered the opinion of the court.

A motion is made on behalf of the plaintiffs for a mandamus to the Circuit Court of the United States for the southern district of New York, to compel that court to vacate an order in the above cause, directing a judgment entered against the defendants on the 12th of December, 1857, of $21,458.21, to be vacated. The judgment was entered upon a verdict rendered for the plaintiffs in an action for the alleged infringement of a patent for an "improvement in the mode of applying water to fire engines, so as to render their operation more effective." The judgment was entered in consequence of the stay of proceedings having expired, given to the defendants to make a case on which to move for a new trial. Afterwards, on the 19th December, during the same term, an order was entered on motion of the defendants, after hearing counsel on both

sides, by Judge Ingersoll, then holding the court, vacating the judgment on the payment of costs that had previously accrued, and also upon the condition that the case should be settled in a short time mentioned, and the motion made for a new trial, with liberty to either party to turn the case into a bill of exceptions, which right had been reserved at the trial. The case was settled accordingly, the motion for a new trial heard and denied, a bill of exceptions settled and signed, agreeably to the order of the 19th December, and filed in the office of the clerk of said court. Since the motion for a new trial, and the settlement of the bill of exceptions, the attorney for the plaintiff has issued an execution on the judgment of the 12th December, claiming it to be still in force, on the ground that the condition had not been complied with in respect to the payment of costs. A motion was subsequently made by the defendants to set aside this execution and the judgment aforesaid unconditionally, which was granted by the court. The present motion to this court is for a rule to show cause against the court below, why a mandamus should not issue to vacate this last order.

The ground upon which the court below placed its decision for setting aside the judgment and execution unconditionally, is, that the attorney for the plaintiffs, by not making out his bill of costs, procuring a taxation, and demanding them previous to the hearing of the motion for a new trial, thereby impliedly consented to waive this condition, and cannot afterwards set it up for the purpose of invalidating the order of the 19th December, vacating the judgment. We concur in this view of the court, and we are also satisfied, from the course of the proceedings preparatory to the motion for the new trial, the hearing of that motion, and the turning of the case into a bill of exceptions with a view to a writ of error, it was the understanding of both parties that the judgment of the 12th December was to be considered as vacated, and that a new one be entered for the plaintiffs, if a motion for a new trial was desired.

The court is of opinion, therefore, that the facts presented upon this motion for a mandamus are not such as entitle the plaintiffs to a rule to their cause, and it must therefore be denied.

JAMES L. AND SAMUEL L. TAYLOR, ADMINISTRATORS OF ROBERT TAYLOR, DECEASED, PLAINTIFFS IN ERROR, *v.* NATHAN T. CARRYL, WHO SURVIVED WILLIAM J. WARD.

Where a vessel had been seized under a process of foreign attachment issuing from a State court in Pennsylvania, and a motion was pending in that court for an order of sale, a libel filed in the District Court of the United States, for mariners'

wages, and process issued under it, could not divest the authorities of the State of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title to the property, and the sale by the marshal as inoperative.

Where property is levied upon, it is not liable to be taken by an officer acting under another jurisdiction.

The cases examined where conflicting claims against the same property are set up under the laws of the United States and under State laws.

The process of foreign attachment in Pennsylvania is identical with that which issues out of the District Court of the United States sitting in admiralty.

The admiralty jurisdiction of the courts of the United States, although exclusive on some subjects, is concurrent upon others. The courts of common law deal with ships or vessels as with other personal property.

In order to give jurisdiction *in rem*, the seizure by the marshal must have been valid; and this was not the case when the vessel was, at the time of seizure, in the actual and legal possession of the sheriff.

THIS case was brought up from the Supreme Court of Pennsylvania, by a writ of error issued under the twenty-fifth section of the judiciary act.

The facts of the case are particularly stated in the opinion of the court.

It was argued by *Mr. Cadwallader* and *Mr. Hood* for the plaintiffs in error, and by *Mr. Evarts* for the defendant.

The Reporter would be much pleased if he could place before his readers an extended report of the arguments of counsel in a case of such importance and general interest to the profession as the present. But he is admonished by the size to which the present volume has grown, that it has already reached the customary limits of such a work; and all that he can do is to present a brief sketch of the views of the respective counsel.

After examining the respective jurisdictions of the State and admiralty courts, and the nature of the process and proceedings, the counsel for the plaintiffs in error deduced the following propositions:

1. That over all maritime liens for seamen's wages, the District Court of the United States has exclusive cognizance whenever invoked by the seamen, and the State courts have no jurisdiction over such liens.

2. Although a State court has no jurisdiction whatever over a maritime lien, yet that court will afford to a seaman, if he choose to resort to it, a remedy by *personal* action, against the owner or master of the vessel, on the contract for wages, or perhaps by permitting him to intervene in a personal action, already pending; but the cognizance of the State court does not attach, unless specially invoked by the seaman.

3. That the existence of one or more remedies for a seaman to recover his wages in a State court, does not oust the cogni-

zance of the admiralty court over his lien against the vessel; the seaman may pursue either of these remedies only, or both together.

4. That the pendency of proceedings in foreign attachment in a State court against the vessel, at the suit of a general creditor of the owner, and the seizure and sale of the vessel by the sheriff under such proceedings, do not oust the admiralty jurisdiction of the District Court of the United States over liens for the wages of the seamen, if invoked by them, nor prevent the admiralty court from enforcing such liens against the vessel in specie, by proceedings *in rem.*

5. That the sale of a vessel, under a writ or order of a common-law court, does not, under the general maritime law of the United States, divest the lien of a seaman for his wages, so as to prevent its enforcement against the vessel in specie, by the District Court of the United States, under proceedings *in rem* in the admiralty.

6. That a sale of a vessel under a writ or order of the District Court of the United States, proceeding *in rem* against a vessel in the admiralty, not appealed from nor reversed, passes to the purchaser a title to the vessel discharged of all liens and encumbrances whatever.

7. That where a vessel subject to maritime liens for seamen's wages is seized by the sheriff under a writ from a State court, and subsequently a proceeding *in rem* is commenced in the admiralty to enforce these liens, it would be an usurpation of admiralty jurisdiction by the State court, if, after being informed of the existence of said liens and proceedings, the State court ordered a sale of the vessel, as perishable and chargeable, on the ground, *inter alia*, of the accruing daily expenses of the said mariners' wages.

The proceeding under which the sale was ordered by the State court was based not upon the simple allegation of perishableness, but upon an allegation of perishableness by reason of *chargeableness;* in other words, the sale was prayed and ordered because the subject was a chargeable one. That which was alleged to render her thus chargeable was mainly an accumulating liability for the very seamen's wages in question. Without this liability, *non constat*, that any sale would have been ordered. In correcter language, it is legally to be assumed, that without it there would have been no sufficient chargeableness. For these wages, the lien had already attached to the vessel by the proceeding in admiralty. Thus, in order to render the vessel saleable as chargeable, the subject of the lien, which could constitutionally be enforced directly in the admiralty alone, was by a usurpation of jurisdiction imported

into the proceeding in the State court, as the foundation of the very proceeding in question.

This appears from the order of sale of the State court made not under one alone, but under both of the foreign attachments, and from the petition referred to in the order of sale of Robert Bell, one of the plaintiffs in attachment, alleging the vessel in question to be "of a chargeable and perishable nature, from the daily expense of wharfage, custody fees, mariners' wages, and liable to deterioration in her hull, apparel, and furniture, from exposure to ice, wind, sun, and weather."

8. The legal custody of the vessel claimed for the admiralty in this case will not necessarily lead to conflict between the United States and State courts and their respective officers; but, on the contrary, will tend to prevent such conflicts, by maintaining each in the legitimate exercise of its jurisdiction and powers.

According to the English admiralty law, as recognised by Sir John Jarvis, Chief Justice of the Common Pleas, when a vessel subject to maritime liens for seamen's wages is seized by the sheriff, under a writ of foreign attachment from a State court, and subsequently a proceeding *in rem* is commenced in the admiralty, to enforce the seamen's liens, the latter proceeding relates back to the time when the liens were created, and in contemplation of law the legal custody of the vessel is deemed to have been in the admiralty from the period when the lien first attached, (Harmer *v.* Bell, 22 Eng. L. and Eq. R., 72,) so far at least as may be necessary to protect these liens. This legal custody of the admiralty is not incompatible with, and does not necessarily interfere with, the possession of the sheriff, nor the proceedings in the State court. In such a case, the sheriff may hold the vessel until bail be entered for the owner, or until the owner's interest has been sold to satisfy plaintiff's claim. But the proceedings *in rem* in the admiralty, being known to the purchaser at the sheriff's sale, he will take the vessel *cum onere*—and, on paying off the maritime liens, will acquire a perfect title. On the other hand, if the admiralty sell the vessel whilst the proceedings in the State court are pending, and the sheriff still in possession, the title of the purchaser is good against all the world; but the surplus that may remain out of the proceeds of the admiralty sale, after payment of the liens against the vessel, would, on application to that court, be ordered to be paid to the sheriff, or into the State court.

In the case of the Royal Saxon, the purchasers at the sheriff's sale might have obviated the necessity of a sale by the admiralty by satisfying the maritime liens. They could have dis-

charged the vessel from them by paying the holders, or, by leave of the admiralty court, they could have paid into its registry enough to satisfy them, being entitled to receive back any surplus. In this way they could have acquired a perfect title; but they pursued neither course, nor did they bring the matter in any form before the District Court of the United States. The maritime liens therefore continued attached to the vessel after the sheriff's sale, and until sold by the marshal, when Mr. Taylor became the purchaser.

If the doctrines laid down in this case by the Supreme Court of Pennsylvania, and on which the judgment of that court can alone be sustained, are to be adopted as the maritime and admiralty law of the United States, the privileged lien, heretofore supposed to belong to mariners, is in effect taken away. It will be in the power of a master or owner of a vessel, in every case, to prevent seamen from availing themselves of their lien.

This may be effected by procuring a constable to seize the vessel, and hold her in custody until she is about to sail, and then release her. It only requires a *fi. fa.* or attachment to issue on a judgment confessed before a justice of the peace for a small amount, to a real or pretended creditor; because, according to the doctrine of the Supreme Court of Pennsylvania, there is no peculiar potency in admiralty process *in rem*, against ships—"in substance, the proceeding by a justice of the peace against a stray cow is exactly equivalent." (Record, 72; Taylor *v.* Carryl, 12 Harris, 261.) By the seizure of the ship, therefore, whether by sheriff or constable, the whole custody of her is in the State tribunal, (Record, 61, 77,) and any action or decree afterwards by the admiralty, in order to enforce the mariners' lien against the ship, would be in relation to a subject over which it had no control, and would consequently be void." (Record, 61; Taylor *v.* Carryl, 12 Harris Rep., 269.)

Judge Wells, in his opinion delivered in the case of the Golden Gate, (Newberry's Adm. Rep., 296, 308; 5 Am. Law Reg., 155, 158,) points out other inconveniences from allowing to the process of justices of the peace, &c., the force of proceedings *in rem*. "If," says he, "there is an average of fifty counties to each State, and twenty justices of the peace to each county, we should then have in the United States thirty-one thousand courts of admiralty and maritime jurisdiction, to say nothing of the courts of record," &c. (5 Am. Law Reg., 158, 159.)

The Supreme Court of Pennsylvania have decided that, by the law of that State, a seaman may come into her courts and

enforce his maritime lien for wages against the proceeds of a vessel sold by the sheriff. Although this be a doctrine unknown to the old common law, yet there would be no reason to complain of it, if that court had not gone farther, and decided that the seaman's only remedy in such a case was in the State court, and that he had no longer a right to enforce his lien in the admiralty. The State court undertook to define the limits of the jurisdiction of the admiralty courts; and if it has erred in this, it is the right and duty of the Supreme Court of the United States to correct the error, and whilst asserting the legitimate jurisdiction of the admiralty, to administer the maritime law as it has been recognised and established by the Constitution and laws of the United States. It is an important function of this court to defend the lawful jurisdiction of the admiralty, and the just efficacy of its process against judicial as well as legislative encroachment, among other reasons, because on these mainly depend the rights of seamen and others having maritime liens.

In this case, the Supreme Court of the United States is not called on to alter in any respect the municipal law of Pennsylvania, but simply to declare that the additional remedy allowed to seamen by that law does not oust the admiralty of its exclusive jurisdiction, if the seamen prefer a recourse to it, rather than to the remedies provided by the State law.

A reversal, therefore, of the judgment of the Supreme Court of Pennsylvania will involve no victory of Federal over State authority and power. It will concede to the admiralty and maritime jurisdiction of the Federal courts nothing but what the stanchest friend of State rights and the most jealous adversary of Federal encroachment may safely concede, because imperatively required for the safety and protection of a class of men whose rights are specially protected by the commercial codes of every civilized nation, and by none more carefully than by that of the United States; rights, in the maintenance of which the Commonwealth of Pennsylvania and her people are as much interested as the people of any of the other States, for the sake of those of her citizens (and they are very numerous) who have devoted themselves to the sea.

The third point of the counsel for the defendant was the following:

Third Point. The judgment below on the merits of the controversy determined by it is free from error.

I. The plaintiff below, by his purchase at the sheriff's sale, acquired a good title to the barque "Royal Saxon."

1. By the process of foreign attachment, and the possession

of the sheriff under that process, the barque was in the custody of the law, to abide the result of the suit in which process issued. (Act Penn., June 13, 1856, secs. 48, 50; same, March 20, 1845, sec. 2; Morgan *v.* Whatmaugh, 5 What., 125; Serg. For. Att., 1, 23.)

2. Its sale, pending the suit, as perishable property, was regular, and by authority of a competent court having jurisdiction.

3. The judicial sale of property as perishable is, in the nature of the procedure, and from the same policy and necessity which occasion the sale, a conversion or transmutation of the thing itself, overriding every question of title and lien.

(1.) The right and power of such sale are not supported upon any notion or determination of title, but wholly upon the condition of the thing sold.

(2.) The motive and effect of the sale are for the benefit of the real title and of every valid lien, to save from perishing to the owner and the lienor the subject of his property or lien.

(3.) To say the court has this right to sell the thing in its custody, and exercises this right, and yet the buyer at such sale does not take the thing sold, but only the right, title, or interest, of some particular person or persons, is insensible, and subversive of the whole doctrine of sales by necessity. (Foster *v.* Cockburn, Sir Thomas Parker's Exch. R., 70; Jennings *v.* Carson, 4 Cranch, 26, 27; Grant *v.* McLaughlin, 4 Johns. R., 34; The Tilton, 5 Mas., 481, 482.)

(4.) The remedy of any party whose property has been, without right as against him, brought into this peril of litigation which has necessitated, and so justified, its valid sale, is by action against the suitor or the officer who has wrongfully subjected it to this conversion, or by claiming upon the proceeds of the sale, at his election.

II. The defendant below, by his purchase at the marshal's sale, acquired no title to the barque.

1. When the attachment and monition issued in the admiralty suit, the barque was in the custody of the sheriff of the county of Philadelphia, and so continued until after the order for its sale as perishable.

The marshal, therefore, never had custody, nor the District Court possession, of the barque, to support any jurisdiction to sell as perishable. (The Robert Fulton, 1 Paine C. C. R., 625, 626; Hagan *v.* Lucas, 10 Peters, 403; Jennings *v.* Carson, 4 Cranch, 26, 27.)

2. The effect of a sale in admiralty, pending a suit, of property as perishable, is not at all strengthened or qualified by the nature of the claim or lien prosecuted in the suit.

Whether the cause of action be of one degree of privilege or priority or another, the efficacy of the writ to the marshal is the same, the custody of the court is the same, and the grounds and effect of the special sale of the property in custody are the same.

So, too, whether the cause of action fail to be supported in the final decree is immaterial; the jurisdiction to sell, and the title conveyed, depending on the court's possession of the suit, and of the perishable property, and not at all on the event of the suit. (Harmer *v.* Bell, the case of the Bold Buccleugh in Privy Council, 22 Eng. L. and E.)

3. The title of the defendant below, then, derives no special validity from the peculiar privilege among admiralty liens accorded to wages.

The whole question is, between the two sales by the two courts, as to which passed the title; if the cause of action in the Supreme Court of Pennsylvania had been for seamen's wages, and the cause of action in the District Court had been on a charter party, or bill of lading, the question of the effect of the two sales would rest on the same considerations as under the actual facts in the case.

III. The sale by the sheriff gave to the purchaser a title discharged of all liens, which thereafter attached only to the fund produced by the sale. This effect follows every judicial sale of the *res* itself, (made by a court having jurisdiction,) and the claim of seamen's wages has no exemption from this consequence.

1. The nature of the lien of seamen's wages subjects it to this consequence.

It is neither a *jus in re* nor a *jus ad rem;* it gives no right of possession, and is not displaced by change of possession—it is a right of action to be enforced by judicial procedure, and with (among others) the special remedy of being satisfied, by means of such procedure, out of the ship. (The Nancy, 1 Paine C. C. R., 184; The Brig Nestor, 1 Sumn., 80; Ex parte Foster, 2 Story, 144; Harmer *v.* Bell, 22 Eng. L. and E. R., 72.)

Whatever prevents the judicial *process* (from whose vigor alone the seamen's right of action is converted into a right of possession or dominion over the ship) from reaching the ship, postpones or defeats, as the case may be, the enforcement of his right of action against the ship.

If the ship be locally without the jurisdiction of the process, this postpones or defeats the remedy.

If the ship, though locally within the jurisdiction of the process, be withdrawn from its operation by a previous subjection to the process of another jurisdiction, this postpones or defeats

the remedy. (The Robert Fulton, *ut supra*; Hagan *v.* Lucas, same.)

A conversion of the ship into proceeds by a lawful exercise of dominion over it, by paramount authority, or through judicial sentence, defeats the remedy against the ship, which, as it were, no longer exists, in specie, to meet the remedy.

The familiar rule, that seamen's claims attach for their satisfaction to the proceeds of such sales, proves that the ship is discharged from their claims; otherwise the seamen would take the purchase-money, produced by other interests than theirs, to discharge claims still resting on the ship, and not included in the purchase-money. (Presb. Corp. *v.* Wallace, 3 Rawle, 150; Sheppard *v.* Taylor, 5 Pet., 675; Brown *v.* Full, 2 Sumn., 441; Trump *v.* Ship Thomas, Bee's R., 86; The St. Jago de Cuba, 9 Wheat., 414, 419.)

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes before this court by writ of error to the Supreme Court of Pennsylvania, under the twenty-fifth section of the judiciary act of the 24th September, 1789.

The defendants (Ward & Co.) instituted an action of replevin in the Supreme Court of Pennsylvania, for the barque Royal Saxon.

Upon the trial of the cause at *nisi prius*, it appeared that the barque arrived at the port of Philadelphia in October, 1847, on a trading voyage, and was the property of Robert McIntyre, of Londonderry, in Ireland. In November, 1847, she was seized by the sheriff of Philadelphia county, under a writ of foreign attachment that was issued against her owner and another, at the suit of McGee & Co., of New Orleans, from the Supreme Court; and at the same time her captain was summoned as a garnishee. On the 15th January, 1848, those creditors commenced proceedings in the Supreme Court to obtain an order of sale, because the barque was of a chargeable and perishable nature, suffering deterioration from exposure to the weather, and incurring expenses of wharfage, custody fees, &c., &c. This application was opposed by the captain of the barque, but was allowed by the court on the 29th of January, 1848. The vessel was duly sold by the sheriff under this order, the 9th February, 1848, to the plaintiffs in the replevin, Ward & Co.

On the 21st January, 1848, while the writs of attachment were operative, and a motion for the sale of the barque was pending in the Supreme Court, the seamen on board the barque filed their libel in the District Court of the United States for the eastern district of Pennsylvania, sitting in admiralty, for the balances of wages due to them, respectively, up to that date,

and prayed for the process of attachment against the barque, according to the practice of the court. This was issued, and, on the same day, the marshal returned on the writ, "Attached the barque Royal Saxon, and found a sheriff's officer on board, claiming to have her in custody." The captain appeared to this libel, and filed an answer admitting the demands of the seamen.

On the 25th January he exhibited a petition to the District Court, in which he represented the pendency of the suits in attachment and in admiralty; that the barque was liable to him for advances; that she was subject to heavy charges, and could not be employed to carry freight; and therefore he, with the approbation of the British consul, which accompanied the petition, solicited an order of sale for the benefit of all persons interested. This order was granted by the District Court, after due inquiry, on the 9th February, 1848, and was executed the 15th of February, 1848, by the marshal of the court, at which time the defendant in the replevin was the purchaser, who took the possession of the vessel, and held her until retaken in this replevin suit of Ward & Co. Upon the trial of the replevin cause at *nisi prius*, the defendant solicited instructions to the jury, which were refused by the court, and the court instructed the jury unfavorably to his title. From the instructions asked, and the charge delivered, a selection is made, to exhibit the questions decided. The court was requested to charge—

3. "That when the lien of a mariner for wages is sought to be enforced in the admiralty by libel, and the marshal has attached the vessel under such proceedings, the vessel so attached is in the exclusive custody of the admiralty until the claims of the libellants have been adjudicated, or the vessel relieved by order of the court, on stipulation or otherwise; and such exclusive custody exists, notwithstanding a previous foreign attachment from a court of law served on the vessel by the sheriff."

5. "That a foreign attachment is not properly a proceeding *in rem;* but an attachment from the admiralty on a libel for mariners' wages is *in rem;* and the legal possession acquired by the sheriff, on service of the writ of foreign attachment, is ended, superseded, or suspended, by the service of such attachment from the admiralty."

8. "That when, on the 21st of January, 1848, the Royal Saxon was attached under the process issued on the libel for mariners' wages, she came by virtue of that attachment into the exclusive custody of the court of admiralty; and such exclusive legal custody continued from the 21st January, 1848, until the sale by the marshal, by order of that court, on the 15th February, 1848."

10. "That the legal possession of the vessel being exclusively in the admiralty court from the 21st January, 1848, till the sale made, by order of that court, on the 15th February, 1848, the sale by the sheriff on the 9th February, 1848, gave no title to the purchaser as against the sale by the marshal."

The court refused so to instruct the jury, but charged them: "That the court of admiralty could not proceed against the vessel while she remained in the custody of an independent and competent jurisdiction; that the presence of the marshal on the ship did not prove his custody, for the sheriff's officer was there before him; that the marshal did not dispossess the sheriff, but prudently retired himself, and informed the court in his return that the vessel was in the custody of the sheriff; that if the sheriff first took possession of the vessel, and maintained it until she was sold to the plaintiffs, they had the better title; and that the fact of the continuing possession of the sheriff was for the jury." A verdict was returned in favor of the plaintiffs, upon which a judgment was rendered in the Supreme Court in their favor, confirming the opinion of the judge as expressed to the jury at *nisi prius*.

The judgment of the District Court allowing the order of sale proceeded upon the grounds: "That the suits in attachment in the Supreme Court applied to alleged interests in the vessel, not to the vessel itself. The attachment creditor, if he succeeds in his suit, obtains recourse against the thing attached just so far as his defendant had interest in it, and no farther. The rights of third parties remain in both cases unaffected. The bottomry creditor, residing, it may be, in a foreign country, is no party to either proceeding, and loses none of his rights. His contract was with the thing, not the owner, and it is therefore not embarrassed, and cannot be, by any question or contest of ownership. So, too, seamen, whoever owns the vessel, or how often soever the ownership may be changed, wherever she may go, whatever may befall her—so long as a plank remains of her hull, the seamen are her first creditors, and she is privileged to them for their wages," &c., &c.

Again: "What interest in the ship," asks the District Court, "does the sheriff propose to sell? Not a title to it, but the defendant's property in it, whatever it may be. Not so in the admiralty. Here the subject-matter of the controversy is the *res* itself. It passes into the custody of the court. All the world are parties, and the decree concludes all outstanding interests, because all are represented. Here they are marshalled in their order of title and privilege. There is no difficulty in allowing an arrest by the admiralty, notwithstanding the vessel or some interest in it has passed into the

custody of the sheriff. He retains all his rights, notwithstanding the marshal's intervention. The proceedings against the vessel, the thing, the subject of the property or title, may still go on in the admiralty. The sheriff's vendee of the ship may intervene there, as the defendant might have done in this court; he may make defence to the proceeding there as the successor to the defendant's rights, and may be substituted ultimately before the judge of the admiralty as a claimant of the surplus fund."

This cause has been regarded in this court as one of importance. It has been argued three different times at the bar, and has received the careful consideration of the court. The deliberations of the court have resulted in the conviction that the question presented in the cause is not a new question, and is not determinable upon any novel principle, but that the question has come before this and other courts in other forms, and has received its solution by the application of a comprehensive principle which has recommended itself to the courts as just and equal, and as opposing no hindrance to an efficient administration of the judicial power.

In Payne *v.* Drew, 4 East., 523, Lord Ellenborough said: "It appears to me, therefore, not to be contradictory to any cases nor any principles of law, and to be mainly conducive to public convenience and to the prevention of fraud and vexatious delay in these matters, to hold that where there are several authorities equally competent to bind the goods of a party, when executed by the proper officer, that they 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."

This rule is the fruit of experience and wisdom, and regulates the relations and maintains harmony among the various superior courts of law and of chancery in Great Britain.

Those courts take efficient measures to maintain their control over property within their custody, and support their officers in defending it with firmness and constancy. The court of chancery does not allow the possession of its receiver, sequestrator, committee, or custodee, to be disturbed by a party, whether claiming by title paramount or under the right which they were appointed to protect, (Evelyn *v.* Lewis, 3 Hare, 472; 5 Madd., 406,) as their possession is the possession of the court. (Noe *v.* Gibson, 7 Paige, 713.) Nor will the court allow an interfering claimant to question the validity of the orders under which possession was obtained, on the ground that they were improvidently made. (Russell *v.* East Anglien R. Co., 3 McN.

and Gord., 104.) The courts of law uphold the right of their officers to maintain actions to recover property withdrawn from them, and for disturbance to them in the exercise of the duties of their office.

But it is in this court that the principle stated in Payne *v.* Drew has received its clearest illustration, and been employed most frequently, and with most benignant results. It forms a recognised portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations. The decisions of this court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates, of whatever class, by the approbation and confidence of those submitted to their government. The decision in the case of Hagan *v.* Lucas, 10 Pet., 400, is of this class. It was a case in which a sheriff had seized property under valid process from a State court, and had delivered it on bail to abide a trial of the right to the property, and its liability to the execution. The same property was then seized by the marshal, under process against the same defendant. This court, in their opinion, say: "Where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy by the order of the court. But the same rule does not govern when the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys collected under different executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff; a most injurious conflict of jurisdiction would be likely often to arise between the Federal and the State courts, if the final process of the one could be levied on property which had been taken on process of the other. The marshal or the sheriff, as the case may be, by a levy acquires a special property in the goods, and may maintain an action for them. *But if the same goods may be taken in execution 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 is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction." The principle

contained in this extract from the opinion of the court was applied by this court to determine the conflicting pretensions of creditors by judgment in a court of the United States, and an administrator who has declared the insolvency of his estate, and was administering it under the orders of a probate court, (8 How. S. C. R., 107,) in a controversy between receivers and trustees holding under a court of chancery, and judgment creditors seeking their remedy by means of executory process, (14 How. S. C. R., 52, 368,) and to settle the priorities of execution creditors of distinct courts. (Pulliam *v.* Osborn, 17 How., 471.)

In a case not dissimilar in principle from the present, the principle was applied in favor of the Executive department, having property in custody whose possession was disturbed by a State officer under judicial process. An attachment from a State court was levied upon merchandise imported, but not entered at the custom-house, and the validity of the levy was the question involved. (Harmar *v.* Dennie, 3 Pet., 292.) The court say: "From their arrival in port, the goods are, in legal contemplation, in the custody of the United States. An attachment of such goods presupposes a right to take the possession and custody, and to make such possession and custody exclusive. If the officer attaches upon *mesne* process, he has the right to hold the possession to answer the exigency of the writ. The act of Congress recognises no such authority, and admits of no such exercise of right." To the argument, that the United States might hold for the purpose of collecting duties, and the sheriff might attach the residuary right, subject to the prior claim, the court say: "The United States have nowhere recognised or provided for a concurrent possession or custody by any such officer."

A recognition of the same principle is to be found in Peck *v.* Jenness, 7 How. S. C. R., 612. An act of Congress had conferred on the courts of the United States exclusive jurisdiction "of all suits and proceedings of bankruptcy," and had provided that the act should not be held to impair or destroy existing rights, liens, mortgages, &c., &c., on the estate of the bankrupt. A District Court of the United States decided that its jurisdiction extended to administer the entire estate of the bankrupt court, and that the liens on the property, whether judicial or consensual, must be asserted exclusively in that court, and that all other jurisdictions had been superseded. This court denied the pretension of the District Court, and affirmed, "That when a court has jurisdiction, it has a right to decide every question which occurs in the cause; and when the jurisdiction of the court and the right of the plaintiff to

prosecute his suit has once attached, that right cannot be arrested or taken away by proceedings in another suit. These rules have their foundation not merely in comity, but in necessity; for if one may enjoin, the other may retort, by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision. A limited number of cases exist, in which a party sued in a State court may obtain the transfer of the cause to a court of the United States, by an application to the State court in which it was commenced; and this court, in a few well-defined cases, by the twenty-fifth section of the judiciary act of 1789, may revise the judgment of the tribunal of last resort of a State. In all other respects the tribunals of the State and the Union are independent of one another. The courts of the United States cannot issue "an injunction to stay proceedings in any court of a State," and the judiciary act provides that "writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." "Thus, as the law now stands," say this court, "an individual who may be indicted in a Circuit Court for treason against the United States is beyond the power of the Federal courts and judges, if he be in custody under the authority of a State." (Ex parte Dorr, 3 How. S. C. R., 103.) And signal instances are reported in verification of the above statement. (Ex parte Robinson, 6 McLean R., 355.)

This inquiry will not be considered as irrelevant to the question under the consideration of the court. The process of foreign attachment has been for a long time in use in Pennsylvania, and its operation is well defined, by statute as well as judicial precedents. The duties of the sheriff, under that process, are identical with those of a marshal, holding an attachment from the District Court sitting in admiralty. "The goods and chattels of the defendant, in the attachment, (such is the language of the statute,) in the hands of the garnishee, shall, after such service, be bound by such writ, and be in the officer's power; and if susceptible of seizure or manual occu-

pation, the officers shall proceed to secure the same, to answer and abide the judgment of the court in that case, unless the person having the same shall give security. (Purdin's Dig., 50, sec. 50; 5 Whar., 125; Carryl *v.* Taylor, 12.)

It follows, by an inevitable induction from the cases of Harmar *v.* Dennie, 3 Pet., 299; Hagan *v.* Lucas, 10 Pet., 400; and Peck *v.* Jenness, 7 How., 612, that the custody acquired through the "seizure or manual occupation" of the Royal Saxon, under the attachment by the sheriff of Philadelphia county, could not legally be obstructed by the marshal, nor could he properly assert a concurrent right with him in the property, unless the court of admiralty holds some peculiar relation to the State courts or to the property attached, which authorized the action or right of its marshal. The relation of the District Courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says: "Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent, (as in cases of possessory suits, mariners' wages, and marine torts,) there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation," continues the commentator, "would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction." (3 Story's Com., sec. 1666, note.)

In conformity with this opinion, the habit of courts of common law has been to deal with ships as personal property, subject in the main, like other personal property, to municipal

authority, and liable to their remedial process of attachment and execution, and the titles to them, or contracts and torts relating to them, are cognizable in those courts.

It has not been made a question here that the Royal Saxon could not be attached, or that the title could not be decided in replevin. But the District Court seems to have considered that a ship was a juridical person, having a *status* in the courts of admiralty, and that the admiralty was entitled to precedence whenever any question arose which authorized a judicial tribunal to call this legal entity before it. The District Court, in describing the source of its authority, says of the contract of bottomry, that "it is made with the thing, and not the owner," and that the contract of the mariners is similar; that the RES "represents" in that court all persons having a right and privilege, while the rights of the owner are treated there as something incorporeal, separable from the *res*, and which might be seized by the sheriff, even though the *res* might be in the admiralty. This representation is not true in matter of fact, nor in point of law. Contracts with mariners for service, and other contracts of that kind, are made on behalf of owners who incur a personal responsibility; and if lenders on bottomry depend upon the vessel for payment, it is because the liability of the owner is waived in the contract itself. "In all causes of action," says the judge of the admiralty of Great Britain, "which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were not themselves personally liable, or where the liability had not been given up." (The Druid, 1 Wm. Rob, 399.) And the opinion of this court in The Schooner Freeman *v.* Buckingham, 18 How., 183, was to the same effect.

In courts of common law, the forms of action limit a suit to the persons whose legal right has been affected, and those who have impaired or injured it. In chancery, the number of the parties is enlarged, and all are included who are interested in the object of the suit; and as the parties are generally known, they are made parties by name and by special notice.

In admiralty, all parties who have an interest in the *subject* of the suit—the *res*—may appear, and each may propound independently his interest. The seizure of the RES, and the publication of the monition or invitation to appear, is regarded as equivalent to the particular service of process in the courts of law and equity. But the RES is in no other sense than this the representative of the whole world. But it follows, that to give jurisdiction *in rem*, there must have been a valid seizure and an actual control of the ship by the marshal of the court;

and the authorities are to this effect. (Jennings *v.* Curson, 4 Cr., 2; 2 Ware's Adm. R., 362.) In the present instance, the service was typical. There was no exclusive custody or control of the barque by the marshal, from the 21st of January, 1848, to the day of the sale; and when the order of sale was made in the District Court, she was in the actual and legal possession of the sheriff.

The case of the Oliver Jordan, 2 Curtis's R., 414, was one of a vessel attached by a sheriff in Maine, under process from the Supreme Court. She was subsequently libelled in the District Court of the United States, upon the claim of a material man. The District Court sustained the jurisdiction of the court. But on appeal the exception to the jurisdiction was allowed, and the decree of the District Court reversed. Mr. Justice Curtis observed: "This vessel being in the custody of the law of the State, the marshal could not lawfully execute the warrant of arrest." In the case of the ship Robert Fulton, 1 Paine C. C. R., 620, the late Mr. Justice Thompson held that the warrant from the admiralty could not be lawfully executed under similar circumstances, and that the District Court could not proceed *in rem.* The same subject has been considered by State courts, and their authority is to the same effect. (Keating *v.* Spink, 3 Ohio R., N. S., 105; Carryl *v.* Taylor, 12 Harris, 264.)

Our conclusion is, that the District Court of Pennsylvania had no jurisdiction over the Royal Saxon when its order of sale was made, and that the sale by the marshal was inoperative.

The view we have taken of this cause renders it unnecessary for us to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them.

Our opinion is, that there is no error in so much of the record of the Supreme Court of Pennsylvania as is brought before this court by the writ of error, and the judgment of the court is consequently affirmed.

Mr. Chief Justice TANEY, Mr. Justice WAYNE, Mr. Justice GRIER, and Mr. Justice CLIFFORD, dissented.

Mr. Justice WAYNE, Mr. Justice GRIER, and Mr. Justice CLIFFORD, concurred with Mr. Chief Justice TANEY in the following dissenting opinion:

Mr. Chief Justice TANEY dissenting:

I dissent from the opinion of the court. The principle upon which the case is decided is so important, and will operate so

widely, that I feel it my duty to show the grounds upon which I differ. This will be done as briefly as I can; for my object is to state the principles of law upon which my opinion is formed, rather than to argue them at length.

The opinion of the court treats this controversy as a conflict between the jurisdiction and rights of a State court, and the jurisdiction and rights of a court of the United States, as a conflict between sovereignties, both acting by their own officers within the spheres of their acknowledged powers. In my judgment, this is a mistaken view of the question presented by the record. It is not a question between the relative powers of a State and the United States, acting through their judicial tribunals, but merely upon the relative powers and duties of a court of admiralty and a court of common law in the case of an admitted maritime lien. It is true that the court of admiralty is a court of the United States, and the court of common law is a court of the State of Pennsylvania. But the very same questions may arise, and indeed have arisen, where both courts are created by and acting under the same sovereignty. And the relative powers and duties of a court of admiralty and a court of common law can upon no sound principles be different, because the one is a court of the United States and the other the court of a State. The same rules which would govern under similar circumstances, where the process of attachment or a *fieri facias* had issued from a Circuit Court of the United States exercising a common-law jurisdiction, must govern in this case. The court of admiralty and court of common law have each their appropriate and prescribed sphere of action, and can never come in conflict, unless one of them goes outside of its proper orbit. And a court of common law, although acting under a State, has no right to place itself within the sphere of action appropriated peculiarly and exclusively to a court of admiralty, and thereby impede it in the discharge of the duties imposed upon it by the Constitution and the law.

There are some principles of law which have been so long and so well established that it is sufficient to state them without referring to authorities.

The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must be first paid.

By the Constitution and laws of the United States, the only court that has jurisdiction over this lien, or authorized to enforce it, is the court of admiralty, and it is the duty of that court to do so.

The seamen, as a matter of right, are entitled to the process of the court to enforce payment promptly, in order that they

may not be left penniless, and without the means of support on shore. And the right to this remedy is as well and firmly established as the right to the paramount lien.

No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien, or the remedy which is given to the seaman.

A general creditor of the ship-owner has no lien on the vessel. When she is attached (as in this case) by process from a court of common law, nothing is taken, or can be taken, but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship. And the only interest which this process can seize is a secondary and subordinate interest, subject to the superior and paramount claims for seamen's wages; and what will be the amount of those claims, or whether anything would remain to be attached, the court of common law cannot know until they are heard and decided upon in the court of admiralty.

I do not understand these propositions to be disputed.

Under the attachment, therefore, which issued from the common-law court of Pennsylvania, nothing was legally in the custody of the sheriff but the interest of the owner, whatever it might prove to be, after the liens were heard and adjudicated in the only court that could hear and determine them. The common-law process was not and could not be a proceeding *in rem*, to charge the ship with the debt, for the creditor has no lien upon her, and the court had no jurisdiction over anything but the owner's residuum.

The whole ship could not be sold by them, so as to convey an absolute right of property to the purchaser. And even what was seized was not taken to subject it to the payment of the debt, but merely to compel the owner to appear personally to a suit brought against him *in personam* in the court which issued the process of attachment. It was ancillary to the suit against him personally, and nothing more. The vessel would be released from the process, and restored to him, as soon as he gave bail and appeared to the suit; and she would be condemned and sold only upon his refusal to appear. But, according to the laws of the State and the practice of the common-law court, twelve months or more might elapse before the vessel was either sold or released from the process.

The question, then, is simply this: can a court of common law, having jurisdiction of only a subordinate and inferior interest, shut the doors of justice for twelve months or more against the paramount and superior claims of seamen for wages

due, and prevent them from seeking a remedy in the only court that can give it? I think not. And if it can be done, then the paramount rights of seamen for wages, so long and so constantly admitted, is a delusion. The denial of the remedy for twelve months or more after the ship has arrived is equivalent, in its effect upon them, to a denial of the lien; substantially and practically it would amount to the same thing. And it is equally a denial of the right of the court of admiralty to exercise the jurisdiction conferred on it by the Constitution and laws of the United States.

Now it is very clear, that if this ship had been seized by process from a common-law court of the United States for a debt due from the owner, the possession of the marshal under that process would have been superseded by process from the admiralty upon a preferred maritime lien. This I understand to be admitted. And if it be admitted, I do not see how the fact that this process was from a common-law court of a State, and served by its own officer, can make any difference; for the common-law court of a State has no more right to impede the admiralty in the exercise of its legitimate and exclusive powers, than a common-law court of the United States. And the sheriff, who is the mere ministerial officer of the court of common law, can have no greater power or jurisdiction over the vessel than the court whose process he executes. He seizes what the court had a right to seize; he has no right of possession beyond it; and if the interest over which the court has jurisdiction is secondary and subordinate to the interest over which the admiralty has exclusive jurisdiction, his possession is secondary and subordinate in like manner, and subject to the process on the superior and paramount claim. It is the process and the authority of the court to issue it that must determine who has the superior right. And if the one is to enforce a right paramount and superior to the other, it is perfectly immaterial whether the first process was served by a sheriff or the marshal. Nor does it make any difference when they are served by different officers of different courts. In the case of the Flora, 1 Hagg., 298, the vessel had been seized by a sheriff upon process from the Court of King's Bench. She was afterwards, and while in possession of the sheriff, arrested upon process from the admiralty on a prior maritime lien, and was sold by the marshal while the sheriff still held her under the common-law process. The sale by the marshal was held to be valid by the King's Bench. It is true, that the creditor at whose suit the vessel was seized by the sheriff consented to the sale, and claimed to come in for the surplus after paying the maritime lien. But if the marshal could not lawfully ar-

rest while she was in the possession of the sheriff, he could not lawfully sell under that arrest, nor while the sheriff still held possession, and no consent of parties would make it a valid marshal's sale, and give a good title to the purchaser, if the sale was without authority of law. The validity of these proceedings was brought before the courts by the ship-owner, and earnestly litigated. The Court of King's Bench sanctioned the sale, not upon the ground that the creditor consented to it, but upon the ground that the marshal acted under a court of competent authority, (see note 301,) and they refused to interfere with the surplus which remained after payment of seamen's wages, which had been paid into the registry of the admiralty, even in behalf of the creditor who had seized under their own process. The King's Bench do not seem to have supposed there was any conflict of jurisdiction in the case, or that their process or officer had been improperly interfered with by the marshal, nor did the King's Bench hold that there was any incongruity in the possession of the sheriff and the marshal at the same time. On the contrary, it was conceded on all hands that the possession of the sheriff was no obstacle to the arrest by the marshal, nor any impediment in the way of the admiralty, when exercising its appropriate and exclusive jurisdiction, in enforcing claims prior and superior to that of the attaching creditor. Is there any substantial difference between that case and the one before us? I can see none.

Chancellor Kent, in his Commentaries, states the principle with his usual precision and clearness, and in a few words. In vol. 1st, 380, speaking of the lien for seamens' wages, he says: "The admiralty jurisdiction is essential in all such cases, for the process of a court of common law cannot directly touch the thing *in specie*." And in my judgment the process of the court of common law in this case did not touch the interest of the seamen in the ship.

But it seems, however, to be supposed, that the circumstance that the common-law court was the court of a State, and not of the United States, distinguishes this case from that of the Flora, and is decisive in this controversy. And it is said that the Royal Saxon, being in possession of an officer of a State court, under process from the court, she was in the possession of an officer of another sovereignty, and was in the custody of its law, and that no process could be served upon her, issuing from the court of a different sovereignty, without infringing upon the rights of the State, and bringing on unavoidably a conflict between the United States and the State.

If, by another and different sovereignty, it is meant that the power of the State is sovereign within its sphere of action, as

marked out by the Constitution of the United States, and that no court or officer of the United States can seize or interfere with property in the custody of an officer of a State court, where the property and all the rights in it are subject to the control of the judicial authorities of the State, nobody will dispute the proposition. But if it is intended to say that, in the administration of judicial power, the tribunals of the States and the United States are to be regarded as the tribunals of separate and independent sovereignties, dealing with each in this respect upon the principles which govern the comity of nations, I cannot assent to it. The Constitution of the United States is as much a part of the law of Pennsylvania as its own Constitution, and the laws passed by the General Government pursuant to the Constitution are as obligatory upon the courts of the States as upon those of the United States; and they are equally bound to respect and uphold the acts and process of the courts of the United States, when acting within the scope of its legitimate authority. And its courts of common law stand in the same relation to the courts of admiralty, in the exercise of their judicial powers, as if they were courts of common law of the United States. The Constitution and the laws, which establish the admiralty courts and regulate their jurisdiction, are a part of the supreme law of the State; and the State could not authorize its common-law courts to issue any process, or its officers to execute it, which would impede or prevent the admiralty court from performing the duties imposed upon it, on exercising the power conferred on it by the Constitution and laws of the United States. The State courts have not, and cannot have, any jurisdiction in admiralty and maritime liens, to bring them into conflict with the courts of the United States. This principle appears to me to rest on the clear construction of the Constitution, and has been maintained by eminent jurists.

Precisely the same question now decided came before the Circuit Court of Massachusetts twenty years ago, in the case of certain logs of mahogany, Thomas Richardson, claimant, reported in 2d Sumn., 589; and also before the District Court of the State of Maine, thirty years ago, in the case of Poland et al. *v.* the freight and cargo of the brig Spartan, reported in Ware's Rep., 143; and in both of these cases the point was fully considered and decided by the court; and in both it was held that a previous seizure under a process of attachment from a State court could not prevent the admiralty from proceeding *in rem* to enforce the preferred liens of which it has exclusive jurisdiction.

In the case in the Circuit Court of Massachusetts, Mr. Justice

Story says: "A suit in a State court by replevin or by attachment can never be admitted to supersede the right of a court of admiralty to proceed by a suit *in rem*, to enforce a right against that property, to whomsoever it may belong. The admiralty does not attempt to enter into any conflict with the State court, as to the just operation of its own process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under the process. No doubt can exist that a ship may be seized under admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien on a ship for seamen's wages, or a bottomry bond."

I quote the words of Mr. Justice Story, because he briefly and clearly states the principle upon which the jurisdiction of the respective courts is regulated, and upon which I think this case ought to be decided. The Constitution and laws of the United States confer the entire admiralty and maritime jurisdiction expressly upon the courts of the General Government. And admiralty and maritime liens are therefore outside of the line which marks the authority of a common-law court of a State, and excluded from its jurisdiction. And if a common-law court sells the vessel to which the lien has attached, upon condemnation, to pay the debt, or on account of its perishable condition, it must sell subject to the maritime liens, and they will adhere to the vessel in the hands of the purchaser, and of those claiming under him.

Upon what sound principle, then, of judicial reasoning can it be maintained, that although the process of a common-law court cannot reach the maritime liens, yet, by laying hold of some other interest, it can withdraw them from admiralty for an indefinite period of time? It cannot issue its mandate to the admiralty, not to proceed upon those liens; but, according to the present decision, it may take the lien out of its power and out of its jurisdiction. I cannot be persuaded that a court which, by the Constitution of the United States, has no jurisdiction over the subject-matter—that is, the maritime lien—can directly or indirectly prevent or delay the court which, by the Constitution, has exclusive jurisdiction, from fulfilling its judicial duty, or the seamen from pursuing their remedy, where alone they can obtain it.

But the decision of this court in the case of Hagan *v.* Lucas, 10 Pet., 400, it is said, is the same in principle, and must govern the case now before us. If this were the case, I should yield to its authority, however reluctant I might feel to do so. But in my judgment the point decided in that case has no analogy whatever to the questions arising in this.

In the case of Hagan *v.* Lucas, a judgment had been obtained in the State court of Alabama against certain defendants, and an execution issued, upon which certain slaves were seized by the sheriff as the property of the defendants. Lucas, the defendant in this writ of error, claimed the property as belonging to him; and, under a statute of Alabama, the property was restored to him by the sheriff, upon his giving bond for the forthcoming of the slaves, if it should be found that they were the property of the persons against whom the execution was issued. And proceedings were thereupon had, to try before the court the right of property, according to the provisions of the State law. Pending these proceedings, a judgment was obtained in the District Court of the United States against the same defendants, and an execution issued, which the marshal levied on the same property that had been seized by the sheriff. Lucas thereupon appeared in court, and again claimed the slaves as belonging to him, and at the trial exhibited proof that the proceedings to try the right of property under the sheriff's levy were still pending and undetermined in the State court. Both the court below and this court held, that under these circumstances the property could not be taken in execution by the marshal upon process from the District Court of the United States.

But what was the principle upon which that case turned? and what resemblance has it to the questions we are now called on to consider?

Here were two courts of common law, exercising the same jurisdiction, within the same territorial limits, and both courts governed by the same laws. Neither court had any peculiar or exclusive jurisdiction over the property in question, nor of any peculiar right or lien upon it. The State court had the same power with the District Court to hear and decide any question that might arise as to the rights of property of any person, and to protect any liens and priorities of payment to which the property or its proceeds were liable. In a word, they were courts of concurrent and co-ordinate jurisdiction over the subject-matter; and if the plaintiff in the District Court had any preferred interest in the property, or any superior or prior claim, he could have asserted that claim in the State court, and have obtained there the same remedy and the same protection of his rights, and as effectually and speedily, as the court of the United States could have afforded him.

And this court, in deciding the case, did nothing more than adhere to a rule which, I believe, is universally recognised by courts of justice—that is, that between courts of concurrent jurisdiction, the court that first obtains possession of the con-

troversy, or of the property in dispute, must be allowed to dispose of it finally, without interference or interruption from the co-ordinate court. And this rule applies where the concurrent jurisdictions are two courts of the United States or two courts of a State, or one of them the court of a State and the other a court of the United States. It was no new question when the case of Hagan *v.* Lucas came before this court; but an old and familiar one, upon which courts of concurrent jurisdiction have necessarily uniformly acted, in order to prevent indecorous and injurious conflicts between courts in the administration of justice. Indeed, this principle seems hardly to have been disputed in that case. The arguments of counsel are not given in the report. But, judging from the opinion delivered by the court, the main question seems to have been, whether the slaves were not released from execution by the bond given by Lucas, and the bond substituted in their place. The court, under the authority of a case decided in the State court of Alabama, held that they were not released from the sheriff's levy, and therefore applied the familiar rule in relation to courts of concurrent jurisdiction.

But how can the case of Hagan *v.* Lucas influence the decision of this? If Pennsylvania had an admiralty or any other court with jurisdiction over maritime liens, and the attaching creditor had proceeded in that court, undoubtedly the same principle would apply. But the State has no such court, and can have none such under the Constitution of the United States. The jurisdiction of the District Court is exclusive on that subject, and the line of division between that and the courts of common law is plainly and distinctly drawn. And when the District Court proceeded to enforce the lien for seamen's wages, it interfered with no right which the creditor had acquired under the process of attachment, nor with any right of property, subject to State jurisdiction; and when the District Court, acting within its exclusive and appropriate jurisdiction, proceeded to enforce the preferred and superior right of seamen's wages, it claimed no superiority over the State court; it merely exercised a separate and distinct jurisdiction. It displaced no right which the attaching creditor had acquired under the State process, nor in any degree lessened his security. Nor did it interfere with any right over which the State court had jurisdiction. If the liens were paid without sale, his attachment still held the ship. If she was sold, his right, whatever it was, adhered to the surplus, if any remained after discharging the liens. And if the State court passed judgment of condemnation in his favor, he would be entitled to receive from the registry of the admiralty whatever was awarded him by the State court,

if there was surplus enough after paying the superior and preferred claims for maritime liens. I can see no conflict of jurisdiction; nor can there be any, if each tribunal confines itself to its constitutional and appropriate jurisdiction.

But my brethren of the majority seem to suppose, that the principle decided in Hagan *v.* Lucas goes farther than I understand it; and that it has established the principle, that where a ship, within the limits of a State, is attached by an officer of a State, under process from a State court, no process can be served upon it from a District Court of the United States, while it is held under attachment by the sheriff; and that the sheriff might lawfully repel the marshal, if he attempted to serve a process *in rem*, although it was issued by the District Court of the United States, to enforce a paramount and a superior claim, for which the ship was liable, and which the District Court had the exclusive right to enforce, and over which the State court had not jurisdiction.

If this be the principle adopted by this court, and be followed out to its necessary and legitimate results, it must lead them further, I am convinced, than they are prepared to go. For it might have happened, that after this vessel was seized by the sheriff, and while she remained in his possession, it was discovered that she was liable to forfeiture, or had incurred some pecuniary penalty which was by law a lien upon her, and process issued by the District Court to arrest her, in order to enforce the penalty or forfeiture. In such a case, no one, I presume, would think that the sheriff had a right to keep out the marshal, and prevent him from arresting the ship; nor would such an arrest, I presume, be regarded as a violation of the sovereignty of the State, nor an illegal interference with the process or jurisdiction of its courts. Yet if it be admitted that the marshal may under such process lawfully take possession and control of the vessel, upon what principle of law does it stand? Simply upon this: that the rights of the United States under the Constitution are paramount and superior to the right of the attaching creditor. And as the District Court has exclusive jurisdiction to decide upon them, and enforce them, and the State court no jurisdiction over them, the State court cannot lawfully interfere with the process of the District Court, when exercising its exclusive jurisdiction to enforce and maintain this paramount and superior right.

But is not the claim for mariners' wages superior and paramount to the claim of the general creditor, at whose suit the attachment issued? Has not the District Court the exclusive power to enforce and maintain this right, and is not the State court without jurisdiction upon the subject? It is true, that

the seaman's right is not regarded as of equal dignity and importance with the rights of the United States. But if the proposition be true, that after the vessel was seized by the sheriff she was in the custody of the law of the State, and no process from the District Court would authorize the marshal to arrest her, although it was issued upon a higher and superior right, for which the ship was liable, and over which the State court had no jurisdiction, the proposition must necessarily embrace process to enforce the superior and prior rights of the United States, as well as the superior and privileged rights of individuals; for the District Court has no right to trespass upon the sovereign and reserved rights of a State, or to interfere unlawfully with the process of its courts, because the United States are the libellants, and the process issued at their instance. In this respect, the United States have no greater right than an individual. And if the Royal Saxon might have been arrested by the marshal to enforce the higher and superior right of the United States in the appropriate court, I can see no reason why he might not upon the same grounds make the arrest to enforce and protect the higher and superior right to mariners' wages. I think it will be difficult to draw any clear line of distinction between them, and, in my opinion, the process may be lawfully executed by the marshal in either case. I agree with the majority of my brethren in regarding it as among the first duties of every court of the United States carefully to avoid trespassing upon the rights reserved to the States, or interfering with the process of their courts when they are exercising either their exclusive or concurrent jurisdiction in the matter in controversy. And with the high trusts and powers confided by the Constitution to the Supreme Court, it is more especially its duty to abstain from all such interference itself, and to revise carefully the judgments of the inferior courts of the United States whenever that question arises, and to reverse them if they exceed their jurisdiction. But I must add, that while in my judgment this court should be the last court in the Union to exercise powers not authorized by the Constitution, it should be the last court in the Union to retreat from duties which the Constitution and laws have imposed.

It has been suggested that this was a foreign ship, and the seamen foreign seamen, and that they are not therefore embraced in the act of Congress which gives a lien upon the vessel for seamen's wages. But this provision of the law was nothing more than an affirmance of the lien which was given by the maritime law in England from the earliest period of its commercial jurisprudence, and indeed by the maritime law of every nation engaged in commercial adventures. And the

English law was brought with them by the colonists when they migrated to this country, and was invariably acted on by every admiralty court, long before the act of Congress was passed.

It is true, that it is not in every case obligatory upon our courts of admiralty to enforce it in the case of foreign ships, and the right or duty of doing so is sometimes regulated with particular nations by treaty. But as a general rule, where there is no treaty regulation, and no law of Congress to the contrary, the admiralty courts have always enforced the lien where it was given by the law of the State or nation to which the vessel belonged. In this respect the admiralty courts act as international courts, and enforce the lien upon principles of comity. There may be, and sometimes have been, cases in which the court, under special circumstances, has refused to interfere between the foreign seamen and ship-owner; but that is always a question of sound judicial discretion, and does not affect the jurisdiction of the court, and, like all questions resting in the judicial discretion of the court below, (such as granting or refusing a new trial, continuing a case, or quashing an execution,) it is not a subject for revision here, and furnishes no ground for appeal, or for impeaching the validity of the judgment. The District Court undoubtedly had jurisdiction of the case, if in its discretion it deemed it proper to exercise it.

Indeed, there appears to have been no special circumstances brought to the notice of the court to induce it, upon international considerations, not to interfere. There was no objection on the part of the foreign ship-owner or master; but, on the contrary, a general desire that the court should do so. And certainly this circumstance was not even adverted to in the State or District Court, and had no influence upon the opinions of either.

It is perhaps to be regretted that this question of jurisdiction did not arise between two courts of common law, but has arisen between the admiralty courts of the United States and a common-law court of the State. I am sensible, that among the highest and most enlightened minds, which have been nurtured and trained in the studies of the common law, there is a jealousy of the admiralty jurisdiction, and that the principles of the common law are regarded as favorable to personal liberty and personal rights, and those of the admiralty as tending in a contrary direction. And under the influence of this opinion, they are apt to consider any restriction upon the power of the latter as so much gained to the cause of free institutions. And as there is no admiralty jurisdiction reserved

to the States, and the administration of justice in their courts is confined to questions of common law and chancery, the studies and pursuits of the jurists in the States do not generally lead them to examine into the history and character of the admiralty jurisdiction; nor to inquire into its usefulness, and indeed necessity, in every country extensively engaged in commerce. Their opinions are naturally formed from common-law decisions, and common-law writings and commentaries. And no one has contributed more than Lord Coke to create these opinions. His great knowledge of the common law, displayed in his voluminous writings, has made him a high authority in all matters concerning the administration of justice. And every one who in early life has passed through the usual studies of the common law, feels the influence of his opinions afterwards, in all matters connected with legal inquiries. The firmness with which he resisted the encroachments of the Crown upon the liberty of the subject, in the reigns of James I and Charles I, has added to the weight of his opinions, and impressed them more strongly and durably upon the mind of the student. But before we receive implicitly his doctrines on the admiralty jurisdiction, it may be well to remember that in the case of Smart *v.* Wolf, 3 T. R., 348, where the opinions of Lord Coke were referred to upon a question of admiralty jurisdiction, Mr. Justice Buller said: "with respect to what is said relative to the admiralty jurisdiction in 4 Inst., 135, that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, the jurisdiction."

I need not speak of the weight to which this opinion is entitled, when judicially pronounced by Mr. Justice Buller in the King's Bench, in deciding a well-considered case then before the court.

Every one who has studied the history of English jurisprudence generally, and who has not confined his researches to the decisions of the common-law courts, and the commentaries of writers trained in them, is aware that a very grave contest existed for a long time, as to the relative jurisdictions of the Court of King's Bench and the admiralty after the passage of the statutes of Richard II, which are so often referred to. And this controversy was continued with unabated zeal on both sides after the passage of the statutes of Henry IV and Henry VIII, on the same subject.

It is not my purpose to discuss the points on which the courts differed. I refer to the controversy merely to show that the construction given to the English statutes by the

King's Bench, and which finally narrowed so much the jurisdiction of the English admiralty, was earnestly disputed at the time by many of the most distinguished jurists of the day. Indeed, the decisions of the King's Bench were by no means uniform, and the opinions of common-law judges on the subject widely differed. This appears by the opinion of the twelve judges, given to the King in Council, according to the usage of the English Government at that period of its history, and also by the ordinance of the Parliament in 1648, both of which materially differed from the decisions made before and afterwards in the King's Bench. I refer to these opinions particularly because they show, past doubt, that the construction placed upon the English statutes, now so confidently assumed to have been the admitted one at the time, was, in fact, for several generations, earnestly disputed by legal minds of the highest order, and was at length forced on the admiralty by the controlling power of the King's Bench; for, whatever justice or weight of argument there might be on the part of the construction of the admiralty judges, the power was in the King's Bench. It exercised not merely the ordinary appellate authority of a superior court, but it issued its prohibition, forbidding any other court to try a suit brought in it where the judges of the King's Bench denied the jurisdiction of the inferior court, and claimed the right to have the case tried before themselves.

How, and under what influences, such a power would be exercised, from the reign of Richard II to that of Henry VIII, we may readily imagine. It was a period when England was divided by the rival claims of the houses of York and Lancaster to the crown, and was often convulsed by civil wars, not upon questions of civil liberty or national policy, but merely to determine which of the claimants should be their king; and when the monarch who succeeded in fighting his way to the throne framed his policy, and appointed the officers, civil as well as military, with a view to maintain his own power, and destroy the hopes of his adversary, rather than with any desire to promote the liberties of the people, or establish an enlightened and impartial administration of justice in his courts. And as the king was presumed to preside in person in the King's Bench, and the judges held their offices at his pleasure, no reader of history will doubt the temper and spirit in which power was exercised.

But we are not left to conjecture on that subject. The same efforts and means that were successfully used to break down the court of admiralty, were also used at the same time, and by the same men, to restrict the powers of the court of chan-

cery, but not with the like success. And the same reasons were assigned for it—that is, that it proceeded upon the principles and adopted the practice of the civil law, and had no jury, and was on that account unfavorable to the principles of civil liberty, whilst the proceedings at common law supported and cherished them. These hostile efforts against the chancery continued until the reign of James I, and were made with renewed vigor in the time of Lord Ellesmere, who was appointed Lord Keeper by Queen Elizabeth, and Chancellor by James I.

A brief passage from the life of Lord Chancellor Ellesmere, by Lord Campbell, will tell us how far the earlier decisions of the Courts of King's Bench on the statutes of Richard II, Henry IV, and Henry VIII, which are so often pressed upon us, ought to be respected as just interpretations of these statutes, and also how far we ought to regard those judges as high and impartial jurists, seeking only to maintain free institutions when they give judgments restraining the jurisdiction of other courts.

The passage I quote from Lord Campbell is in his 2d vol. Lives of the Chancellors, 184, 185, London edition of 1845, where, after stating that few of his (Lord Ellesmere's) judgments had come down in a shape to enable us to form an opinion of their merits, but that they were said to have been distinguished for sound learning, lucid arrangement, and great precision of doctrine, he proceeds in the following words:

"The only persons by whom he was not entirely approved were the common-law judges. He had the boldness to question and correct their pedantic rules more freely than Lord Keeper Puckering, Lord Keeper Bacon, or any of his predecessors, had done, and not unfrequently he granted injunctions against executions on common-law judgments, on the ground of fraud in the plaintiff, or some defect of procedure by which justice had been defeated. He thus not only hurt the pride of these venerable magistrates, but he interfered with their profits, which depended mainly upon the number of suits brought before them, and the reputation of their respective courts. These jealousies, which begun so soon after his appointment, went on constantly increasing, till at last, as we shall see, they produced an explosion which shook Westminster Hall to its centre."

We need nothing further to show what respect is due to the opinions of judges actuated by such motives.

The legislation of England, however, in the present age, when the principles of civil liberty and enlightened jurisprudence are better understood, shows that the restrictions upon

the admiralty jurisdiction, imposed by the King's Bench, have been found unsuitable to the wants of a great commercial people, and that the enlargement of that jurisdiction is not regarded, at the present day, as adverse to the march of liberal and free institutions. And the decisions of the King's Bench having been too firmly established, by repeated adjudications, to be removed by judicial authority, Parliament interposed, and by the statute of 3d and 4th Victoria, passed in 1840, restored to the court many of the most important powers in civil cases that had been wrested from it by the decisions in the King's Bench. The courts of common law proved to be far less suited for such controversies. And it is no small evidence of the soundness of the doctrines heretofore upheld by this court, that with the powers restored by Parliament, the English admiralty now exercises nearly the same jurisdiction which this court had previously maintained to be the appropriate and legitimate power of a court of admiralty. A synopsis of the jurisdiction of the English admiralty, as now established, is stated in 1 Kent's Com., 371, 372, in the notes. But it is proper to remark, that in stating in these notes the admiralty jurisdiction as recognised in the United States, I think it is stated too broadly—broader than this court has sanctioned; for, as regards the jurisdiction in policies of insurance, I believe it has never been asserted in any circuit but the first, and certainly has never been brought here for adjudication.

This brief review of the long contest in England, between the Courts of King's Bench and the admiralty, seemed to be necessary, as it shows past doubt that the efforts of the former to take away the jurisdiction of the latter, and to compel the suitors to seek redress in the King's Bench, did not arise from any anxiety to preserve free institutions, and that the charges made against the admiralty, of favoring despotic principles, and usurping powers which did not belong to it, are without foundation. It shows, moreover, that the persevering encroachments of the King's Bench, and its unwarranted construction of the English statutes, were constantly disputed and opposed by enlightened jurists. The contest was carried on to a very late period, with varying decisions, in the Court of King's Bench itself, upon the subject, and no certain and definite line of jurisdiction in admiralty appears to have been fixed and established, even at the period of the American Revolution, and indeed not until the passage of the late act of Parliament.

And if we are to look to England for an example of enlightened policy in the Government, and a system of jurisprudence suited to the wants of a great commercial nation, or a just and impartial administration of the laws by judicial tribunals upon

principles most favorable to civil liberty, I should not look to the reigns of Richard II, or of Henry IV, or Henry VIII, for either. And I should rather expect to find examples worthy of respect and commendation in the England of the present day, in her statute of 3d and 4th of Victoria, in the elevated and enlightened character of its present courts of justice, and in their mutual respect and consideration for the acts and authority of each other, without any display of jealousy or suspicion.

As to the unfavorable tendencies of the admiralty jurisdiction, it is perhaps sufficient to say, that under the Constitution of the United States it has no criminal jurisdiction; nor is the suitor without the protection of a trial by jury, if the legislative body which creates the court and regulates its powers think proper to give the right. There is nothing in the character and proceedings of the admiralty incompatible with the trial by jury. And, indeed, it has already been given to a certain extent by the act of Congress of 1845, and may at the will of Congress be given in every case, if it is supposed the purposes of justice require it.

I can therefore see no ground for jealousy or enmity to the admiralty jurisdiction. It has in it no one quality inconsistent with or unfavorable to free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity in every just and enlightened commercial nation. The delays unavoidably incident to a court of common law, from its rules and modes of proceeding, are equivalent to a denial of justice where the rights of seamen, or maritime contracts or torts, are concerned, and seafaring men the witnesses to prove them; and the public confidence is conclusively proved by the well-known fact, that in the great majority of cases, where there is a choice of jurisdictions, the party seeks his remedy in the court of admiralty in preference to a court of common law of the State, however eminent and distinguished the State tribunals may be.

The opinions of Lord Coke, in all matters relating to the laws and institutions of England, were deeply impressed upon the English nation, and for a long time exercised a controlling influence. But with the advance of knowledge, and a more enlightened judgment in the science of government and jurisprudence, the courts of justice have not shut their eyes to errors committed under the influence of prejudice or passion. This is evident from the language of Mr. Justice Buller hereinbefore mentioned, by the respect shown to the jurisdiction and authority of the admiralty in the case of the Flora, in 1st Hag., and by the recent act of Parliament, and I can see no good

reason for fostering in the common-law courts of this country, whether State or Federal, opinions springing from prejudices which arose out of the conflicts of the times, and which tend to create jealousies and suspicions on their part, and produce discord instead of harmony and mutual good feeling in the tribunals of justice. These jealousies and suspicions of Lord Coke undoubtedly grew out of the vehement conflicts, personal as well as political, in which he was so prominently engaged during all his lifetime. They have been discarded and disowned in the courts of the country from which we derived them, and also emphatically repudiated by the stat. of 3 and 4 of Victoria.

And believing, as I do, upon the best consideration I am able to give to the subject, that the decision and the principle upon which the opinion of the court founds itself is inapplicable to the case before us, and that if it is carried out to its legitimate results it will deprive the admiralty of power, useful, and indeed necessary, for the purposes of justice, and conferred on it by the Constitution and laws of the United States, I must respectfully record my dissent.

INDEX

OF THE

PRINCIPAL MATTERS.

ADMIRALTY.

1. Where the master of a vessel was also part owner, and made a contract of affreightment with a lumber company, of which he was also a member, and the cargo was consigned to the master, the case is not within admiralty jurisdiction, but appropriate to that of a court of chancery. *Grant* v. *Pouillon*, 162.
2. Where a judgment of the Circuit Court, sitting in admiralty, was affirmed here by a divided court, interest was not to be calculated upon the judgment. *Hemmenway* v. *Fisher*, 255.
3. The eighteenth rule of this court never applied to cases in admiralty which are brought up by appeal, and the rule itself is repealed by the sixty-second rule. *Ibid.*
4. The admiralty jurisdiction of the courts of the United States extends to cases of collision upon navigable waters, although the place of such collision may be within the body of a county of a State, and may be above the flux and reflux of the tide. *Jackson* v. *Steamboat Magnolia*, 296.
5. The District Courts exercise this jurisdiction over fresh-water rivers "navigable from the sea," by virtue of the judiciary act of 1789, and not as conferred by the act of 1845, which extends their jurisdiction to the great lakes and waters "not navigable from the sea." *Ibid.*
6. The admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction. *Peoples' Ferry Company* v. *Beers*, 393.
7. Whether the District Courts can enforce a lien in such cases, where the law of the State where the vessel was built gave a lien for its construction, is a question which the court does not now decide. *Ibid.*
8. Where a tow-boat was descending the Mississippi river with a vessel fastened to each side, and another at the stern, and a collision ensued between one of the vessels thus lashed and an ocean steamer ascending the river, the evidence shows that the latter was in fault, and must pay for all the damage. *Snow et al.* v. *Hill et al.*, 543.
9. Where a vessel had been seized under a process of foreign attachment issuing from a State court in Pennsylvania, and a motion was pending in that court for an order of sale, a libel filed in the District Court of the United States for mariners' wages and process issued under it, could not divest the authorities of the State of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title to the property, and the sale by the marshal as inoperative. *Taylor* v. *Carryl*, 583.
10. Where property is levied upon, it is not liable to be taken by an officer acting under another jurisdiction. *Ibid.*
11. The cases examined where conflicting claims against the same property are set up under the laws of the United States and under State laws. *Ibid.*
12. The process of foreign attachment in Pennsylvania is identical with that which issues out of the District Court of the United States sitting in admiralty. *Ibid.*

ADMIRALTY, (*Continued.*)

13. The admiralty jurisdiction of the courts of the United States, although exclusive on some subjects, is concurrent upon others. The courts of common law deal with ships or vessels as with other personal property. *Ibid.*
14. In order to give jurisdiction *in rem*, the seizure by the marshal must have been valid; and this was not the case when the vessel was, at the time of seizure, in the actual and legal possession of the sheriff. *Ibid.*

AGENTS.

1. A broker who negotiates the sale of an estate is not entitled to his commission until he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and the vendor. *McGavock* v. *Woodlief*, 221.
2. Where an assignee of a claim upon a foreign Government, holding it under an assignment supposed to be good, but afterwards adjudged invalid, prosecuted the claim to a successful result, and was subjected to costs and expenses in protecting the fund from rival claimants, and thereby preserving it, he was entitled to a reimbursement of these costs and expenses by the true owner, upon a final settlement of accounts between them. *Williams* v. *Gibbes*, 535.
3. Being placed in the position of a trustee, it was his duty to defend the title, and the expenses for so doing were properly chargeable to the estate. *Ibid.*
4. The assignee ought also to have been allowed a compensation for his trouble and personal exertions in the prosecution of the claim; and under the special circumstances of this case, the Circuit Court having allowed thirty-five per cent. of the sum realized, this court are not prepared to say it is too much. *Ibid.*
5. At a sale of public lands in a Territory, an agent who purchased for another must account, as trustee, to his employer, although the statutes of the Territory have abolished all resulting trusts. *Irvine* v. *Marshall*, 558.

APPEALS.

1. Where this court affirmed a decree of a Circuit Court, which was, that a conveyance of property should be executed upon the payment of a sum of money; and the Circuit Court proceeded to carry out its decree by issuing an attachment against the party who refused to execute such conveyance, an appeal will not lie to this court from the order directing the attachment. *McMicken* v. *Perrin*, 133.
2. The appeal must be dismissed, with costs, on motion. *Ibid.*
3. Where an appeal from a decree is taken within ten days from the rendition of the decree, it is in time to operate as a supersedeas; and so, also, if taken within ten days after the decree is settled and signed. *Silsby* v. *Foote*, 290.

APPEAL BONDS.

1. The penalty of the bond taken, when an injunction is awarded, is no evidence of the amount or value in dispute. *Brown* v. *Shannon*, 55.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See COMMERCIAL LAW.

BANKRUPTCY.

1. Deeds of large tracts of land made by a grantor when deeply in debt, and when suits were pending against him, and who shortly afterwards petitioned for the benefit of the bankrupt act, the possession and occupation of the land continuing the same after the sale as before, and the consideration money one-half only of the actual value, held to be fraudulent and void as against creditors. *Hudgins* v. *Kemp*, 45.
2. The Circuit Court of the United States has no power to entertain an original bill brought by a creditor, who has come in and proved his debt against the bankrupt, for the purpose of annulling or vacating a discharge and certificate in bankruptcy, obtained in the District Court upon imputations of fraud, done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who had taken a dividend out of the bankrupt's estate. *Commercial Bank of Manchester* v. *Buckner*, 108.

BANKRUPTCY, (*Continued.*)

3. The District Court, which passed the decree in bankruptcy, can take cognizance of such a case. *Ibid.*
4. Whether or not such a bill could be filed by a creditor who had not come in and proved his debt, and who was not a party to the decree in bankruptcy, is a question which the court does not now decide. *Ibid.*
5. Nor has the Circuit Court the power, under its general jurisdiction over frauds, to give relief either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, had assented to the bankrupt's discharge and certificate, and had taken a dividend out of the bankrupt's estate. *Ibid.*

BILLS OF EXCEPTION.

1. A refusal of the court below to grant a new trial is not a proper subject for a bill of exception. *Doswell* v. *De La Lanza*, 29.
2. The Circuit Court of the United States in Alabama, by a general rule, adopted the practice of the State courts, which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court, unless with the consent of counsel, &c. *United States* v. *Breitling*, 252.
3. But where a judge holding the Circuit Court in Alabama signed a bill of exceptions under special circumstances, after adjournment, and without the consent of counsel, this court will consider the exception as properly before it. It is in the power of a court to suspend its own rules, or except a particular case from them, to subserve the purposes of justice. *Ibid.*
4. And the signature of the judge was attached to the bill, in conformity with the decisions of this court. *Ibid.*
5. The exception brings up the charge of the court to the jury, but not the admission of evidence which was objected to on the trial, but to the admission of which no exception was noted. *Ibid.*
6. The charge of the court, being founded on a hypothetical state of facts of which there was no evidence, was erroneous. *Ibid.*
7. Rulings of the court below, in admitting or rejecting evidence, can be brought to this court for revision only by a bill of exceptions. *Suydam v. Williamson*, 429.
8. Where there is a bill of exceptions, the writ of error does not operate only upon that part of the record. Wherever an error is apparent on the record, it is open to revision, whether it be made to appear by a bill of exceptions, or in any other manner. *Ibid.*
9. A bill of exceptions may include in its scope the rulings of the court below as to the admissibility of evidence, which a demurrer to evidence cannot do. *Ibid.*
10. Where the only bills of exception were to the refusal of the court to grant a continuance and change the venue, the judgment of the court below must be affirmed, as these matters are not the subjects of review by this court. *McFaul* v. *Ramsay*, 523.
11. The laws of Iowa permitting a demurrer only when the petition by a fair and natural construction does not show a substantial cause of action, a demurrer to part of the petition in this case was properly overruled. *Ibid.*
12. Exceptions must be taken or the points reserved whilst the jury are at the bar. *Barton* v. *Forsyth*, 532.
13. Where there was an affidavit made, after verdict and judgment, that the affiant was the real party in interest, and prayed to be substituted for, or admitted with, the defendant, and the court overruled the motion, an exception to this ruling will not bring up the points which were raised at the trial; nor will it bring up the ruling upon the motion. *Ibid.*

CALIFORNIA.

1. The regulations for the colonization of the Territories of the Government of Mexico, made 21st November, 1828, in pursuance of the act of the General Congress, August 18, 1824, provided: 1st. That the Governors of the Territories should be empowered to grant vacant lands, among others, to private persons who may ask for them, for the purpose of cultivating and inhabiting the same. 2d. That every person soliciting lands shall address

CALIFORNIA, (*Continued.*)
to the Governor a petition, expressing his name, country, and religion, and describing as distinctly as possible, by means of a map, the land asked for. 3d. The Governor shall proceed to obtain the necessary information, whether the petition contains the proper conditions required by the law of the 18th August, 1824, both as regards the land and the petitioner, in order that the application may be at once attended to; or, if it be preferred, the municipal authority may be consulted, whether there be any objection to the making of the grant. 4th. This being done, the Governor will accede or not to such petition, in conformity to the laws on the subject. 5th. The definitive grant asked for being made, a document, signed by the Governor, shall be given, to serve as a title to the party interested, wherein it must be stated that the grant is made in exact conformity with the provisions of the law; in virtue of which, possession shall be given. 6th. The necessary record shall be kept, in a book provided for the purpose, of all the petitions presented and grants made, with maps of the lands granted, and a circumstantial report shall be forwarded quarterly to the Supreme Government. *United States* v. *Cambuston*, 59.

2. Where there was no evidence, with respect to a grant of land in California, that any one of these preliminary steps had been taken, this court cannot confirm the claim. *Ibid.*
3. The decisions of this court in cases of claims to land in Louisiana and Florida are not applicable where precise and recent regulations exist, directing the manner in which land shall be granted. *Ibid.*
4. There are also strong grounds of suspicion with respect to the *bona fides* of the grant in question; but as the claimant may not have had an opportunity of producing evidence in the court below, the case will be remanded to that court for further proceedings. *Ibid.*
5. As the act of Congress passed on the 3d of March, 1851, does not specify the time within which an appeal must be made to this court from the District Courts of California, the subject must be regulated by the general law respecting writs of error and appeals. Either party is at liberty, therefore, to appeal from such a decree within five years from the time of its rendition. *United States* v. *Pacheco*, 261
6. Under the sixty-third rule of this court, an appellee in a case from California may docket and dismiss according to that rule; but a new appeal may be taken at any time within five years, or it may be that the record may be filed by the appellant at the same term at which a certificate or record had been filed by the appellee, and the case dismissed. *Ibid.*
7. After a case has been thus docketed and dismissed at the instance of an appellee who is a claimant of land, if a patent should be taken out, it will still be subject to be reviewed by this court at any time within the five years above mentioned. *Ibid.*
8. Where a petitioner files a claim to land in California before the board of commissioners created by Congress, the intervention of rival claimants is a practice not to be encouraged. *United States* v. *Fossat*, 413.
9. Where there is no natural boundary or descriptive call for the termination of lines of a tract of land, and the quantity of land called for in the grant is "one league of the larger size, a little more or less," the survey must only include a league. The words "a little more or less" must be rejected. *Ibid.*
10. The grant is for one league of land, to be taken within the southern, western, and eastern boundaries designated therein, and to be located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the Executive department of this Government. *Ibid.*

CHAMPERTY.

1. The ancient English doctrines respecting maintenance or champerty have not found favor in the United States; and in Michigan (where the land lies which is involved in the present controversy) its application to sales, by one out of possession, has been annulled. *Roberts* v. *Cooper*, 467.
2. Although, in that State, an agreement to carry on a suit upon condition of receiving a share of the proceeds might be void, yet the rule would not

CHAMPERTY, (*Continued.*)
apply to a transfer of the legal estate to one, in trust for himself and the other stockholders in a corporation. *Ibid.*

CHANCERY.

1. When a transcript of a record of another court was attached to the answer as an exhibit, and portions of it particularly referred to, and the record of the entire case pleaded, a decree, certified by the clerk, which had been executed by the parties, must be considered as part of the record, although it had not the signature of the judge. The signature of the judge is not the only evidence by which a decree can be authenticated. *Secombe* v. *Steele*, 94.
2. Property was agreed to be sold, and the payment was to be made by a deposit of the price in one of two banks, in Boston, and a certificate delivered to the vendor. The vendee made the deposit in another bank, in Boston, and tendered the certificate to the vendor, within the time limited, and the vendor having refused to receive it, he tendered the purchase-money and interest, and that being refused, he filed his bill for a specific performance, and paid the money into court. Held, under the circumstances, to be sufficient. *Ibid.*
3. Creditors of the vendor, who recovered judgments and sold the property, pending a suit for a specific performance, in which the purchase-money had been paid into court, are not necessary parties to the suit, nor are the purchasers at the sheriff's sale under such judgments. *Ibid.*
4. Under a statute of Minnesota, the court of chancery might divest the title of the defendant in the land, without requiring him to make a conveyance. *Ibid.*
5. Where a bill in chancery was filed for the purpose of enjoining a judgment at law, obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, and did not contain any charges of fraud; neither did it aver that it was owing to the contrivance or unfairness of the defendant that an adequate remedy could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed. *Hungerford* v. *Sigerson*, 156.
6. Where the master of a vessel was also part owner, and made a contract of affreightment with a lumber company, of which he was also a member, and the cargo was consigned to the master, the case is not within admiralty jurisdiction, but appropriate to that of a court of chancery. *Grant* v. *Pouillon*, 162.
7. Where there was a covenant to sell land upon condition that the purchase-money should be paid in instalments, and other acts done by the covenantee, in failure to perform which, rent was to be charged, and the covenantee failed to execute his contract, the rent was justly chargeable. *Stinson* v. *Dousman*, 461.
8. The Territory of Minnesota having abolished the court of chancery, the excuses of the defendant must be judged of as if it was a case in chancery, the statute having so directed. But in this case, time would be held to be an essential consideration in the contract by a court of equity, and the excuses for non-performance are insufficient. *Ibid.*
9. Where there were proceedings in a State court between a bank, one of its creditors, and one of its debtors, and the bank having failed, assigned its assets to trustees, who intervened in the dispute between the other two parties, the judgment of the State court against the intervenors must be considered final, and a bill filed by them in the Circuit Court of the United States must be dismissed. *Ingraham* v. *Dawson*, 486.
10. If there were irregularities in the proceedings of the State court, it was for that court to correct them, had complaint been made at the proper time. *Ibid.*
11. A person dealing with an unlettered man who can neither read nor write, and taking from him a promissory note for the payment of money and a deed for property, in trust, to secure the payment, is bound to show, when he seeks to enforce them, that they, or the material parts of them, were read and fully explained to the party before they were executed, and that he fully understood their meaning and effect. *Selden* v. *Myers*, 506.

CHANCERY, (*Continued.*)

12. If this fact is established by positive and unimpeached testimony, parol evidence cannot be received, to show that the contract was different from that expressed in the writings, or that nothing was at that time due from the party who executed the instruments. *Ibid.*
13. Where there was a contract for the sale of a lot of ground, partly on time, and the vendee entered into possession; and the vendor did not formally demand the payment of the balance when due, but merely said he was ready to make a deed when the money was paid; and after the time of payment had elapsed, the vendee made a tender of the sum due, which the vendor refused to receive; these and other circumstances show that time was not of the essence of the contract, and the vendee was entitled to relief upon a bill for a specific performance of the contract. *Ahl* v. *Johnson*, 511.
14. Where the defendant appeared to a bill in chancery, and defended the suit, and no want of jurisdiction appeared in the record, and then the complainant died, an objection that the defendants were citizens of another State comes too late when made to a bill of revivor, which is only a continuance of the suit. *Whyte* v. *Gibbes*, 541.
15. Moreover, a plea to the jurisdiction comes too late after a mandate has gone down from this court to the court below. *Ibid.*

COMMERCIAL LAW.

.. For the Law of Garnishee see Garnishee.

1. Where the question before the jury was, whether or not one of the defendants was a partner in a commercial firm, it was proper for the court to exclude the declarations made by the defendant in the absence of the plaintiffs. *Teller* v. *Patten*, 126.
2. It was also proper not to confine the attention of the jury to declarations made at one particular time in the presence of one of the plaintiffs, but to allow all similar declarations to be given in evidence, so that the jury could judge of the entire question of the existence of the partnership. *Ibid.*
3. Where an accepted and endorsed bill of exchange was placed by the drawer as collateral security for his own debt in the hands of his creditor, and when the creditor came to sue the acceptor, the court instructed the jury, "that if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that the drawer had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts," then the jury would find for the defendant—this instruction was erroneous. *Goodman* v. *Simonds*, 343.
4. The facts of the case examined, to ascertain whether or not there was sufficient evidence to go to the jury upon these points. *Ibid.*
5. This court again says, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. *Ibid.*
6. Where a party is in possession of a negotiable instrument, the presumption is that he holds it for value, and the burden of proof is upon him who disputes it; an exception being where the defect appears on the face of the instrument. *Ibid.*
7. It is a question of fact for the jury, whether or not the holder had knowledge of defects existing antecedently to the transfer to him. *Ibid.*
8. The English and American cases examined. *Ibid.*
9. Surrendering collateral securities previously given, and affording increased indulgence as to time, furnish a sufficient consideration for the transfer of new collaterals. *Ibid.*
10. Where a bill of exchange was drawn in proper form and protested for non-acceptance, parol evidence of an understanding between the drawer and

COMMERCIAL LAW, (*Continued.*)
the party in whose favor the bill was drawn, calculated to vary the terms of the instrument was not admissible. *Brown* v. *Wiley*, 442.
11. Where the endorser of a promissory note, in conversation with the agent of the holder, before its maturity, dispensed with a presentation of the note and demand of payment, and promised to pay it, or provide for its payment, at maturity, he could not, when sued, set up as a defence that the note was not presented for payment, and demand made therefor when it was due, and that no notice of its dishonor was given. *Sigerson* v. *Mathews*, 496.
12. If, after the maturity of the note, the endorser promised the agent of the holder to pay the same, having, at the time of making such promise, knowledge of the fact that the note had not been presented for payment, and no demand made therefor, or notice of non-payment, he could not, when sued, set up as a defence a want of such demand or notice. *Ibid.*

CONSTITUTIONAL LAW.
1. Where the Circuit Court adopted the construction of a State statute which was placed upon it by the Supreme Court of the State, the decision was correct; and a different construction of the statute subsequently placed upon it by the Supreme Court of the State will not authorize this court to reverse the judgment of the Circuit Court as having been erroneously given. *Morgan* v. *Curtenius*, 1.
2. Where it does not appear either by express averment or by a necessary intendment from any matter stated in the case, nor does any entry on the record of the cause in the Supreme Court of the State show, that any of the questions of which this court is entitled to take cognizance under the terms of the 25th section of the judiciary act, arose in the cause and were actually decided by that court, the writ of error must be dismissed, for the want of jurisdiction. *Christ Church* v. *County of Philadelphia*, 26.
3. The Constitution of the United States gives to Congress the power to provide and maintain a navy, and to make rules for its government. *Dynes* v. *Hoover*, 65.
4. In the exercise of this power, Congress provided for the punishment of desertion and of other crimes not specified in the articles, which should be punished according to the laws and customs in such cases at sea. *Ibid.*
5. Where a seaman was charged with deserting, and the court martial found him guilty of attempting to desert, the court had jurisdiction over the subject-matter, and an action of trespass for false imprisonment will not lie against the ministerial officer who executes the sentence for attempting to desert. *Ibid.*
6. It is only where a court has no jurisdiction over the subject-matter, or, having such jurisdiction, is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered *coram non judice*, that an action will lie against the officer who executes its judgment. *Ibid.*
7. The authorities upon this point examined, and also the legal powers of courts martial. *Ibid.*
8. This court has no jurisdiction, under the 25th section of the judiciary act of 1789, of the question whether or not a law of a State is in opposition to the Constitution of that State. *Withers* v. *Buckley*, 84.
9. Therefore, where it is alleged that the Constitution of a State declares that private property shall not be taken for public uses, and that the highest court of the State has sustained the validity of a law which violates this constitutional provision, this court has no power to review that decision. *Ibid.*
10. The fifth article of the amendments of the Constitution of the United States was intended to prevent the Government of the United States from taking private property for public uses without just compensation, and was not intended as a restraint upon the State Governments. *Ibid.*
11. A law of the State of Mississippi, for improving the navigation of a river which empties itself into the Mississippi, is not in conflict with the act of Congress providing for the admission of that State into the Union, which act guaranties the free navigation of the Mississippi river. *Ibid.*

CONSTITUTIONAL LAW, (*Continued.*)

12. Being admitted upon a footing of equality with the other States, the State of Mississippi had the rightful power to change the channels or courses of rivers within the interior of the State, for purposes of internal improvement. *Ibid.*
13. And, moreover, the law in question does not propose to affect the navigation of the Mississippi river, but only a small stream running into it. *Ibid*
14. Where a suit was brought upon a bill of exchange in one of the State courts of Louisiana, and by that court was transferred to another State court for the purpose of being connected with certain proceedings in insolvency, and this transfer was pleaded in bar in the Circuit Court of the United States to the prosecution of the suit in that court upon the bill, the plea was not good. *Hyde* v. *Stone*, 170.
15. The jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power. *Ibid.*
16. The insertion of the bill amongst the debts of the insolvent upon his schedule, is evidence of the fact of notice; and the sufficiency of the evidence was a question for the jury, and is not subject to review in this court. *Ibid*
17. When New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relation to each other, and their rights of property, remained undisturbed. *Leitensdorfer* v. *Webb* 176.
18. The executive authority of the United States properly established a provisional Government, which ordained laws and instituted a judicial system; all of which continued in force after the termination of the war, and until modified by the direct legislation of Congress, or by the Territorial Government established by its authority. *Ibid.*
19. A suit brought in a court established by the provisional Government was properly transferred to a court created by the act of Congress establishing the Territory of New Mexico, the jurisdiction of which was fixed by a Territorial statute. *Ibid.*
20. Under the Constitution of the State of Arkansas, the Legislature passed a law allowing the State to be sued. *Beers* v. *State of Arkansas*, 527.
21. According to this law, a suit was brought upon some of the State bonds; and whilst the suit was going on, the Legislature passed another law, requiring the bonds to be filed in court, or the suit to be dismissed. *Ibid.*
22. The suitor refusing to file his bonds, the suit was dismissed; and the case was carried to the Supreme Court of the State, where the judgment was affirmed. *Ibid.*
23. The case, being brought to this court under the twenty-fifth section of the judiciary act, must be dismissed for want of jurisdiction. *Ibid.*
24. The permission to bring the suit was not a contract whose obligations were impaired by the passage of the subsequent law. *Ibid.*
25. Where property has been levied upon under a State law, it is not liable to be seized by the marshal under process from the District Court of the United States upon a libel for mariners' wages. *Taylor* v. *Carryl*, 583.

CONSTRUCTION OF STATUTES.

1. Where the Circuit Court adopted the construction of a State statute which was placed upon it by the Supreme Court of the State, the decision was correct; and a different construction of the statute subsequently placed upon it by the Supreme Court of the State will not authorize this court to reverse the judgment of the Circuit Court as having been erroneously given. *Morgan* v. *Curtenius*, 1.
2. The power granted by Congress to the corporation of the city of Washington, "to open and keep in repair streets, avenues, lanes, alleys, &c., agreeably to the plan of the city," includes the power to alter the grade or change the level of the land on which the streets by the plan of the city are laid out. *Smith* v. *Corporation of Washington*, 135.
3. If, in the exercise of this power, an individual proprietor suffers inconvenience or is put to expense, the corporation are not liable in damages. *Ibid.*
4. In May, 1830, Congress passed an act (4 Stat. at L., 420) which gave the right

CONSTRUCTION OF STATUTES, (*Continued.*)
of pre-emption to settlers on the public lands, but made null and void all assignments and transfers of the right of pre-emption prior to the issuance of patents. This act was to remain in force for one year. *Marks* v. *Dickson*, 501.
5. In January, 1832, another act was passed, (4 Stat. at L., 496,) supplementary to the former, allowing certificates of purchase to be transferred, and patents to be issued in the name of the assignee. *Ibid.*
6. In June, 1834, another act was passed, (4 Stat. at L., 678,) reviving the act of 1830. *Ibid.*
7. The true construction of this act of 1834 is, not that it restored the prohibitory clause of 1830, but that it revived the supplement, together with the original act; and that, consequently, an assignment was good and legal before a patent was issued. *Ibid.*
8. But it was necessary to enter the land at the land office, before the right of assignment accrued; and, therefore, assignments made before such entry were assignments of floats, and void. *Ibid.*
9. A power, however, although executed before the location, was sufficient to justify an assignment made after the location, there being a tacit affirmance of the power, when it might have been set aside. *Ibid.*

CONTRACTS.
1. Where there was a contract for the purchase of a cargo of flour, and a portion of it was delivered, paid for, and used by the purchaser, he cannot repudiate the contract, upon the ground that the brand upon the flour was not that for which he contracted. *Lyon* v. *Bertram*, 150.
2. The cases upon this point examined. *Ibid.*
3. Where the statute of limitations imposes a bar upon certain species of contracts after three years, and upon others after two years, and the plea did not show that the contract in question was of the latter class, the plea was bad. *Ibid.*
4. The laws of California require that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action may be joined. So that this statute is complied with, it is not a fatal objection that the respective interests of parties *jointly* concerned are not accurately set forth. *Ibid.*
5. A broker who negotiates the sale of an estate is not entitled to his commission until he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and the vendor. *McGavock* v. *Woodlief*, 221.
6. Where there was a covenant to sell land upon condition that the purchase-money should be paid in instalments, and other acts done by the covenantee, in failure to perform which, rent was to be charged, and the covenantee failed to execute his contract, the rent was justly chargeable. *Stinson* v. *Dousman*, 461.
7. The Territory of Minnesota having abolished the court of chancery, the excuses of the defendant must be judged of as if it was a case in chancery, the statute having so directed. But in this case, time would be held to be an essential consideration in the contract by a court of equity, and the excuses for non-performance are insufficient. *Ibid.*
8. Where there was a contract for the sale of a lot of ground, partly on time, and the vendee entered into possession; and the vendor did not formally demand the payment of the balance when due, but merely said he was ready to make a deed when the money was paid; and after the time of payment had elapsed, the vendee made a tender of the sum due, which the vendor refused to receive; these and other circumstances show that time was not of the essence of the contract, and the vendee was entitled to relief upon a bill for a specific performance of the contract. *Ahl* v. *Johnson*, 511.

COURTS MARTIAL.
1. The Constitution of the United States gives to Congress the power to provide and maintain a navy, and to make rules for its government. *Dynes* v. *Hoover*, 65.
2. In the exercise of this power, Congress provided for the punishment of

COURTS MARTIAL, (*Continued.*)
desertion and of other crimes not specified in the articles, which should be punished according to the laws and customs in such cases at sea. *Ibid.*
3. Where a seaman was charged with deserting, and the court martial found him guilty of attempting to desert, the court had jurisdiction over the subject-matter, and an action of trespass for false imprisonment will not lie against the ministerial officer who executes the sentence for attempting to desert. *Ibid.*
4. It is only where a court has no jurisdiction over the subject-matter, or, having such jurisdiction, is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered *coram non judice*, that an action will lie against the officer who executes its judgment. *Ibid.*
5. The authorities upon this point examined, and also the legal powers of courts martial. *Ibid.*

DUTIES.
See TARIFF.

EJECTMENT.
1. In an action of ejectment, where the defendant pleads the statute of limitations, he must connect his own possession with the adverse possession and title of another person which is set up as a defence. Otherwise, the plea is not good. *Doswell* v. *De La Lanza*, 29.

EVIDENCE.
1. In an action against the owners of a ferry boat, for personal injuries sustained by the negligence of its officers, it was held that the plaintiff might show that he was engaged in a particular business, and had been incapacitated from attending to it, as exhibiting the extent of the injury, and that it had occasioned expense, suffering, and loss of time which had value to him, although the nature of his occupation was not set forth in the declaration. *Wade* v. *Leroy*, 34.
2. The signature of the judge is not the only evidence by which a decree can be authenticated. *Secombe* v. *Steele*, 94.
3. Where the question before the jury was, whether or not one of the defendants was a partner in a commercial firm, it was proper for the court to exclude the declarations made by the defendant in the absence of the plaintiffs. *Teller* v. *Patten*, 126.
4. It was also proper not to confine the attention of the jury to declarations made at one particular time in the presence of one of the plaintiffs, but to allow all similar declarations to be given in evidence, so that the jury could judge of the entire question of the existence of the partnership. *Ibid.*
5. Rulings of the court below, in admitting or rejecting evidence, can be brought to this court for revision only by a bill of exceptions. *Suydam v. Williamson*, 427.
6. A bill of exceptions may include in its scope the rulings of the court as to the admissibility of evidence, which a demurrer to evidence cannot do. *Ibid.*
7. A demurrer to evidence makes the evidence a part of the record. *Ibid.*
8. Where a bill of exchange was drawn in proper form and protested for non-acceptance, parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn, calculated to vary the terms of the instrument, was not admissible. *Brown* v. *Wiley*, 442.
9. The deposition of an officer of the General Land Office, as to the opinions and practice prevailing in that office, cannot be read to the jury as proof of the law, although it might have influence with the court in explaining the law to the jury. *Roberts* v. *Cooper*, 467.
10. A person dealing with an unlettered man who can neither read nor write, and taking from him a promissory note for the payment of money and a deed for property, in trust, to secure the payment, is bound to show, when he seeks to enforce them, that they, or the material parts of them, were read and fully explained to the party before they were executed, and that he fully understood their meaning and effect. *Selden* v. *Myers*, 506.
11. If this fact is established by positive and unimpeached testimony, parol

EVIDENCE, (*Continued.*)
evidence cannot be received, to show that the contract was different from that expressed in the writings, or that nothing was at that time due from the party who executed the instruments. *Ibid.*
12. Evidence of the sale of property under certain proceedings of a State court was properly received in the Circuit Court, where the proceedings of the State court were duly certified, and it had competent jurisdiction over the subject-matter. *Barton* v. *Forsyth*, 532.

FRAUDULENT CONVEYANCES.
1. Deeds of large tracts of land made by a grantor when deeply in debt, and when suits were pending against him, and who shortly afterwards petitioned for the benefit of the bankrupt act, the possession and occupation of the land continuing the same after the sale as before, and the consideration money one-half only of the actual value, held to be fraudulent and void as against creditors. *Hudgins* v. *Kemp*, 45.

FRAUDULENT SALES OF PERSONAL PROPERTY.
1. Where a sheriff was sued for taking goods under an attachment, which goods had been previously assigned under circumstances which were alleged to be fraudulent, it was proper for the court to charge the jury, "that if they believed, from the evidence, that the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of fact, to be determined by the jury under all the circumstances of the case; that if the sale were secret, and no means taken to apprise the public of it, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant. *Warner* v. *Norton*, 448.

GARNISHEE.
1. By the laws of Virginia, where an absent defendant is sued, and a garnishee is found within the State having funds of the absent debtor in his hands, the court may either suffer the fund to remain in the hands of the garnishee, or be paid over to the attaching creditor, security being given in either case to refund the money upon a final decree. *Mattingly* v. *Boyd*, 128.
2. Whilst the suit is pending, therefore, the money must be considered as in the custody of the court, and not liable to be sued for by the absent debtor against his garnishee. *Ibid.*
3. Consequently, the statute of limitations does not run whilst the suit is pending; and if an action is brought against the executor of the garnishee after the termination of the principal suit in sufficient time to clear the statute, a recovery must be had. *Ibid.*
4. The garnishee having used the money, his executor must pay interest from the time when the attachment process was served, up to the time of the death of the garnishee—it being so claimed in the bill. *Ibid.*
5. The garnishee was entitled to a reasonable sum for the trouble which he had taken. *Ibid.*

JURISDICTION.
1. In the present case, the complainant and appellant did not derive his title to the land in dispute from any statute of the United States; and therefore this court has no jurisdiction over the matter by virtue of the 25th section of the judiciary act. *Wynn* v. *Morris*, 3.
2. Where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims. *Garland* v. *Wynn*, 6.
3. Therefore, in a case where the register and receiver of public lands have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right who had a preference of entry which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded—in such a case, the jurisdiction of the courts of justice is not ousted by the regulations of the Commissioner of the General Land Office. *Ibid.*

JURISDICTION, (*Continued.*)

4. Where it does not appear either by express averment or by a necessary intendment from any matter stated in the case, nor does any entry on the record of the cause in the Supreme Court of the State show, that any of the questions of which this court is entitled to take cognizance under the terms of the 25th section of the judiciary act, arose in the cause and were actually decided by that court, the writ of error must be dismissed, for the want of jurisdiction. *Christ Church* v. *County of Philadelphia*, 26.
5. Where a bill is filed to enforce the specific execution of a contract in relation to the use of a patent right, this court has no appellate jurisdiction, unless the matter in controversy exceeds two thousand dollars. *Brown* v. *Shannon*, 55.
6. The jurisdiction, where the bill is founded upon a contract, differs materially from the jurisdiction on a bill to prevent the infringement of the monopoly of the patentee, or of those claiming under him by legal assignments, and to protect them in their rights to the exclusive use. *Ibid.*
7. The penalty of the bond taken, when an injunction is awarded, is no evidence of the amount or value in dispute. *Ibid.*
8. This court has no jurisdiction, under the 25th section of the judiciary act of 1789, of the question whether or not a law of a State is in opposition to the Constitution of that State. *Withers* v. *Buckley*, 84.
9. Therefore, where it is alleged that the Constitution of a State declares that private property shall not be taken for public uses, and that the highest court of the State has sustained the validity of a law which violates this constitutional provision, this court has no power to review that decision. *Ibid.*
10. The Circuit Court of the United States has no power to entertain an original bill brought by a creditor, who has come in and proved his debt against the bankrupt, for the purpose of annulling or vacating a discharge and certificate in bankruptcy, obtained in the District Court upon imputations of fraud, done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who had taken a dividend out of the bankrupt's estate. *Commercial Bank of Manchester* v. *Buckner*, 108.
11. The District Court, which passed the decree in bankruptcy, can take cognizance of such a case. *Ibid.*
12. Whether or not such a bill could be filed by a creditor who had not come in and proved his debt, and who was not a party to the decree in bankruptcy, is a question which the court does not now decide. *Ibid.*
13. Nor has the Circuit Court the power, under its general jurisdiction over frauds, to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, had assented to the bankrupt's discharge and certificate, and had taken a dividend out of the bankrupt's estate. *Ibid.*
14. Where a suit was brought upon a bill of exchange in one of the State courts of Louisiana, and by that court was transferred to another State court for the purpose of being connected with certain proceedings in insolvency, and this transfer was pleaded in bar in the Circuit Court of the United States to the prosecution of the suit in that court upon the bill, the plea was not good. *Hyde* v. *Stone*, 170.
15. The jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power. *Ibid.*
16. The insertion of the bill amongst the debts of the insolvent upon his schedule, is evidence of the fact of notice; and the sufficiency of the evidence was a question for the jury, and is not subject to review in this court. *Ibid.*
17. In New Mexico, the laws of the provisional Government authorized an attachment against the property of a debtor, in cases in which a party claiming to be a creditor, upon a petition and affidavit, charged that his debtor had fraudulently disposed of his property, so as to hinder, delay, or defraud, his creditors. By the same law, an issue was directed to be tried upon the

JURISDICTION, (*Continued.*)
petition and affidavit of the plaintiff; upon which issue, if the finding sustained the petition and affidavit, the plaintiff was authorized to proceed to the proof of his debt; if the finding was against the charge in the petition, the attachment was to be dismissed. These proceedings with reference to the attachment are in their nature proceedings in abatement, and are not final as to the rights of the parties, and therefore cannot be reviewed upon writ of error in this court. *Leitensdorfer* v. *Webb*, 176.

18. By the judiciary act of 1789, no civil suit shall be brought against an inhabitant of the United States by an original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. *Chaffee* v. *Day*, 208.
19. This provision of law is not changed by any subsequent process act, or by the law giving jurisdiction to Circuit Courts in patent cases, without regard to citizenship. *Ibid.*
20. Therefore, where a suit was commenced for an infringement of a patent right, and process was served by attaching the property of an absent defendant, this was not sufficient to give the court jurisdiction. *Ibid.*
21. An averment, in pleading, that the Covington Drawbridge Company were citizens of Indiana was sufficient to give jurisdiction to the Circuit Court of the United States, because the company was incorporated by a public statute of the State which the court was bound judicially to notice. *Covington Drawbridge Company* v. *Shepherd*, 227.
22. The former decisions of this court upon this subject examined. *Ibid.*
23. The admiralty jurisdiction of the courts of the United States extends to cases of collision upon navigable waters, although the place of such collision may be within the body of a county of a State, and may be above the flux and reflux of the tide. *Jackson* v. *Steamboat Magnolia*, 296.
24. The District Courts exercise this jurisdiction over fresh-water rivers "navigable from the sea," by virtue of the judiciary act of 1789, and not as conferred by the act of 1845, which extends their jurisdiction to the great lakes and waters "not navigable from the sea." *Ibid.*
25. The admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction. *People's Ferry Company* v. *Beers*, 393.
26. Whether the District Courts can enforce a lien in such cases, where the law of the State where the vessel was built gave a lien for its construction, is a question which the court does not now decide. *Ibid.*
27. Where there was a covenant to sell land, and if the covenantee did not comply with the terms of payment, the covenantor had a right to declare the contract void, and charge rent; the amount of rent was not the test of the jurisdiction of this court, as the amount of property involved was large. *Stinson* v. *Dousman*, 461.
28. This court has not jurisdiction, under the twenty-fifth section of the judiciary act, to review the judgment of a State court, where the question involved merely related to the proper boundary between two tracts of land, although the owners of both had valid grants from the United States. *Moreland* v. *Page*, 522.
29. Where the only bills of exception were to the refusal of the court to grant a continuance and change the venue, the judgment of the court below must be affirmed, as these matters are not the subjects of review by this court. *McFaul* v. *Ramsay*, 523.
30. Where the Legislature of a State passed a law allowing the State to be sued upon her bonds, and afterwards directed the bonds to be filed under the penalty of dismissal, and the case was dismissed because the suitor refused to file his bonds, this does not furnish a case within the twenty-fifth section of the judiciary act. *Beers* v. *State of Arkansas*, 527.
31. A bill in chancery, purporting to be a cross bill, filed under the same law of Arkansas which was mentioned in the preceding case of Holford's Administrator *v.* The State of Arkansas, comes under the decision in that case, and must be dismissed for want of jurisdiction in this court. *Bank of Washington* v. *State of Arkansas*, 530.

JURISDICTION, (*Continued.*)

32. A plea to the jurisdiction comes too late after a mandate has gone down from this court to the court below. *Whyte* v. *Gibbes*, 541.
33. Where there was a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations, a judgment upon the demurrer and motion to strike out was not such a final judgment as can be reviewed by this court. *Holcombe* v. *McKusick*, 552.
34. An order of the Circuit Court to quash an execution, is not such a judgment as can be reviewed in this court by a writ of error. *McCargo* v. *Chapman*, 555.
35. The jurisdiction of the courts of the United States as courts of equity is ample to enforce the performance of trusts under both the Constitution and laws. *Irvine* v. *Marshall*, 558.
36. The United States can declare by Congress what the law shall be with respect to the public lands, and enforce that law through the judiciary department. *Ibid.*
37. Although the officers of the land department may in practice, and as a rule of convenience, have received the certificate of purchase as evidence of title, yet neither that practice nor the certificate itself can control the power either of the United States or of this court, to adjudge or to confirm the title to the land to the true owner. *Ibid.*

JURY.

1. Where a sheriff was sued for taking goods under an attachment, which goods had been previously assigned under circumstances which were alleged to be fraudulent, it was proper for the court to charge the jury, "that if they believed, from the evidence, that the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of fact, to be determined by the jury under all the circumstances of the case; that if the sale were secret, and no means taken to apprise the public of it, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant. *Warner* v. *Norton*, 448.

LANDS—PUBLIC, IN CALIFORNIA.

See CALIFORNIA.

LANDS—PUBLIC.

1. Where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims. *Garland* v. *Wynn*, 6.
2. Therefore, in a case where the register and receiver of public lands have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right who had a preference of entry which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded—in such a case, the jurisdiction of the courts of justice is not ousted by the regulations of the Commissioner of the General Land Office. *Ibid.*
3. The decision of this court in the case of Brown *v.* Clements (3 How., 650) reviewed and controlled. *Gazzam* v. *Phillips's Lessee*, 372.
4. The quantity of land granted to a patentee in pursuance of a pre-emption right under the act of 29th May, 1830, must, in an action at law, be ascertained from the description in the patent, and cannot be controlled by any supposed original equity to the whole of a quarter section to which a claim might have been made before the register and receiver. *Ibid.*
5. Some latitude of discretion is allowed to the surveyor general under the act of 24th April, 1820, and the instructions of the land office, in the subdivision of fractional sections containing more than one hundred and sixty acres; and he is not obliged, absolutely, and under all circumstances, to lay off a full quarter or half quarter section, though the fraction is capable of such a subdivision. *Ibid.*

LANDS—PUBLIC, (*Continued.*)

6. In May, 1830, Congress passed an act (4 Stat. at L., 420) which gave the right of pre-emption to settlers on the public lands, but made null and void all assignments and transfers of the right of pre-emption prior to the issuance of patents. This act was to remain in force for one year. *Marks* v. *Dickson*, 501.
7. In January, 1832, another act was passed, (4 Stat. at L., 496,) supplementary to the former, allowing certificates of purchase to be transferred, and patents to be issued in the name of the assignee. *Ibid.*
8. In June, 1834, another act was passed, (4 Stat. at L., 678,) reviving the act of 1830. *Ibid.*
9. The true construction of this act of 1834 is, not that it restored the prohibitory clause of 1830, but that it revived the supplement, together with the original act; and that, consequently, an assignment was good and legal before a patent was issued. *Ibid.*
10. But it was necessary to enter the land at the land office, before the right of assignment accrued; and, therefore, assignments made before such entry were assignments of floats, and void. *Ibid.*
11. A power, however, although executed before the location, was sufficient to justify an assignment made after the location, there being a tacit affirmance of the power, when it might have been set aside. *Ibid.*
12. At a sale of public lands in a Territory, an agent who purchased for another must account, as trustee, to his employer, although the statutes of the Territory have abolished all resulting trusts. *Irvine* v. *Marshall*, 558.
13. The United States, being the owner of the public lands within the States and Territories, have the right to say to whom, in what mode, and by what title, they shall be conveyed. *Ibid.*
14. It promotes the public sales, that agents should be allowed to attend and purchase, under the usual responsibility of agents or trustees. *Ibid.*
15. The control, enjoyment, and disposal, by the United States, of their own property, is independent of the locality of such property, whether it be situated in a State or Territory; nor are the contracts of the Government with respect to subjects within its constitutional competency, local, or confined in their effects and operation strictly to the sites of the subjects to which they relate. *Ibid.*
16. Although a certificate may be the subject of bargain and sale, yet the United States can take care that the conveyance shall be made to him who is in good faith their vendee. *Ibid.*
17. The jurisdiction of the courts of the United States as courts of equity is ample to enforce the performance of trusts under both the Constitution and laws. *Ibid.*
18. The United States can declare by Congress what the law shall be with respect to the public lands, and enforce that law through the judiciary department. *Ibid.*
19. Although the officers of the land department may in practice, and as a rule of convenience, have received the certificate of purchase as evidence of title, yet neither that practice nor the certificate itself can control the power either of the United States or of this court, to adjudge or to confirm the title to the land to the true owner. *Ibid.*

LIMITATION—STATUTES OF

1. By the laws of the Republic of Texas, no action would lie on a foreign judgment, and all actions of debt were prescribed in four years. *Bacon* v. *Howard*, 22.
2. When about to form a Constitution, for the purpose of becoming a State of the Union, the Legislature passed a law permitting suits to be brought on foreign judgments, but limiting them to sixty days when the judgment was of four years standing and upward. *Ibid.*
3. The plaintiffs' bill attempted to avoid the effect of the last limitation as to their judgment, which was more than four years old, on the ground that they lived more than two thousand miles distant, and could not know of the passage of the last act within time to prosecute their action. *Ibid.*
4. Held, that the last-mentioned statute conferred a favor, and was not retro-

LIMITATION—STATUTES OF, (*Continued.*)
spective; and that plaintiffs' action was barred, whether he knew of the act or not. *Ibid.*
5. The Constitution of the United States does not restrain the right of each State to legislate as to the remedy on suits on judgments in other States. *Ibid.*
6. In an action of ejectment, where the defendant pleads the statute of limitations, he must connect his own possession with the adverse possession and title of another person which is set up as a defence. Otherwise, the plea is not good. *Doswell* v. *De La Lanza*, 29.
7. By the laws of Virginia, where an absent defendant is sued, and a garnishee is found within the State having funds of the absent debtor in his hands, the court may either suffer the fund to remain in the hands of the garnishee, or be paid over to the attaching creditor, security being given in either case to refund the money upon a final decree. *Mattingly* v. *Boyd*, 128.
8. Whilst the suit is pending, therefore, the money must be considered as in the custody of the court, and not liable to be sued for by the absent debtor against his garnishee. *Ibid.*
9. Consequently, the statute of limitations does not run whilst the suit is pending; and if an action is brought against the executor of the garnishee after the termination of the principal suit in sufficient time to clear the statute, a recovery must be had. *Ibid.*

MANDAMUS.
1. A rule laid upon the district judge of the State of Texas, to show cause why a mandamus should not be issued for him to allow an appeal in a certain case; but upon an examination of the case, the mandamus refused. *Mussina* v. *Cavazos*, 280.
2. Where there was an order of the Circuit Court to set aside a judgment upon payment by the defendant of the costs which had accrued up to that time, the plaintiff's counsel, by not insisting upon the payment of such costs, thereby impliedly waived the condition upon which the judgment was to be vacated, and cannot proceed upon the judgment as being still in force. *Ransom* v. *New York*, 581.
3. Other circumstances lead to the opinion that it was the understanding of both sides that the judgment should be vacated. *Ibid.*
4. This court therefore overrule a motion for a mandamus directing the court below to set aside the order vacating the judgment, or for a rule to show cause why a mandamus should not issue. *Ibid.*

PARTIES.
1. Creditors of the vendor, who recovered judgments and sold the property, pending a suit for a specific performance, in which the purchase-money had been paid into court, are not necessary parties to the suit, nor are the purchasers at the sheriff's sale under such judgments. *Secombe* v. *Steele*, 34.

PARTNERSHIP.
See COMMERCIAL LAW.

PATENT RIGHTS.
1. Where a bill is filed to enforce the specific execution of a contract in relation to the use of a patent right, this court has no appellate jurisdiction, unless the matter in controversy exceeds two thousand dollars. *Brown* v. *Shannon*, 55.
2. The jurisdiction, where the bill is founded upon a contract, differs materially from the jurisdiction on a bill to prevent the infringement of the monopoly of the patentee, or of those claiming under him by legal assignments, and to protect them in their rights to the exclusive use. *Ibid.*
3. The penalty of the bond taken, when an injunction is awarded, is no evidence of the amount or value in dispute. *Ibid.*
4. In suits for the infringement of a patent right, the rule of damages is the amount which the infringer actually realized in profits, not what he might have made by reasonable diligence. *Dean* v. *Mason*, 198.
5. After a bill is taken *pro confesso* in the Circuit Court, a motion to allow an answer to be filed is addressed to the discretion of the court; and from a refusal so to do, an appeal does not lie to this court. *Ibid.*

PATENT RIGHTS, (*Continued.*)

6. A motion to dismiss the complainant's bill, upon the ground that he had parted with his interest, was properly overruled, because such assignment was not made until after the time when the computation of profits ended. *Ibid.*
7. By the judiciary act of 1789, no civil suit shall be brought against an inhabitant of the United States by an original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. *Chaffee* v. *Day*, 208.
8. This provision of law is not changed by any subsequent process act, or by the law giving jurisdiction to Circuit Courts in patent cases, without regard to citizenship. *Ibid.*
9. Therefore, where a suit was commenced for an infringement of a patent right, and process was served by attaching the property of an absent defendant, this was not sufficient to give the court jurisdiction. *Ibid.*
10. The Union India Rubber Company have a right to manufacture articles of India Rubber. *Day* v. *Union India Rubber Company*, 216.
11. Foote's patent declared good, for the combination of machinery used in "the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove, in which such rod shall be acted upon directly by the heat of the stove or the fire which it contains." *Silsby* v. *Foote*, 378.
12. The award by the Circuit Court of damages for an infringement of the patent affirmed, by an equal division of this court; but the allowance of interest overruled. *Ibid.*
13. Where a patentee claims more than he is entitled to, his patent may still be good for what is really his own, provided he enters a disclaimer for the surplus without any unreasonable delay. In this case, the patentee was allowed to recover damages for an infringement, but not to recover costs, agreeably to the provisions of the act of Congress of the 3d March, 1837. *Ibid.*
14. The reaping machines made by Manny do not infringe McCormick's patent, either as to the divider, the manner in which the reel is supported, or the combination of the reel with a seat for the raker. *McCormick* v. *Talcott*, 402.
15. McCormick not being the original inventor of the machine called a divider, but the patentee of only an improvement for a combination of mechanical devices, could not hold as an infringer one who used only a part of the combination. *Ibid.*
16. The manner of supporting the reel in Manny's machine is not like that in McCormick's, and was used before McCormick's first patent. *Ibid.*
17. With respect to the raker's seat, McCormick's patent was for a combination of the reel with a seat arranged and located according to his description. But Manny's arrangement differs from McCormick's in principle as well as in form and combination, and is therefore no infringement of McCormick's patent. *Ibid.*

PENNSYLVANIA.

1. By the laws of Pennsylvania before the Revolution, a pre-emption right to islands in the Susquehanna river could not be obtained by settlement. *Fisher* v. *Haldeman*, 186.
2. The courts of that State have so decided, and this court adopts their decision. *Ibid.*

PLEAS AND PLEADINGS.

1. In an action against the owners of a ferry boat, for personal injuries sustained by the negligence of its officers, it was held that the plaintiff might show that he was engaged in a particular business, and had been incapacitated from attending to it, as exhibiting the extent of the injury, and that it had occasioned expense, suffering, and loss of time which had value to him, although the nature of his occupation was not set forth in the declaration. *Wade* v. *Leroy*, 34.
2. A demurrer only admits facts which are well pleaded. *Commercial Bank of Manchester* v. *Buckner*, 108.
3. Where the statute of limitations imposes a bar upon certain species of con-

PLEAS AND PLEADINGS,, (*Continued.*)
tracts after three years, and upon others after two years, and the plea did not show that the contract in question was of the latter class, the plea was bad. *Lyon* v. *Bertram*, 150.
4. The laws of California require that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action may be joined. So that this statute is complied with, it is not a fatal objection that the respective interests of parties *jointly* concerned are not accurately set forth. *Ibid.*
5. Where a bill in chancery was filed for the purpose of enjoining a judgment at law, obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, and did not contain any charges of fraud; neither did it aver that it was owing to the contrivance or unfairness of the defendant that an adequate remedy could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed. *Hungerford* v. *Sigerson*, 156.
6. In New Mexico, the laws of the provisional Government authorized an attachment against the property of a debtor, in cases in which a party claiming to be a creditor, upon a petition and affidavit, charged that his debtor had fraudulently disposed of his property, so as to hinder, delay, or defraud, his creditors. By the same law, an issue was directed to be tried upon the petition and affidavit of the plaintiff; upon which issue, if the finding sustained the petition and affidavit, the plaintiff was authorized to proceed to the proof of his debt; if the finding was against the charge in the petition, the attachment was to be dismissed. These proceedings with reference to the attachment are in their nature proceedings in abatement, and are not final as to the rights of the parties, and therefore cannot be reviewed upon writ of error in this court. *Leitensdorfer* v. *Webb*, 176.
7. An averment, in pleading, that the Covington Drawbridge Company were citizens of Indiana, was sufficient to give jurisdiction to the Circuit Court of the United States, because the company was incorporated by a public statute of the State which the court was bound judicially to notice. *Covington Drawbridge Company* v. *Shepherd*, 227.
8. The former decisions of this court upon this subject examined. *Ibid.*
9. A plea to the jurisdiction comes too late after a mandate has gone down from this court to the court below. *Whyte* v. *Gibbes*, 541.
10. Where there was a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations, a judgment upon the demurrer and motion to strike out was not such a final judgment as can be reviewed by this court. *Holcombe* v. *McKusick*, 552.

PRACTICE.
1. A refusal of the court below to grant a new trial is not a proper subject for a bill of exception. *Doswell* v. *De La Lanza*, 29.
2. Exceptions to the master's report respecting rents and profits not having been taken in the court below, they cannot be sustained in this court. *Hudgins* v. *Kemp*, 45.
3. The penalty of the bond taken, where an injunction is awarded, is no evidence of the amount or value in dispute. *Brown* v. *Shannon*, 55.
4. Where this court affirmed a decree of a Circuit Court, which was, that a conveyance of property should be executed upon the payment of a sum of money; and the Circuit Court proceeded to carry out its decree by issuing an attachment against the party who refused to execute such conveyance, an appeal will not lie to this court from the order directing the attachment. *McMicken* v. *Perrin*, 133.
5. The appeal must be dismissed, with costs, on motion. *Ibid.*
6. A writ of error will not lie from the refusal of the court below to continue a case. *Thompson* v. *Selden*, 194.
7. After a notice to produce books and papers, there must be a motion for an order to produce them. *Ibid.*
8. After a bill is taken *pro-confesso* in the Circuit Court, a motion to allow an answer to be filed is addressed to the discretion of the court; and from a refusal so to do, an appeal does not lie to this court. *Dean* v. *Mason*, 198.

PRACTICE, (*Continued.*)

9. A motion to dismiss the complainants' bill, upon the ground that he had parted with his interest, was properly overruled, because such assignment was not made until after the time when the computation of profits ended. *Ibid.*
10. Although an irregularity in the citation may be cured by an appearance in court, yet a defect in the writ of error, (such as not naming a return day for the writ,) or an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal, are fatal errors, and the case must be dismissed for want of jurisdiction. *Carroll* v. *Dorsey*, 204.
11. The defect of an irregular citation (being signed by the clerk of the court, and not by the judge who allowed the writ of error) is cured by an appearance in this court; so that a motion to dismiss the writ, when made at the term succeeding that at which the appearance was entered, comes too late. *Chaffee* v. *Hayward*, 208.
12. No one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court. *Payne* v. *Niles*, 219.
13. Therefore, where there was a judgment in the court below, and certain persons intervened, whose petition for intervention was dismissed, they have no right to sue out a writ of error from the judgment to which they were not parties; nor was any process, upon their intervention, served upon the original defendant. *Ibid.*
14. Where the judge files the statement of facts after the trial, *nunc pro tunc*, it is reasonable to presume that he had been requested to do so at the trial. *McGavock* v. *Woodlief*, 221.
15. The Circuit Court of the United States in Alabama, by a general rule, adopted the practice of the State courts, which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court, unless with the consent of counsel, &c. *United States* v. *Breitling*, 252.
16. But where a judge holding the Circuit Court in Alabama signed a bill of exceptions under special circumstances, after adjournment, and without the consent of counsel, this court will consider the exception as properly before it. It is in the power of a court to suspend its own rules, or except a particular case from them, to subserve the purposes of justice. *Ibid.*
17. And the signature of the judge was attached to the bill, in conformity with the decisions of this court. *Ibid.*
18. The exception brings up the charge of the court to the jury, but not the admission of evidence which was objected to on the trial, but to the admission of which no exception was noted. *Ibid.*
19. The charge of the court, being founded on a hypothetical state of facts of which there was no evidence, was erroneous. *Ibid.*
20. Where a judgment of the Circuit Court, sitting in admiralty, was affirmed here by a divided court, interest was not to be calculated upon the judgment. *Hemmenway* v. *Fisher*, 255.
21. The eighteenth rule of the court never applied to cases in admiralty which are brought up by appeal, and the rule itself is repealed by the sixty-second rule. *Ibid.*
22. As the act of Congress passed on the 3d of March, 1851, does not specify the time within which an appeal must be made to this court from the District Courts of California, the subject must be regulated by the general law respecting writs of error and appeals. Either party is at liberty, therefore, to appeal from such a decree within five years from the time of its rendition. *United States* v. *Pacheco*, 261.
23. Under the sixty-third rule of this court, an appellee in a case from California may docket and dismiss according to that rule; but a new appeal may be taken at any time within five years, or it may be that the record may be filed by the appellant at the same term at which a certificate or record had been filed by the appellee, and the case dismissed. *Ibid.*

PRACTICE, (*Continued.*)

24. After a case has been thus docketed and dismissed at the instance of an appellee who is a claimant of land, if a patent should be taken out, it will still be subject to be reviewed by this court at any time within the five years above mentioned. *Ibid.*
25. Where an appeal from a decree is taken within ten days from the rendition of the decree, it is in time to operate as a supersedeas; and so, also, if taken within ten days after the decree is settled and signed. *Silsby* v. *Foote*, 290.
26. A decision on a motion for a new trial, being addressed to the discretion of the court, is no ground for a writ of error. *Warner* v. *Norton*, 448.
27. Exceptions must be taken or the points reserved whilst the jury are at the bar. *Barton* v. *Forsyth*, 532.
28. An objection, that the executors of the assignee had distributed a portion of the money in the regular course of administration, should have been made when the cause was before this court upon its merits. After a mandate has gone down, and the cause came before the Circuit Court for a settlement of accounts, the objection comes too late. *Williams* v. *Gibbes*, 535.
29. No objection can be made to the Circuit Court allowing a supplemental answer to be filed when the mandate went down. It was like a petition to bring before the court the facts, which were proper to be known before instructions were given to the master as to the mode of settling the accounts. *Ibid.*
30. An order of the Circuit Court to quash an execution, is not such a judgment as can be reviewed in this court by a writ of error. *McCargo* v. *Chapman*, 555.
31. Where there was an order of the Circuit Court to set aside a judgment upon payment by the defendant of the costs which had accrued up to that time, the plaintiffs' counsel, by not insisting upon the payment of such costs, thereby impliedly waived the condition upon which the judgment was to be vacated, and cannot proceed upon the judgment as being still in force. *Ransom* v. *New York*, 581.
32. Other circumstances lead to the opinion that it was the understanding of both sides that the judgment should be vacated. *Ibid.*
33. This court therefore overrule a motion for a mandamus directing the court below to set aside the order vacating the judgment, or for a rule to show cause why a mandamus should not issue. *Ibid.*

SPECIAL VERDICT.

1. Every special verdict, in order to enable the appellate court to act upon it, must find the facts on which the court is to pronounce the judgment according to law, and not merely state the evidence of facts. In this manner it becomes a part of the record. *Suydam* v. *Williamson*, 429.
2. Where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the case may be brought before an appellate court by a special verdict or an agreed statement of facts. *Ibid.*
3. But in such a case, the previous rulings of the court upon questions of evidence do not come before the appellate court, unless brought up by a bill of exceptions. *Ibid.*
4. A special verdict requires the presence and assent of the court, and a bill of exceptions must always be signed and sealed by the judge. *Ibid.*

STATE COURTS—JUDGMENTS OF.

1. The courts of Pennsylvania have decided that a pre-emption right to islands in the Susquehanna river could not be obtained by settlement before the Revolution, and this court adopts their decision. *Fisher* v. *Haldeman*, 186.
2. Where there were proceedings in a State court between a bank, one of its creditors, and one of its debtors, and the bank having failed, assigned its assets to trustees, who intervened in the dispute between the other two parties, the judgment of the State court against the intervenors must be considered final, and a bill filed by them in the Circuit Court of the United States must be dismissed. *Ingraham* v. *Dawson*, 486.
3. If there were irregularities in the proceedings of the State court, it was for that court to correct them, had complaint been made at the proper time. *Ibid*

STATUTES—CONSTRUCTION OF.
See CONSTRUCTION.
TARIFF.
1. By the eighth section of the act of Congress passed on the 30th of July, 1846, (9 Stat. at L., 42, 43,) it is declared that if the appraised value of imports which have actually been purchased shall exceed by ten per centum or more the value 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. *Sampson* v. *Peaslee*, 571.
2. The true construction of this section is, that the additional duty of twenty per centum is to be levied only upon the appraised value, and not upon charges and commissions added to it. *Ibid.*
3. The day of the sailing of a vessel from a foreign port is the true period of exportation of goods. The Secretary of the Treasury so directed it to be done, as he had a right to do by law; and this court concurs with him in this, as being a correct exposition of the statute. *Ibid.*
4. Where an importation was alleged to be an unit, but divided into two invoices for the sake of convenience, and entered of different values, each invoice must stand upon its own footing; and the whole cannot be averaged, so as to avoid the additional duty which is levied upon one invoice taken by itself. *Ibid.*
5. Where an examination made by the merchant appraiser was such as is usually made in buying and selling hemp in bales, and was satisfactory to the merchant appraiser, it was not open to the importer to show that he adopted a mode of examination insufficient to detect fraudulent packing or diversities in the qualities of the different parts of the importation. *Ibid.*
TENDERS—LEGAL.
1. A tender of the purchase-money of land held sufficient, although not precisely within the time nor according to the terms of the contract. *Secombe* v. *Steele*, 94.
TEXAS.
1. Where a person was born at Goliad, then in the State of Coahuila and Texas, being a part of the Republic of Mexico, which place was also the domicil of her father and mother until their deaths, and was removed at the age of four years, before the declaration of Texan independence, to Matamoras, in Mexico, this person is an alien, and can sue in the courts of the United States. *Jones* v. *McMasters*, 8.
2 Her allegiance remained unchanged, unless by her election, which it was incumbent on the opposite party to show. *Ibid.*
3. According to general principles, mere alienage did not forfeit a title to land in Texas; and although the Constitution of Texas provided that no alien should hold land in Texas, except by title emanating directly from the Government of that Republic, yet it was afterwards declared that the Legislature should, by law, provide a method for determining what lands may have been forfeited or escheated. *Ibid.*
4. In the absence of such a legislative provision, a title emanating from the Government of Mexico, anterior to Texan independence, is not forfeited. *Ibid.*
5. In a court of law, where a grant from the Government is in regular form, it is not proper to inquire into the voidability of the grant from equitable considerations. *Ibid.*
6. By the laws of the Republic of Texas, no action would lie on a foreign judgment, and all actions of debt were prescribed in four years. *Bacon* v. *Howard*, 22.
7. When about to form a Constitution, for the purpose of becoming a State of the Union, the Legislature passed a law permitting suits to be brought on foreign judgments, but limiting them to sixty days when the judgment was of four years standing and upward. *Ibid.*
8. The plaintiffs' bill attempted to avoid the effect of the last limitation as to their judgment, which was more than four years old, on the ground that they lived more than two thousand miles distant, and could not

TEXAS, (*Continued.*)
know of the passage of the last act within time to prosecute their action. *Ibid.*

9. Held, that the last-mentioned statute conferred a favor, and was not retrospective; and that plaintiff's action was barred, whether he knew of the act or not. *Ibid.*
10. The Constitution of the United States does not restrain the right of each State to legislate as to the remedy on suits on judgments in other States. *Ibid.*
11. Under the decisions of the courts of Texas, a survey made of land beyond the limits of the surveyor's district, although invalid at the time, is rendered good by the subsequent approval of the proper county surveyor. This court adopts the rule. *Doswell* v. *De La Lanza*, 29.
12. Where patents for land in Texas were erroneously issued, it was proper to cancel them. *Ibid.*
13. In the present case, the land granted in Texas was alleged to be within the *empresario* contract of De Leon. After proof that many of the documents upon the subject were destroyed in the revolution, the court left it to the jury to decide whether or not the land was thus situated. This ruling was correct. *White* v. *Burnley*, 235.
14. The fact that the surveyor included more land than was called for, does not avoid the grant. Whatever the State might do to annul it, third parties have no right to consider it void. *Ibid.*
15. A grantee having been compelled to leave Texas, there was no evidence of his voluntary and final abandonment of the country. As there was no evidence, the jury could not express an opinion upon the subject. *Ibid.*
16. Nor was there any evidence which would justify the court in leaving it to the jury to decide whether or not this grantee was an alien enemy when he made a conveyance, he being then a resident of Louisiana. The mere fact of his being a Spaniard was not sufficient for an inference that he was an enemy of Texas. The averment in the deed that he was a citizen of Mexico was not sufficient. *Ibid.*
17. Where a deed of land in Texas was executed in Louisiana, and recorded in a notary's books, a copy of it which had been compared with the original by a witness who was acquainted with the handwriting of the notary (being dead) and the subscribing witness, was properly admitted in evidence. It was also admitted as a record of another State. *Ibid.*
18. In order that the statute of limitations shall begin to run, the defendant, claiming under a younger title to land which conflicts in part with an elder title, should have been in actual possession of the part which was overlapped by the elder title. *Ibid.*
19. The judge of the District Court of the United States in Texas had power to order the record of a suit in which he was interested to be transmitted to the Circuit Court of the United States in Louisiana. *Spencer* v. *Lapsley*, 264.
20. A plea in abatement, filed in connection with pleas in bar, was irregular; and the refusal of the court below to allow the plea to be filed is not subject to the review of this court. *Ibid.*
21. A contract for the sale of eleven leagues of land in Texas, issued before the revolution, and subsequently located within the colonizing grant of Austin and Williams, with their consent, and certified by the Secretary of State, was good without the signature of the Governor. *Ibid.*
22. So far as the land was within the colonizing grant of Robertson, his consent was not necessary, the term of his grant having expired. *Ibid.*
23. Where no organization of a colonial grant had taken place by the introduction of settlers, the land not occupied was open for public sale, with the consent of the empresario, and the alcalde was a proper person to put the purchaser in possession. *Ibid.*
24. That the survey was made before the order of survey was directed to the surveyor, was not fatal to the grant. Any preliminary defects were cured by the patent. The fairness of the grant cannot be investigated at law, at the instance of a third party. *Ibid.*
25. A power of attorney, authenticated before a regidor, proved by the handwriting of the regidor and the assisting witnesses, held sufficient. *Ibid.*

TRUSTEES
See AGENTS.
WASHINGTON—CORPORATION OF.
1. The power granted by Congress to the corporation of the city of Washington, "to open and keep in repair streets, avenues, lanes, alleys, &c., agreeably to the plan of the city," includes the power to alter the grade or change the level of the land on which the streets by the plan of the city are laid out. *Smith* v. *Corporation of Washington*, 135.
2. If, in the exercise of this power, an individual proprietor suffers inconvenience or is put to expense, the corporation are not liable in damages. *Ibid.*
WATROUS—JUDGE.
1. A rule laid upon the district judge of the State of Texas, to show cause why a mandamus should not be issued for him to allow an appeal in a certain case; but upon an examination of the case, the mandamus refused. *Mussina* v. *Cavazos*, 280.
WRIT OF ERROR.
1. Although an irregularity in the citation may be cured by an appearance in court, yet a defect in the writ of error, (such as not naming a return day for the writ,) or an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal, are fatal errors, and the case must be dismissed for want of jurisdiction *Carroll* v. *Dorsey*, 204.
2. No one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court. *Payne* v. *Niles*, 219.
3. Therefore, where there was a judgment in the court below, and certain persons intervened, whose petition for intervention was dismissed, they have no right to sue out a writ of error from the judgment to which they were not parties; nor was any process, upon their intervention, served upon the original defendant. *Ibid.*
4. Rulings of the court below, in admitting or rejecting evidence, can be brought to this court for revision only by a bill of exceptions. *Suydam* v. *Williamson*, 427.
5. Every special verdict, in order to enable the appellate court to act upon it, must find the facts on which the court is to pronounce the judgment according to law, and not merely state the evidence of facts. In this manner it becomes a part of the record. *Ibid.*
6. Where there is a bill of exceptions, the writ of error does not operate only upon that part of the record. Wherever an error is apparent on the record, it is open to revision, whether it be made to appear by a bill of exceptions, or in any other manner. *Ibid.*
7. Where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the case may be brought before an appellate court by a special verdict or an agreed statement of facts. *Ibid.*
8. But in such a case, the previous rulings of the court upon questions of evidence do not come before the appellate court, unless brought up by a bill of exceptions. *Ibid.*
9. A bill of exceptions may include in its scope the rulings of the court as to the admissibility of evidence, which a demurrer to evidence cannot do. *Ibid.*
10. A demurrer to evidence makes the evidence a part of the record. *Ibid.*
11 So where oyer of any instrument is prayed, or there is a demurrer to any part of the pleadings. *Ibid.*
12. A writ of error operates only upon the record, and brings it into this court. *Ibid.*
13. Therefore, where a paper was filed in the court below after the writ of error was issued, which paper, purporting to contain all the evidence, both admitted and rejected, was signed by the judge and certified to be correct by the counsel of the appellee, and concluded as follows: "A verdict was then, by direction of the court, taken for the plaintiffs for the

WRIT OF ERROR, (*Continued.*)
premises claimed, subject to the opinion of the court upon the questions of law, with liberty to turn this case into a special verdict or bill of exceptions," this paper cannot be considered a part of the record. *Ibid.*
14. A special verdict requires the presence and assent of the court, and a bill of exceptions must always be signed and sealed by the judge. *Ibid.*
15. In this case, the paper is merely a report of the judge who presided at the trial, and as such must be disregarded by this court. *Ibid.*
16. Under the twenty-fifth section of the judiciary act, where the jurisdiction of this court is not shown upon the record, the writ of error must be dismissed; but under the twenty-second section, if no error appears upon the record, the judgment of the court below must be affirmed. *Ibid.*
17. This court again decides, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. *Roberts* v. *Cooper*, 467.