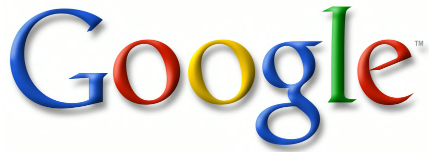


This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

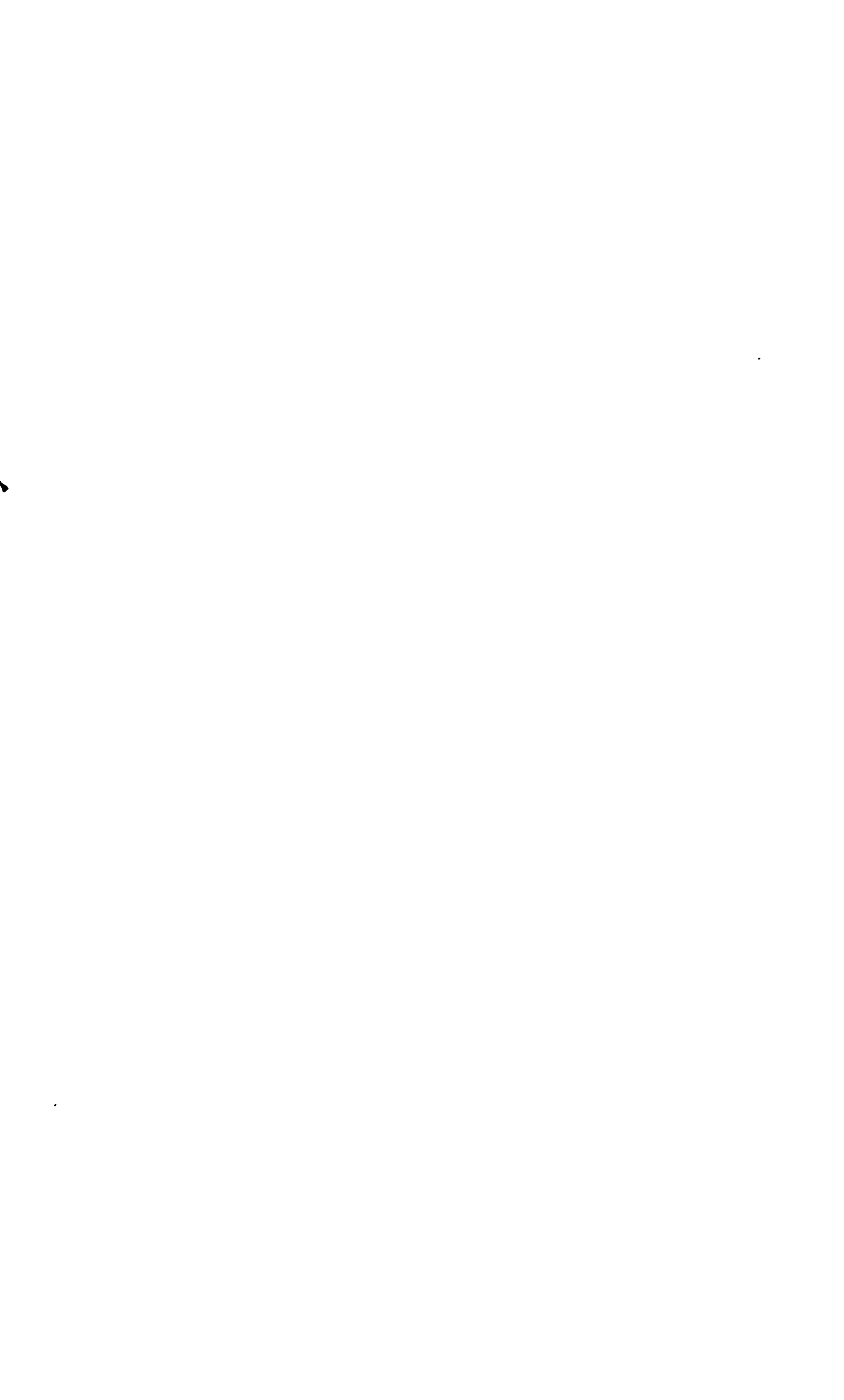
+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

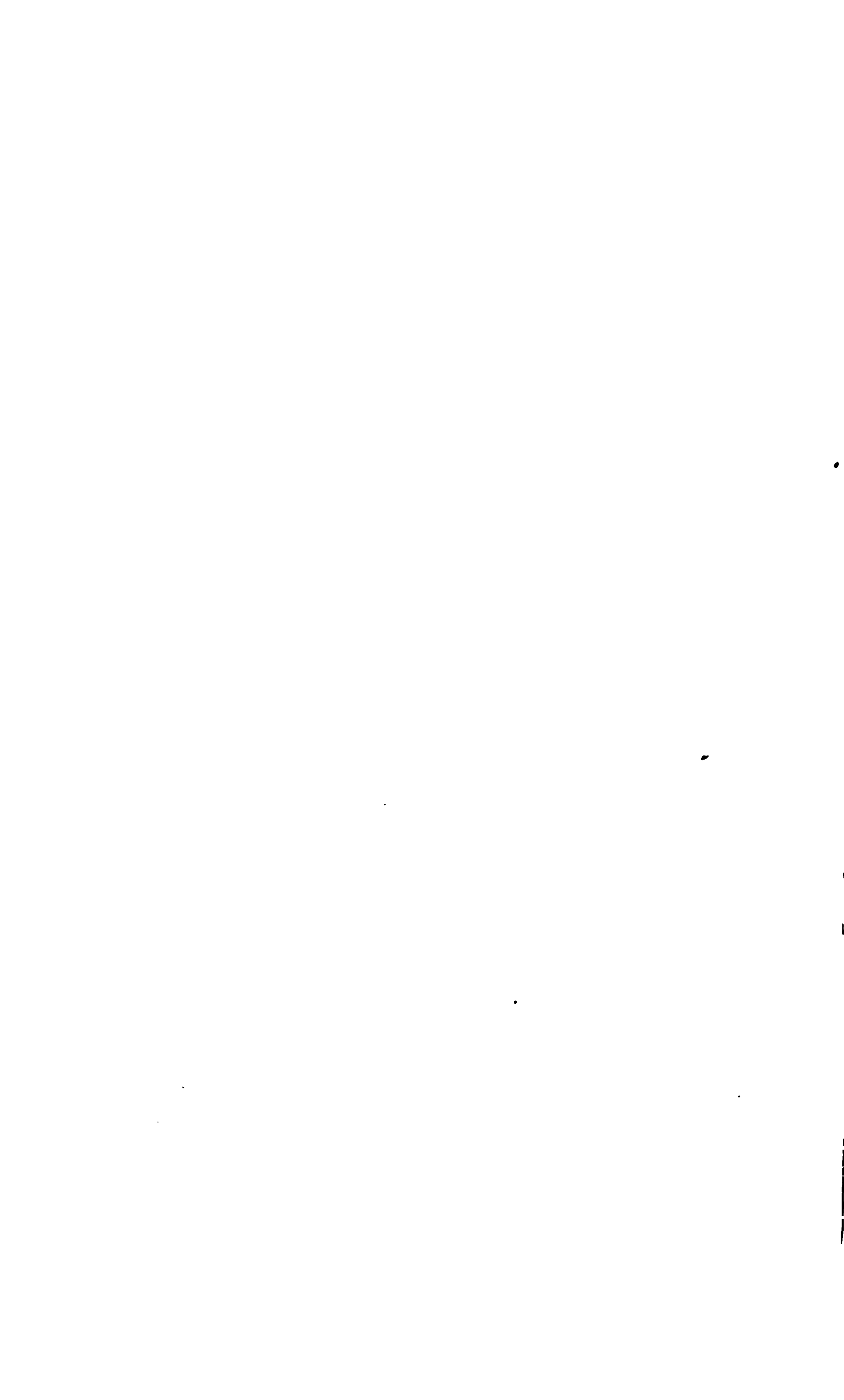
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

3 2044 103 138 525

HARVARD LAW LIBRARY





REPORTS

OF

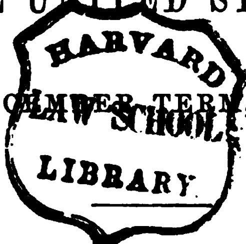
CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.



DECEMBER TERM, 1853.

BY BENJAMIN C. HOWARD,

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

VOL. XV.

BOSTON:
LITTLE, BROWN AND COMPANY,
Law Publishers and Booksellers.
1854.

KF 101 .A212 v.56 c.2

Entered according to Act of Congress, in the year 1854, by
Little, Brown and Company,
in the Clerk's Office of the District Court of the District of Massachusetts.

RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY.

STEREOTYPED BY STONE AND SMART.

PROCEEDINGS

IN RELATION TO THE

DEATH OF WILLIAM R. KING,

LATE VICE-PRESIDENT OF THE UNITED STATES.

December 9th, 1853.

At the opening of the Court this morning, Mr. Cushing, the Attorney-General of the United States, addressed the Court as follows:—

May it please your Honors:—I rise to submit a motion, which seems to be called for by the nature of the subject-matter. God, in his inscrutable, but supreme will, has removed from the service of the country, and from that path of honor which, through a long lifetime of greatness and goodness, he had so nobly trod, the Vice-President of the United States. When the voice of some future panegyrist, on the banks of the Mississippi—the Bravo of the Columbia,—shall speak of the heroes, the legislators, the statesman, and the magistrates of our country, as it recounts the names borne on that glorious roll of immortality, it cannot fail to pause with unalloyed satisfaction at the name of William R. King. Providence, from time to time, raises up men to lead armies on to victory through the clash of the battle-field, or, by rare gifts of written or spoken thought, to wield, at will, the fiercest impulses of nations. Such men, if they have a superlatively splendid career, yet have an agitated one. They create events, and they partake of the vicissitudes of events. They may, they often do, have shaded sides of the mental formation, without which the bright ones would be too dazzingly brilliant. They come to be praised or dispraised alternately, according to the light in which their actions are viewed, and the flux or reflux of the tides of popular emotion. If William R. King be not of these, yet he has an appropriate, and perhaps he has a more enviable place in the temple of fame and in the hearts of Americans. For of him, it is with plainest truth to be said, that with lofty elements in his character to merit and receive the most absolute commendation, there is nothing in it open to censure. He stands to the memory in sharp outline, as it were, against the sky, like some chiselled column of antique art, or some consular statue of the imperial republic wrapped in its marble robes, grandly beautiful in its simple dignity and unity of a faultless proportion.

Placed at an early age in that august assembly, the highest, all things considered, in this or any other land, the Senate of the United States,—and continuing there, save with brief interruption of the most eminent diplomatic employment, during a whole generation of time,—and repeat-

edly elevated to preside over its deliberations, — he had grown to be, not of it merely, but its representative man, its typical person, its all conspicuous model of an upright, pure, spotless, high-minded, chivalric American Senator. This it is, in my judgment, which constitutes the distinctive trait in his character and career, and which drew to him the veneration and the confidence of his countrymen.

We think of him almost as an historical monument of senatorial integrity, rather than as a mere mortal man of the age. Like that gallant soldier, who received the baton of marshal in the very scene of his achievements, and fell, struck by a cannon shot, in the act of grasping the insignia of his command, so the Vice-President did but reach the pinnacle of his greatness to die. Such a death, so timed, though premature for us whom he has left behind to the toils and cares of public duty, was not premature for the consummate completeness of his renown. Knowing how deeply his loss must be deplored by your Honors, it is deemed fitting for me to move that this Court, in unison with what has been done in both Houses of Congress, do now adjourn, in manifestation of its respect for the memory of the deceased Vice-President of the United States.

To which Mr. Chief Justice Taney replied: —

The Court is sensible that every mark of respect is due to the memory of the late Vice-President, William R. King.

His life was passed in the public service, and marked throughout by its purity, integrity, and disinterested devotion to the public good.

It is true that no part of it connected him particularly with the judicial branch of this government. But the people of the United States had elevated him to the highest office but one in their gift; and the loss of a statesman like him, so honored and so worthy of the honor bestowed, is felt to be a public calamity by this department of government as well as by that to which he more immediately belonged. And as a token of their high respect for him while living, and their sincere sorrow for his death, the Court will adjourn to-day, without transacting its ordinary business.

Whereupon, proclamation being made, the Court is adjourned until Monday morning at 11 o'clock.

SUPREME COURT OF THE UNITED STATES.

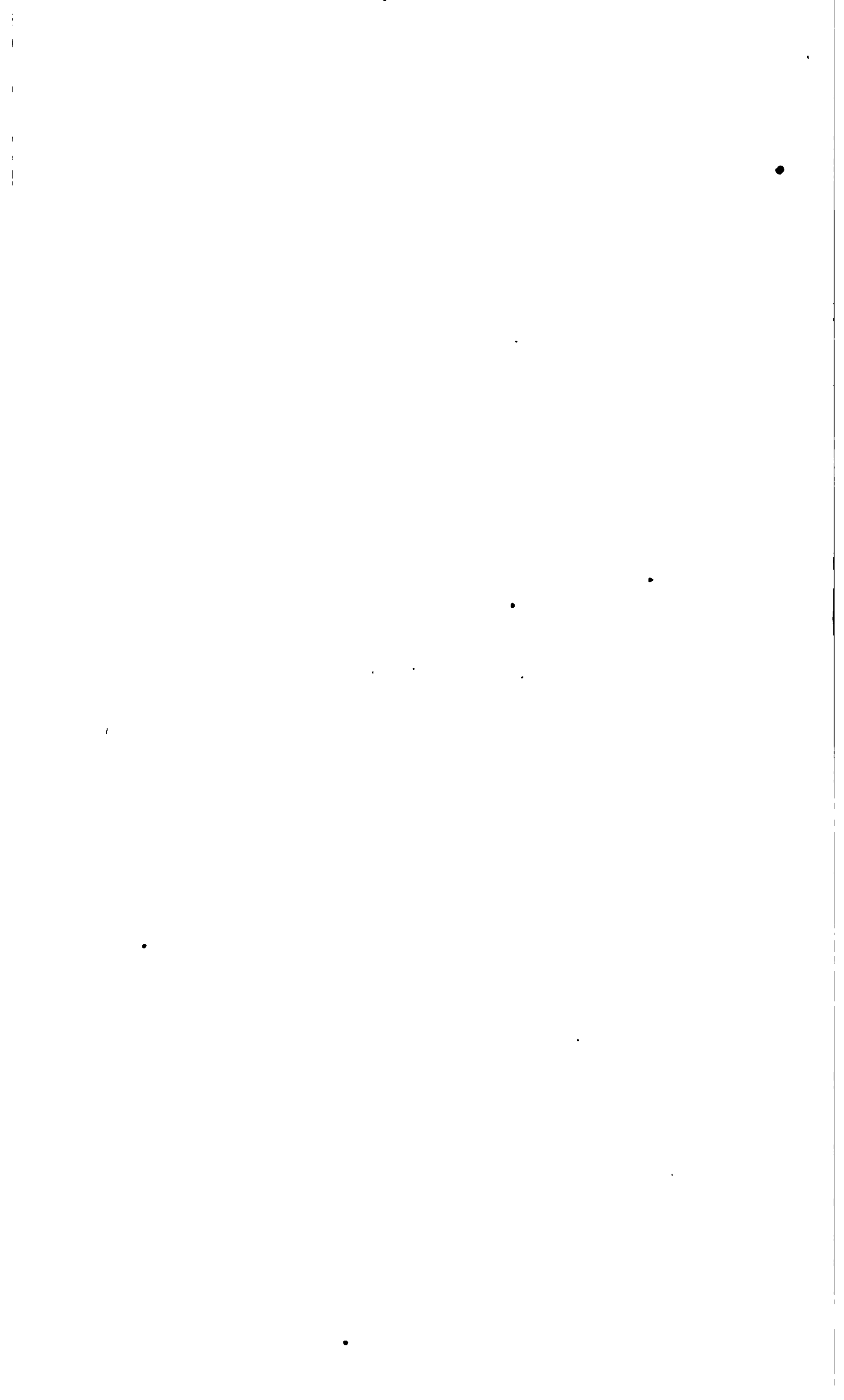
HON. ROGER B. TANEY, Chief Justice.
HON. JOHN McLEAN, Associate Justice.
HON. JAMES M. WAYNE, Associate Justice.
HON. JOHN CATRON, Associate Justice.
HON. PETER V. DANIEL, Associate Justice.
HON. SAMUEL NELSON, Associate Justice.
HON. ROBERT C. GRIER, Associate Justice.
HON. BENJAMIN R. CURTIS, Associate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

CALEB CUSHING, ESQ., Attorney-General.

WILLIAM THOMAS CARROLL, ESQ., Clerk.

BENJAMIN C. HOWARD, ESQ., Reporter.

JONAH D. HOOVER, ESQ., Marshal.



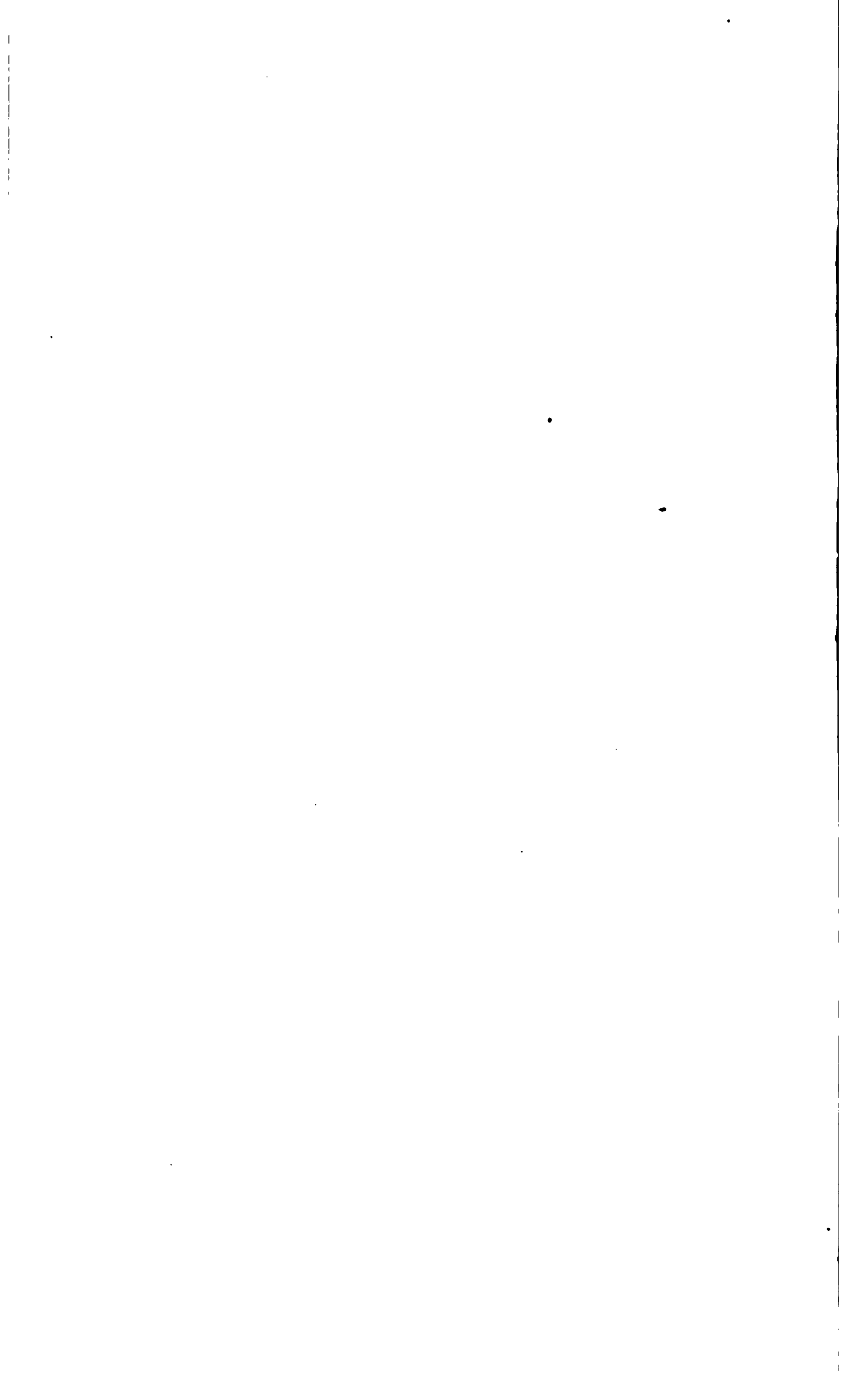
LIST OF ATTORNEYS AND COUNSELLORS,

ADMITTED DECEMBER TERM, 1853.

C. Cushing,	*Massachusetts.*
Geo. W. McCook,	*Ohio.*
Wm. Dunbar,	*Louisiana.*
F. Perin,	*Do.*
John Perkins, Jr.,	*Do.*
T. S. Wilson,	*Iowa.*
Hugh A. Garland,	*Missouri.*
John S. Woodward,	*New York.*
Charles Donohue,	*Do.*
Wm. Shepard Bryan,	*Maryland.*
Frederick K. Bartlett,	*Minnesota.*
Mariano D. Papy,	*Florida.*
Horace W. Soper,	*New York.*
Samuel M. Hart,	*Ohio.*
Nathaniel Hatch,	*District of Columbia.*
Montgomery Blair,	*Do.*
James L. Orr,	*South Carolina.*
Thomas C. P. Buckley,	*New York.*
J. M. Chapman,	*New Jersey.*
T. J. Fox Alden,	*Pennsylvania.*
Waldo Hutchins,	*New York.*
John W. McKim,	*District of Columbia.*
John E. Burrill, Jr.,	*New York.*
Geo. F. Shepley,	*Maine.*
Geo. Buckham,	*New York.*
Charles Tracy,	*Do.*
John Stryker,	*Do.*
E. Ingersold,	*Pennsylvania.*
Samuel W. Parker,	*Indiana.*
Jeremiah Clemens,	*Alabama.*
W. C. Johnson,	*New York.*
George Miller,	*Do.*
William R. Sapp,	*Ohio.*

Wm. Carey Jones,	*California.*
Theodore Gaillard Hunt,	*Louisiana.*
Randell Hunt,	*Do.*
O. H. Browne,	*Nebraska.*
Archibald Williams,	*Illinois.*
Dyre Tillinghast,	*New York.*
Joseph H. Jackson,	*Do.*
J. Thomas Spriggs,	*Do.*
Edward Mills,	*Ohio.*
Wm. G. M. Davis,	*Florida.*
Courtland Cushing,	*Indiana.*
John T. Hoffman,	*New York.*
Alexander Grailhe,	*Louisiana.*
J. N. Platt,	*New York.*
W. Claude Jones,	*Missouri.*
James Raymond,	*Maryland.*
Walter Rutherford,	*New Jersey.*
Wm. W. Boyce,	*South Carolina.*
James H. Thompson,	*Ohio.*
Wm. Henry Norris,	*Maryland.*
Isaac N. Arnold,	*Illinois.*
Rufus P. Spalding,	*Ohio.*
John H. Handy,	*Maryland.*
James B. Everhart,	*Pennsylvania.*
Allen T. Wilson,	*District of Columbia.*
Abraham Becke,	*New York.*
Edward Dickinson,	*Massachusetts.*
Tappan Wentworth,	*Do.*
Theodoric Romeyn Westbrook,	*New York.*
F. W. Hughes,	*Pennsylvania.*
J. A. Barlow,	*Maryland.*
George Sedgwick,	*Michigan.*
J. W. Scudder,	*New Jersey.*
Annis Merrill,	*California.*
Andrew J. Cutler,	*New York.*
James J. Ring,	*Do.*
W. P. Harris,	*Mississippi.*
R. C. Martin,	*New York.*
Benj. C. Barroll,	*Maryland.*
William Fullerton,	*New York.*
Mortimer M. Jackson,	*Wisconsin.*
George A. Starkweather,	*New York.*
John C. Starkweather,	*Wisconsin.*

Abraham H. Sherman,	*New Jersey.*
Isaac A. Velplanck,	*New York.*
Alex. D. Fraser,	*Michigan.*
William Gray,	*Do.*
Robt. P. Toms,	*Do.*
Sidney T. Fairchild,	*New York.*
B. C. Thayer,	*Do.*
C. V. Traphagen,	*New Jersey.*
Virginius H. Joy,	*Louisiana.*
Benj. Pringle,	*New York.*
John Ganson,	*Do*
Luther R. Marsh,	*Do.*



LIST OF CASES REPORTED.

PAGE

Adams *v.* Otterback 539
Anderson et al. *v.* Bock 323
Arkansas, State of *v.* Curran 304

Bennet *v.* Carter 354
Bevins et al. *v.* Ramsey et al. 179
Bispham *v.* Price 162
Bock *v.* Anderson et al. 323
Brooks et al. *v.* Fiske et al. 212
Broome *v.* United States 143
Burden *v.* Corning et al. 252

Carter *v.* Bennet 354
Corning et al. *v.* Burden 252
Corning *v.* Troy Iron and Nail Factory 451
Coxe *v.* Wylie 415
Curran *v.* State of Arkansas 304

D'Auterieve et al. *v.* United States 14
Davenport's Heirs *v.* United States 1
Davis et al. *v.* Garrow et al. 272
Dawson et al. *v.* United States 467
Delauriere *v.* Emison 525
Denmead *v.* Winans 330
Den *v.* Jersey Company 426
Ducros et al. *v.* United States 38

Ely et al. *v.* Smith 137
Emison *v.* Delauriere 525
Eyre et al. *v.* Potter et al. 42

Fiske et al. *v.* Brooks et al. 212
Foley *v.* Harrison 433
Forsyth *v.* Reynolds et al. 358

Garrow et al. *v.* Davis et al. 272
Gibson *v.* Murray 421

Hanna et al. *v.* Rockhill et al. 189
Harrison *v.* Foley 433

Jersey Company *v.* Den 426

Kanouse *v.* Martin 198
Kearney et al. *v.* Taylor et al. 494
Kneeland et al. *v.* Walworth 348

Livingston et al. *v.* Woodworth et al. 547

Magniac et al. *v.* Thompson 281

PAGE
Martin v. Kanouse 198
Mayer v. Phelps 160
McDonogh's Executors v. Murdoch 367
Michigan Central Railroad Company v. Northern Indiana Railroad Company 233
Morse et al. v. O'Reilly et al. 62
Murdoch et al. v. McDonogh's Executors 367
Murray v. Gibson 421

Northern Indiana Railroad Company v. Michigan Central Railroad Company 233

O'Reilly et al. v. Morse et al. 62
Otterback v. Adams 539

Patterson v. United States 10
Phelps v. Mayer 160
Potter et al. v. Eyre et al. 42
Price v. Bispham 162

Ramsey et al. v. Bevins et al. 179
Reynolds et al. v. Forsyth 358
Rockhill et al. v. Hanna et al. 189
Roselius et al. v. United States 31
Same v. Same 36

Smith et al. v. Ely et al. 137

Taylor et al. Kearney et al. 494
Thompson v. Magniac et al. 281
Troy Iron and Nail Factory v. Corning 451

United States v. Broome 143
United States v. D'Auterieve et al. 14
United States v. Davenport's Heirs 1
United States v. Dawson et al. 467
United States v. Ducros et al. 38
United States v. Patterson 10
United States v. Roselius et al. 31
Same v. Same 36

Walworth v. Kneeland et al. 348
Winans v. Denmead 330
Woodworth et al. v. Livingston et al. 547
Wylie v. Coxe 415

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1853.

THE UNITED STATES, APPELLANTS, *v.* SAMUEL DAVENPORT'S HEIRS.

Two grants of land in the country known as the neutral territory lying between the Sabine River and the Arroyo Hondo, confirmed, namely, one for La Nana granted in 1798, and the other for Los Ormegas granted in 1795.

These grants were made by the commandant of the Spanish post of Nacogdoches, who at that time had power to make inchoate grants.

In both cases the grants had defined metes and bounds, and the grantees were placed in possession by a public officer, and exercised many acts of ownership.

The evidence of the grants was copies made by the commandant of the post, and also copies made by the land-office in Texas. These copies, under the circumstances, are sufficient.

At the date of these grants, it was necessary to obtain the ratification of the civil and military Governor before the title became perfected. This not having been done in the present case, the title was imperfect, although the petition alleges that it was perfect, and the District Court had jurisdiction under the Acts of 1824 and 1844.

But the District Court ought not to have decreed that floats should issue where the United States had sold portions of the land, because these vendees were not made parties to the proceedings.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana, under the Acts of 1824 and 1844, so often referred to in cases previously reported.

The facts of the case are recited in the opinion of the Court.

It was argued by *Mr. Cushing* (Attorney-General) on the part of the United States, and by *Mr. Baldwin* and *Mr. Johnson*, with whom was *Mr. Coxe*, on behalf of the appellees.

The points made on the part of the United States were,

I. That the court below had no jurisdiction, and that the decrees are therefore nullities.

These grants were complete titles, requiring nothing more to be done to perfect them; and the cases are full of proof, offered

by the claimants, to show that the grants were perfect grants. But the act of 1824 applies only to cases of incomplete titles, to cases protected by the treaty of 1803, "and which might have been perfected into a complete title, under, and in conformity to, the laws, usages, and customs of the governments under which the same originated, had not the sovereignty of the country been transferred to the United States." 1 Land Laws, 385. The point, it is conceived, is decided in the case of the United States *v.* Reynes, 9 Howard, 144, bottom of page, and 145.

II. That there is no sufficient evidence of the execution of the grants by Fernandez and Gaudiana.

III. That, even if their execution is proved, then they are void; because Fernandez and Gaudiana had no authority to make such large grants. Laws for the sale and distribution of lands. 2 White's Rec. p. 48 to 55; Royal Ordinance of 13th October, 1749, Ibid. 67; Royal Ordinance of 1754, Ibid. 62; O'Reilly's and Gayoso's Regulations, Ibid. 229, 231.

IV. That even if their execution is proved, then the grants are void, because no lands were severed from the public domain by surveys, giving a certain location previous to the treaty of 1800 or even 1803, and the descriptions in the grants are so vague, indefinite, and uncertain, that no location of the lands embraced in them can be given. United States *v.* Miranda, 16 Peters, 156 to 160; 15 Peters, 184, 215, 275, 319; 10 Peters, 331; 3 Howard, 787; 5 Howard, 26; United States *v.* Boisdore's heirs, 11 Howard, 63; Lecompte *v.* United States, Ibid. 115.

V. That the claimants are not within the provisions of the act of 1824, and there are not the proper averments in their petitions to show that they are entitled to its benefits.

The counsel for the appellees made the following points:—

1. The territory within which both of these grants were situate was, at their respective dates, within the boundaries of Texas, (the Arroyo Hondo being the eastern boundary,) and subject to the dominion and control of the commandancy at Nacogdoches, so far as related to the granting of lands.

2. The civil and military commandants at that post were, *ex officio*, lieutenant-governors, and had authority to grant lands within their province or department.

3. These grants were made by them in manner stated in the petitions, and were in conformity with the laws, usages, and customs of Spain, which then existed in the province of Texas and at the post of Nacogdoches.

4. These grants gave to the grantees therein named, and to their legal representatives, a good title to the premises in them respectively described.

5. The plaintiffs, in these suits, have shown themselves, by a regular deduction of title, the owners of the William Burr and Samuel Davenport interests in both tracts; and are, therefore, entitled to recover.

Mr. Johnson, in his argument, said that the United States had not denied the existence of the original grants. As to the allegation that the lands were not severed from the royal domain, if the grant was capable of being located, it need not be actually severed. Glenn v. United States, 13 Howard, 250. This grant can be located. A centre being given, a line must be run from it two leagues to the north and two to the south; then from each end, two east and two west; then close the survey. The record shows that the centre tree existed. The other grant can be surveyed also.

But it has been said that if these titles are good for any thing, they are complete titles, and therefore not within the jurisdiction of the court under the acts of 1824 and 1844.

We are aware that in the case of the United States v. Reynes, 9 Howard, 127, this court has decided that perfect grants, arising under the treaty of 1803, do not fall within, and are not embraced by, the provisions of this law; and to that decision we bow with respectful deference; but we ask the court whether the two grants under consideration are of that description? We submit to your honors whether the fact that these grants were made by the civil or military commandants; whether from the fact that they lay within the neutral territory, a territory which, from its earliest history, was in dispute between the commandants at Natchitoches, in Louisiana, and Nacogdoches, in Texas, and which, by the treaty of 1819, falls within the limits of Louisana; seeing that the grants originated with the commandant in Texas,—are not considerations which will take these cases out of the operation of that decision. Notwithstanding the proof in these cases to the contrary, we submit, whether, under the laws of Spain and of the Indies, *stricti juris*, these grants, to make them perfect and complete, did not require the sanction of the Home Department and authority. Such was the construction put upon them by Governor Salcedo himself, the governor of the internal provinces, when "on his way to San Antonio he collected all the titles he could, in order to have them confirmed." See Colonel Bloodworth's testimony, Y. and M., O. R. p. 201; N. R. 187. And did not the submission of Davenport & Co. of one of the grants to Governor Salcedo, show that they deemed the sanction of the acts of the military commandant, who made the grant, by a higher authority necessary; and did not the action of that governor show his own

acquiescence in these views, and also show that the grant was farther embarrassed, by the fact that it lay within the neutral territory? Y. and M., O. R. p. 140; N. R. 130. This, too, is in accordance with the testimony of Benjamin Fields, who swears that he always supposed such sanction necessary; p. 92 and 93; N. R. 89, 90; and are not these views strengthened by reference to the note of the commissioners, p. 43, 44, and 51? In which last note the commissioners say:—

"It appears to be a historical fact, that the strip of country called the neutral territory was early disputed by the ancient governments of Texas and Louisiana, both alternately assuming and repelling jurisdiction over it; and even after both provinces were united under the dominion of Spain the dispute did not subside, but was kept alive and perpetuated by the local commandants, &c." These commissioners, in their several reports, after classing these in the first class of claims, recommend them for confirmation; a language which would not have been used in reference to perfect titles, and which, coming from them, is to be regarded as the language of the government itself. 9 Pet. R. 468.

These were the grounds on which the District Attorney, in the court below, insisted that the grants were inchoate and not perfect and absolute; and we with great confidence submit to the court, therefore, whether these combined considerations do not clearly distinguish these cases from that of the United States v. Reynes, before referred to; and if so, whether they are not embraced by the act under which the suits are brought; and in view of the whole case in all its aspects, we, with like confidence, submit whether we are not entitled to recover.

1 Howard, 24; 7 Pet. R. 51; 10 Pet. R. 303; Civil Code, title Prescription, 3421, 3437, 3438, 3465, and 3466; 2 White's Recop. 191; Duff Green's American State Papers, vol. 3, p. 72 to 83; Ib. vol. 4, p. 34–36, 60, 61, 75; Executive Document, 33, 2d session, 27th Congress, p. 81. Doe v. Eslava et al. 9 Pet. R. 449; Doe v. The City of Mobile, Ib. 468.

"The authority given to these officers (the register and receiver) was to be exercised only in cases of imperfect grants, confirmed by the act of Congress, and not cases of perfect titles; in these they had no authority to act."

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes before this court by an appeal from a decree of the District Court of the United States for the Eastern District of Louisiana.

The appellees filed their petition in that court to establish their claim to a share in two grants of land, situate on the western border of Louisiana, in the country known as the

neutral territory, lying between the Sabine river and the Arroyo Hondo.

One of these grants was issued by the commandant of the Spanish post at Nacogdoches to Edward Murphy, the 1st day of July, 1798, for a tract of land called La Nana, containing 92,160 acres. The grantee, in the month of November following, conveyed it to the trading firm of William Barr & Co., of which Murphy and Samuel Davenport, the ancestor of the appellees, were respectively members.

The evidence of the grant consists in copies of the petition of Edward Murphy to the commandant, dated in February, 1798, for a donation of the tract La Nana, situate to the east of the Sabine river, on the road leading from the town of Natchitoches. The tract asked for forms a square of four leagues upon that road, the centre of which is the prairie adjoining the bayou La Nana. The motive of the application was, that the petitioner might have summer pasturage for his cattle and other animals. The petition was granted by the commandant, and the procurator was ordered to place the grantee in possession. The procurator fulfilled this order the first of August, 1798, by going upon the land with the grantee and in the presence of witnesses, "took him by the right hand, walked with him a number of paces from north to south, and the same from east to west, and he, letting go his hand, (the grantee,) walked about at pleasure on the said territory of La Nana, pulling up weeds and made holes in the ground, planted posts, cut down bushes, took up clods of earth and threw them on the ground, and did many other things in token of the possession in which he had been placed in the name of His Majesty, of said land with the boundaries and extension as prayed for."

The act of possession was returned to the commandant, who directed "that it should be placed in the protocol of the post to serve as evidence of the same, and that a certified copy should be given to the person interested." The conveyance of Murphy to his firm bears date in the month of November after; was executed in the presence of the same commandant, and at that time the certified copies offered in evidence, purport to have been made.

The other grant is for a tract of land called Los Ormegas, containing 207,360 acres. It is founded on a petition of Jacinta Mora to the commandant of the same post, in November, 1795, who asked for the concession, that he might establish a stock farm for the raising of mules, horses, horned cattle, &c., and to cultivate the soil. The tract described in the petition contains six leagues square on the river Sabine, the centre of the Western line being opposite to the Indian crossing place of that river.

The prayer of the petition was allowed the same day, and orders given to the procurator to place the petitioner in possession, "with all the usual formalities of style, and that he should report his proceedings for the more effectual confirmation of the property."

This order was executed in December, 1795, with the same ceremonial that was employed about the order upon the La Nana grant, and the act recording the transaction was placed in the protocol of the post.

The paper in evidence is a certified copy made by the commandant of the post in 1806, shortly before the conveyance of the grantee to the firm of William Barr & Co., and in the certificate the copy is declared to have been compared and corrected, and that it is true and genuine.

Besides these papers, the plaintiffs procured certified copies from the officers of the land-office in Texas, from copies of the protocol made in 1810, which were submitted by the firm of Barr & Co. to the governor (Salcedo) of one of the internal provinces of New Spain, of which this post was at the time a dependency, apparently for the purpose of obtaining his sanction, either to the authenticity of the document, or to the grant it evinced. This copy of the La Nana papers does not correspond with that of 1798, but that of the Ormegas grant is substantially the same as that made in 1806.

The plaintiffs, farther to support their claim, offered evidence satisfactorily explaining why these papers came to be deposited in the archives of Texas and for the fact of their discovery there.

These claims were presented in 1812, to the commissioners appointed to ascertain and adjust claims to lands in the Western District of Louisiana, and have been before the several boards which have been since constituted to effect the same object. The genuineness of the signatures which appear on these copies of the grant; that they have come from a proper depository; that the parties who now hold them have claimed them since the date of their titles; that the lands are fitted for the objects for which they were sought, and have been used for that purpose; that surveys and possession defined their limits, contemporaneously, or nearly so, with the grants, are facts sufficiently established by the evidence submitted to the District Court. No imputation upon the authenticity of the grants occurs in any of the reports or acts of the government, but in the various reports of the Boards of Inquiry they have been treated as genuine, resting upon just considerations, and entitled to confirmation from the equity of the government.

The questions now arise, have these grants been legally esta-

blished? Were they within the competency of the persons making them? Are they binding upon the faith of the government of the United States? Does it lie within the jurisdiction of this court to render a decree favorable to the petitioners?

The copies made by the Spanish commandant from the protocol, and certified by him to be true and genuine, though dated long after the protocol, would be received in evidence in the courts of Spain, as possessing equal claims to credit as the primordial or originals. For the reason, that those like these are certified by the same officer whose attestation gives authenticity to the protocol, and who is charged to preserve it. 2 Escriche, Dic. de leg. 185. And this court for the same reason has uniformly received them, as having the same authority. United States *v.* Percheman, 7 Peters, 51; United States *v.* Delespine, 15 Peters, 319, and cases cited.

In this case the evidence of the loss or destruction of the protocol is satisfactory, and the copies would be admitted as secondary evidence upon well settled principles.

The power of the commandants of posts, in the Spanish colonies to make inchoate titles to lands within their jurisdictions has been repeatedly acknowledged by this court.

Under the laws and regulations of the Spanish Crown, it is a question of some doubt, whether grants for the purpose of grazing cattle, were any thing more than licenses to use the lands, and whether they were designed to operate upon the dominion. This question was presented in the case of the United States *v.* Huertas, 8 Peters, 475, upon a grant "with the precise condition to use the lands for the purpose of raising cattle, without having the faculty to alienate the said land by sale, transfer, control of retrocession, or by any other title in favor of a stranger without the knowledge of this government," was confirmed by a decree of this court against that objection upon the part of the government, 8 Peters, 475–709. We consider the question closed by the decision in that case, in reference to the country formerly held by Spain, lying to the east of the Sabine.

The land comprehended in these grants at their respective dates was within the unquestioned dominions of the Crown of Spain. The evidence clearly established that the commandants of the posts at Nacogdoches, before and subsequently, were accustomed to make concessions to lands in the neutral territory. This was not at all times an unquestioned jurisdiction, but between the years 1790 and 1800, it seems to have been generally acquiesced in. Some of the grants made within that period have been confirmed by the United States. The dispute of this jurisdiction was a dispute raised by other local commandants and had no relation to the controversy which arose

between the United States and Spain, upon the construction of the treaty of St. Ildefonso and the limits of the cession it made. Had these grants been executed after the date of that treaty, they would probably have been controlled by the doctrine of the case of the United States *v.* Reynes, 9 Howard, 127, and those of a kindred character. Having been executed by officers of the Crown of Spain, within its dominions, and in the exercise of an apparently legitimate authority, the presumption is in favor of the rightfulness of the act. No evidence has been given on the part of this government to impugn it, and much evidence has been adduced to uphold and sustain it.

The petition of the appellees describes the grants to be complete, wanting nothing to their validity from the authorities of Spain.

They have adduced evidence to show that such was the estimation in which they were held by the inhabitants of the district of Nacogdoches. If the court had adopted this conclusion it could have taken no jurisdiction of the case. Its jurisdiction under the act of 1844 is merely to supply the deficiencies in the titles, which were in their incipient state at the termination of the Spanish dominion.

The facts pleaded, enable us to determine the case without a reference to these legal conclusions of the parties. In the United States *v.* Clarke, 8 Peters, 436, this court reviewed the ordinances and regulations of the Crown of Spain for the disposition of its uncultivated lands in the Indies, so as to ascertain in whom, among its officers, the power to grant resided. From the examination, it was concluded that in 1774, it was confided to the civil and military Governors, from whom it had been for some years previously withdrawn, and that it remained with these officers till a period subsequent to the date of these grants in the territories bordering upon the Gulf of Mexico. The commandants of posts, and other sub-delegates of this officer, were charged only with a superintendence of the incipient and mediate states of the title, but the power of completely severing the subject of the grant from the public domain was uniformly retained by that central jurisdiction. We are, therefore, of the opinion, that these concessions must be treated as imperfect, and dependent upon the sanction of the United States. Upon a full examination of the evidence, we think they are sustained upon principles of equity, and that the decree of the District Court that declares them to be valid, should be affirmed.

That portion of the decree which provides that the petitioners be entitled to locate so many acres of land as have at any time been sold, or otherwise disposed of, out of said subdivisions by the United States, or any other unappropriated land belong-

ing to the United States, within the State of Louisiana, falls within the objections, stated in the case of the United States v. Moore, 12 Howard, 209, and of United States v. McDonogh, at this term, and cannot be maintained. To this extent the decree of the District Court is reversed. The effect of which reversal and of the decree rendered, is to exempt the lands sold or disposed of by the United States from the operation of the plaintiff's claim, and to leave the question of indemnity between the claimant and the political department of this government.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is the opinion of this court that the grants set forth in the record are valid grants, and that so much of the decree of the District Court as confirms them should be affirmed; but that such of the lands embraced by the said grants as have been sold or otherwise disposed of by the United States are exempt from the operation of the said grants; and that so much of the decree of the said District Court as authorizes the location of so many acres of the lands embraced in the said grants as have been sold or otherwise disposed of by the United States, on any other unappropriated lands of the United States, within the State of Louisiana, is erroneous, and should be reversed.

Whereupon, it is now here ordered, adjudged, and decreed, that so much of the decree of the District Court as authorizes the location of so many acres of the land as have been disposed of by the United States on any other unappropriated lands of the United States, within the State of Louisiana, be, and the same is hereby reversed and annulled; and that the lands so sold or otherwise disposed of by the United States, be, and the same are hereby exempted from the operation of the said grants.

And it is now here further ordered, adjudged, and decreed, that so much of the decree of the said District Court as declares the said grants to be valid, be, and the same is hereby affirmed.

THE UNITED STATES, APPELLANTS, v. THOMAS H. PATTERSON.

A claimant of a share of the grants spoken of in the preceding case, having failed to produce evidence of the right of his grantor to convey to him, cannot have a decree in his favor.

A person cannot intervene here who was no party to the suit in the District Court. And even if the practice of this court sanctioned such intervention, there is nothing to show his right to do so in this case.

THIS was a branch of the preceding case. The original title and the lands were the same. Patterson claimed under a deed executed on the 21st of November, 1836, by the heirs of William Barr, deceased; but the deed purported to be executed by their attorney in fact, Robert Thompson.

The cause was argued by the same counsel who argued the preceding case, with the addition of *Mr. Lawrence*, who claimed to intervene on behalf of the heirs of Joseph Piernas.

Mr. Lawrence, in support of this claim, alleged that,—The petitioners rely upon a conveyance of Jacinto Mora to Barr, Davenport, and Murphey, bearing date the 22d day of July, 1805. This is the only title they set up in their petition to the Ormegas tract.

During the progress of the cause they offered in evidence a conveyance from Jacinto Mora to Joseph Piernas, bearing date the 25th of April, 1796, a paper purporting to be a conveyance from Piernas to Vitor Portia, dated 30th August, 1804, and a conveyance from Portia to Davenport, dated in the year 1818.

All of these instruments of writing are in due form, except the most important one, viz., that purporting to be from Piernas to Portia, which was not authenticated by a notary or other officer, is not taken from any legal depository, nor recorded in the land-office, and in which neither the handwriting of the witnesses nor of Piernas is proved, nor the witnesses produced or their absence accounted for. In short, there is no proof at all of the genuineness of the paper, but it is left for the court to judge of the genuineness of the signature of Piernas.

Now, it will be at once perceived that if there were no defect in the chain of title from Piernas to Davenport, this would have been the elder and better title to Davenport as to the Ormegas tract; and yet, though the conveyance to Davenport of Piernas's interest was in 1818, and this petition was filed in 1845, it is not even alluded to in the petition.

It will be seen, from the extract from vol. 3, American State Papers, (Rec. 46,) that as late as 1815–16, Piernas made claim

to this land before the board of commissioners, and no claim was made by Vitor Portia.

In 1824-5 the same land was recommended for confirmation, but was never actually confirmed by Congress. Piernas had in the mean time died, and his heirs were young children, living in poverty and obscurity. (See letter of Hayward, Rec. 172; also Report to Commissioner, Rec. 213.)

The heirs of Piernas deny that he ever signed the paper to Portia, and aver that it is entirely fictitious.

Full notice of the claim of Piernas was before the court below, for the petitioners introduced his title themselves. It was, therefore, fully within the competency of the court below, if they perceived, from the record, title in Piernas to the Ormegas tract, and had no legal evidence before them of his having parted with that title,—to have reserved the rights of Piernas's heirs in their decree; and it is respectfully submitted, that it is within the power of this court (should the validity of the grant be affirmed) to protect those rights, so far as they appear in the present record.

In the case of Cunningham and Ashley, (14 How. 377,) this court interposed *meso motu*, to save the new Madrid title. Here an older title is introduced. The act of Congress says the court is to decide on evidence brought in by any person other than the parties to the suit. If so, it is proper to intervene here. The deed from Piernas to Portia had never been recorded, and the court below had no right to receive it.

Mr. Baldwin, in reply to *Mr. Lawrence*, made the following points:—

1. That the great lapse of time raised a strong presumption against this claim.

From 24th day of April, 1818, when, as appears by the record, Piernas conveyed his interest in that tract to Samuel Davenport, no claim has ever been set up to this land, either by Piernas or his heirs, until now, notwithstanding they reside in New Orleans, where their suit was tried at great length in the court below.

2. That the claimants under Piernas cannot intervene in this court, it being a court of appellate jurisdiction.

3. That the deed from Piernas, being an ancient deed under the laws of Louisiana, proved itself.

4. That it was regularly proved—the testimony of Crusat, as to the signature of Piernas, having been taken without objection in the court below.

5. That this court will not undertake to settle the rights of parties in interest, but leave them to litigate their rights in the court

below, or in the State tribunals; and that whatever judgment the court might pronounce in this matter, it would not be conclusive between the parties.

Mr. Justice CAMPBELL delivered the opinion of the court.

This appeal was taken from a decree of the District Court of the United States for the Eastern District of Louisiana.

The appellee claimed in the District Court a confirmation of the grants for the La Nana and Los Ormegas tracts of land, in which, he asserted an interest as an assignee of the heirs of William Barr, one of the members of the firm of William Barr & Co., in which they had been vested.

The questions of law and fact, arising in this case, are the same as those determined in the case of the United States *v.* Samuel Davenport's Heirs, in so far as they concern the validity of the grants.

The evidence of the purchase by the plaintiff from the heirs of Barr is not sufficient. No power of attorney appears in the record to Thompson, who made the conveyance to the plaintiff in their name. It is therefore proper that the decree that shall be entered shall be without prejudice to their right, and this opinion is filed in order that this judgment of the court may be understood. The operation of the judgment will be, to perfect the title for the benefit of the legal representatives of William Barr.

In this cause, as well as in that of the United States *v.* Samuel Davenport's Heirs, a motion was submitted on behalf of the heirs of Joseph Piernas alleging that a deed from Joseph Piernas to Victor Portia, dated the 30th August, 1804, being a link in the title to the Ormegas grant, was not sufficiently proven, and suggesting that it was not a genuine deed, and praying for leave to intervene in this suit to sustain their rights to this property.

The court is of opinion that the motion cannot be allowed. The plaintiff commenced his proceedings to assert his own claims against the United States. Those proceedings can neither benefit nor injure the persons interested in this motion, for they are not parties to the cause. The period for the assertion of a claim under the act of Congress of 17th June, 1844, has expired. Neither in the District Court nor in this court would it be lawful for persons, who failed to avail themselves of the benefit of that act during its operation, to intervene for the purpose of establishing a right under grants like these, after its expiration, in a suit commenced by other persons.

In looking through the record, we find no fact to authorize the belief that the heirs of Piernas have any title to the lands em-

braced in these grants. If, therefore, it was compatible with the constitution and practice of this Court, for a person to intervene here in a litigation, to which he was no party in the court of original jurisdiction, we find nothing to authorize it in the present instance.

The decree will be entered here to conform to that pronounced in the suit of the United States *v.* Davenport's Heirs, with the direction that the confirmation shall be for the use of the legal representatives of William Barr, deceased.

Order.

This cause came to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is the opinion of this Court that the grants set forth in the record are valid grants, and so much of the decree of the District Court as confirms them, should be affirmed for the use of the legal representatives of William Barr, deceased; but that such of the lands embraced by the said grants as have been sold or otherwise disposed of by the United States, are exempt from the operation of the said grants — and that so much of the decree of the said District Court as authorizes the location of so many acres of the lands embraced in the said grants as have been sold or otherwise disposed of by the United States on any other unappropriated lands of the United States within the State of Louisiana is erroneous, and should be reversed.

Whereupon it is now here ordered, adjudged, and decreed, that so much of the decree of the District Court as authorizes the location of so many acres of the land as have been disposed of by the United States on any other unappropriated lands of the United States within the State of Louisiana be, and the same is hereby reversed and annulled — and that the lands so sold or otherwise disposed of by the United States be, and the same are hereby exempted from the operation of the said grants.

And it is now here further ordered, adjudged, and decreed, that so much of the decree of the said District Court as declares the said grants to be valid, be, and the same is hereby affirmed for the use of the legal representatives of William Barr, deceased.

THE UNITED STATES, APPELLANTS, v. JEAN BAPTISTE D'AUTERIEVE, PONPONNE LE BLANC AND OTHERS, HEIRS AND LEGAL REPRESENTATIVES OF JEAN ANTOINE BERNARD D'AUTERIEVE, DECEASED.

The heirs of D'Anterieve claimed a tract of land near the river Mississippi, upon two grounds, viz., 1st, Under a grant to Duvernay by the Western or Mississippi Company in 1717, and a purchase from him by D'Anterieve, the ancestor, accompanied by the possession and occupation of the tract from 1717 to 1780; and 2d, Under an order of survey of Unzaga, Governor of the province of Louisiana in 1772, an actual survey made, and a confirmation thereof by the governor.

With respect to the first ground of title, there is no record of the grant to Duvernay, nor any evidence of its extent. It is, therefore, without boundaries or location; and, if free from these objections, it would be a perfect title, and therefore not within the jurisdiction of the District Court, under the acts of 1824 and 1844.

With respect to the second ground of title, if the proceedings of Unzaga be regarded as a confirmation of the old French grant, then the title would become a complete one, and beyond the jurisdiction of the District Court.

If they are regarded as an incipient step in the derivation of a title under the Spanish government, then the survey did not extend to the back lands which are the property in question, but only included the front upon the river, which was surrendered to the governor in 1780.

Neither the upper or lower side line, nor the field-notes, justify the opinion that the survey included the back lands. A letter addressed to Unzaga by the surveyor is so ambiguous, that it must be controlled by the field notes and map.

The neglect of the parties to set up a claim from 1780 to 1821, and the acts of the Spanish government in granting concessions within the limits now claimed, furnish a presumption of the belief of the parties that the whole property was surrendered in 1780.

THIS was an appeal from the District Court of the United States, for the Eastern District of Louisiana.

The history of the claim is fully set forth in the opinion of the court.

It was argued by *Mr. Cushing*, (Attorney-General,) for the United States, and submitted on a printed argument, by *Messrs. Janin* and *Taylor*, for the appellees.

The points made on the part of the United States were the following: —

1. That the claim of the petitioners, founded on the alleged grant by the Western Company is not open for discussion, the petitioners having taken no appeal from the decree of the court below, confirming their claim to the extent only of the forty-four arpens of front, and excepting evén out of this confirmation the forty in depth on the front granted to the Acadians. But if it were, then every thing relating to that grant and its extent and locality, and what interest D'Auterieve had in it, are so vague and uncertain that it would be impossible to identify and locate the land, and the grant would have to be declared void.

2. That D'Auterieve, by accepting the new concessions from the Spanish authorities, thereby waived all claims under the grant of the Western Company.

3. That the edict of 1728, and the alleged order of O'Reilly reducing the extent of the lands and the granting of them to others, subsequent to the alleged concessions, are acts for which the petitioners can have no relief against the United States, being the acts of competent French and Spanish authorities during the time these powers held the sovereignty of the country.

The property, in the enjoyment of which the treaty stipulates that the inhabitants of the ceded territory were to be maintained and protected, was such property as stood recognized by Spain at the date of the treaty, as the private property of the inhabitants. The United States are not bound to recognize what Spain had not recognized.

4. That the evidence in the case shows that this claim was voluntarily given up and surrendered to the Spanish authorities in 1780, and the long silence from that time until 1836, shows that it had been abandoned by the claimant's ancestors, and the grants made by the Spanish authorities within the limits of the land claimed, to the Acadians and others subsequent to the surrender, show how they regarded the matter.

5. That there was no sufficient evidence of the concessions made by O'Reilly and Unzaga such as to enable the court below to take jurisdiction of the claim. None were produced, and there was no evidence of loss or contents. The act of 1824 limits the jurisdiction to claims founded on any grant, warrant, or order of survey. The letter of Unzaga to D'Auterieve is not a concession, and the recital in the certificate of survey of Andry is not evidence of the existence of the concession or of its contents.

6. That there is nothing in the case to authorize the side lines to be run to the Atchafalaya river. It is alleged in the petition that O'Reilly, at the time of his visit to point Coupee in December, 1769, whilst he reduced the front of the grant, allowed the original depth to the river to remain. The first thing to be done is to show that this was the depth of the French grant. There is not a particle of evidence to show that this was the original depth, or to show that O'Reilly sanctioned it. A supposition, even that he could have sanctioned it, is put to flight by the first article of his regulations, made 18th February, 1770, on his return to New Orleans, from his visit, which declares that grants on the borders of the river (the Mississippi) shall be forty arpens in depth. That this was the depth allowed by O'Reilly to D'Auterieve, is corroborated by the sale made by the widow of the latter shortly after his death, which conveys only to the depth of forty arpens.

As to Andry's plan and certificate of survey, they say nothing as to the rear boundary being the Atchafalaya, neither do they profess to state that he measured and run the side lines to any distance whatever; he merely marks their direction, without saying how far they run; disregarding the twelfth article of O'Reilly's regulations. The rear boundary cannot be ascertained from either or both of the plan and certificate of survey, and the lands cannot, therefore, be located, and the alleged concessions of O'Reilly and Unzaga must therefore be declared void, as being vague and uncertain.

If the claimants were entitled to the confirmation of any part of the concessions it would be confined to the lands delineated on Andry's plan, (which, it will be seen on examination, stretches back from the river only about forty arpens,) because Unzaga in his letter to D'Auterieve states, that he "approves the survey, conformably to the plan of the surveyor, Don Lewis Andry, dated 12th March, last." But even this would avail the claimants nothing, for the whole lands appearing on the plan are absorbed by the Acadian grants, excepted from confirmation by the court below, and other Spanish grants in their rear.

The brief of Messrs. *Janin* and *Taylor* was as follows:—

The petitioners in this action seek to obtain the confirmation of a tract of land as described in their petition, extending from within forty arpens of the Mississippi river to the Atchafalaya. Their title to it is asserted to result from a grant made by the "Western Company," created by the King of France, in 1717, to Paris Duvernay, having four leagues front on the western bank of the Mississippi river, opposite Bayou Manchac, and extending back to the Atchafalaya river. And from the proceedings of the Spanish government in relation to it, after the transfer of Louisiana by France to Spain, under the treaty of 1762, by which the front on the Mississippi was reduced to forty-four arpens, between side lines, the beginning and courses of which were established in 1772, by the proper surveying officer, and approved by the then governor, with the former depth to the Atchafalaya.

We shall confine ourselves to a reference to the evidence in the record produced by the petitioners, inasmuch as there can be no question as to the authority of the Western Company to make the grant alleged to have been made to Paris Duvernay, (1 White's Recopilacion, 641, 642, art. 5; 643, art. 8,) or of the Spanish authorities to recognize the title of the then holder of it to the whole or to a part of the land comprised in it in 1772.

The original grant by the Western Company has not been produced, nor indeed any direct written evidence of its existence, or its precise location or extent.

The evidence showing the existence, location, and extent of the grant to Paris Duvernay is, 1st, historical; 2d, documentary; and 3d, parol, and is as follows:

1st. *Historical Evidence.*

1st. Mention is made of it in Martin's History of Louisiana, vol. 1, pp. 205 and 246. In that work it is spoken of as one of the large grants made by the "Western Company" to promote the settlement of the colony, and is described as situated on the right bank of the Mississippi, opposite Bayou Manchac.

The arrival of the settlers sent out by Duvernay in or about 1718, to be established on the grant, is related in Martin's History, (vol. 1, p. 206,) and it is also spoken of by Bernard de la Harpe, in his "Journale Historique de l'establissement des Français à la Louisiana," p. 142.

2d. *Documentary Evidence.*

1. The existence of the grant is clearly shown by the descriptions of the contents of different papers found by the public officer, who made an inventory in due form of law of the effects left by Claude Trenonay de Chamfret, at Point Coupee, in Louisiana, on the 10th of July, 1793.

2. Its existence is clearly shown by the following copies obtained from France:

1st. An extract from the archives existing in the office of the Minister of Marine and the Colonies of France, containing a statement of the passengers embarked for Louisiana, on the ship Gironde, on the 30th of September, 1724, in which one of the passengers is described as "director or manager of the concession belonging to H. Paris Duvernay;" and others are spoken of as workmen attached to the same concession.

2d. Extract from the same archives, containing a statement as to the companies of infantry supported in the province of Louisiana, and of the situation of the inhabitants at each point, dated May, 1724. Mention is here made of the concession of Mr. Paris, and a number of particulars are given with respect to it.

3d. Extract from a general census of the plantations and inhabitants of the colony of Louisiana, from the same office, dated 1st January, 1726. Mention is made in it of the "concession of Mr. Paris Duvernay, at bayou Goula."

4th. Extract from the same archives, dated 17th May, 1724. This is an extract from the register "Comptes des Indes," and is an order from the directors of the East India Company, on

the council of Louisiana, for fifty negroes, for which Paris Duvernay had paid the sum of 40,000 livres to the company in Paris.

5th. Copy of a notarial act passed in Paris on the 16th of May, 1729, between Duvernay and others, who were interested with him as partners, in relation to this concession.

6th. Copy of a notarial act passed in Paris, on the 2d of October, 1726, containing the deliberations of the persons then interested in relation to the management of this concession.

7th. Copy of a power of attorney, by notarial act, from Paris Duvernay to Claude Trenonay de Chamfret, dated 18th October, 1731, giving him authority to cancel and annul a previous arrangement, and to take back the plantation and concession.

8th. Copy of contract by notarial act between Duvernay and de Chamfret, 18th October, 1731.

9th. Mention of the copy of a decree putting Claude Trenonay de Chamfret, acting under the power of attorney of Paris Duvernay, in possession of the concession contained in the extract from the inventory of Claude Trenonay de Chamfret, before mentioned. The date of this decree was 16th August, 1733. It is erroneously printed in the transcript, 1783.

10th. Notarial act of donation, made by Paris Duvernay to Claude Trenonay, of the establishment, &c., and to all his rights, by virtue of the concession originally made, &c. This was dated at Paris, 28th July, 1748.

11th. Copies of acts, &c., &c., showing sale by Claude Trenonay de Chamfret to D'Auterieve, of the concession, and the ratification of that sale by Claude Trenonay, by his accepting a note or notes representing a part of the price, and enforcing the payment of them.

The act, at page 36, of the transcript, executed by Trenonay, makes mention of his claim against his uncle, Claude Trenonay de Chamfret, for the alienation of property belonging to him; and that at page 37, recites that de Chamfret had given up an obligation of D'Auterieve for the sum of fourteen thousand four hundred and sixty-six livres, the balance of the sale of the plantation at bayou Goula, comprised in the donation to him. In the examination of papers contained in the inventory before referred to, there is one described as the decree of the council, condemning D'Auterieve to pay to Trenonay the amount of his obligation for 14,456 livres.

And this brings us to a new epoch. No trace has been discovered of the original grant. If it remained in the hands of the original grantee, it was doubtless soon lost after he, or his heirs, ceased to have any interest in the land comprised in it. The Western Company ceased to exist long before the transfer

of Louisiana by France to Spain, in 1769. After Spain took possession of the Province, O'Reilly, the first Governor, by an arbitrary exercise of power, declared his determination to reduce the front of D'Auterieve, the then owner of the concession, to a front of twenty arpens. There is, however, no written evidence of this fact, but what results from the statement made by Andry, in the *procès verbal* of his survey. Unzaga, the succeeding Governor, did not carry out the determination of O'Reilly. He reduced the front on the river, however, to forty-four arpens, but left to D'Auterieve the original depth to the Atchafalaya. This appears from the copy of the *procès verbal* of the survey made by Andry, under the authority of the Governor General, on the 12th of March, 1772, to be found at page 27, of the printed transcript, and the plan or map representing the same at page 40, of the original transcript, and from the express approval of the survey, *procès verbal*, and plan, which were laid before him on the 28th of March, 1772, made and given in writing on the 12th of July, of the same year, 1772. There are translations of the material parts of the *procès verbal* of the survey, made by Mr. Janin, and embodied in a brief presented by him to the land office in 1835 or 1836, at page 21, of the transcript, and a translation of the letter of Unzaga approving it, also embodied in the same brief, at page 22.

From these proceedings, three facts are rendered indisputable. 1st. That it was to the knowledge of the Spanish government that a valid grant existed, under the authority of France, for a very large tract of land at the point in question, the title to which at the time vested in D'Auterieve, of which the tract comprised in the lines established by the survey, made a part. 2d. That it had a very wide front on the river; and 3d. That it extended back in depth to the Atchafalaya.

The parol evidence of Degruys, as to the existence, location, and extent of the grant, is very clear and distinct. The portions of his deposition relating to these points are in harmony with the proceedings and acts of the Spanish government, as shown in the record.

The lines established by the Spanish government, as the boundaries to the land left to D'Auterieve, after 1772, are shown by the following evidence:

1st. By the grant to Delpino, received in evidence, and copied into the transcript, and the survey of the land granted to him, which survey was made on the 14th of February, 1772, before the survey made of the land left to D'Auterieve, which was confirmed by the United States to Joseph Hebert, under No. 406. (See confirmation, page 46, of printed transcript.) Public lands, page —, and is represented as lot or section 48, on the

plot of T. 10, R. No. 13 east, which is contained in the original transcript; and

2d. By the grant to An. Maria Dorval, and the survey of the land granted to him, made on the 12th of March, 1772. This was confirmed to Barbre Chlatre, No. 206. (Public Lands, page —.)

These two tracts constituted the upper and lower boundaries of the tract left to D'Auterieve, and the lower and upper lines, respectively, determine the direction of the side lines of the claim.

D'Auterieve continued in possession of this property up to his death. He entered into a contract for erecting a mill there in 1772. He died there in 1776.

D'Auterieve, at his death, left several young children, who were his heirs. After the death of D'Auterieve, his widow, the same year, (1776,) sold six arpens of the front, with the depth of forty arpens. The remainder of the front, to the depth of forty arpens only, was afterwards comprised in an arrangement made by Degruys, with Governor Galvez, as stated in his deposition before referred to. The statement of Degruys is confirmed by the fact that the surveys of the different portions of the front were all made long after the arrangement spoken of by him, (being, in point of fact, made in 1796,) and that it is stated in the *procès verbals* of the surveys that these lands were those which were contained in the forty arpens from the concession of Mr. D'Auterieve, for the establishment of the Acadian families. (See *procès verbal* of survey, by Pintado, and forming part of the concession of Mr. Dotrive, which was destined for the establishment of the Acadian families, and "which were taken for the establishment of the French Acadian families, from the concession of Mr. Dotrive."

The court is also referred to the brief of Mr. Janin, prepared and filed with the commissioners in 1835 or 1836, which we find copied in the transcript at page 18.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the District Court for the Eastern District of Louisiana.

The heirs of D'Auterieve filed their petition under the act of Congress of the 17th June, 1844, which provides for the adjustment of certain land claims against the government, setting up a claim to a large tract in the parish of Iberville, on the west bank of the Mississippi river, at a place called Bayou Goula, some thirty leagues above the city of New Orleans. The decree below is in favor of the heirs, and the case is now before us on an appeal by the United States.

The petition sets out a charter from the King of France, in August, 1717, by which the province of Louisiana was granted to the Western or Mississippi Company; and also a grant from that company in the same year, to Paris Duvernay, a wealthy capitalist of France, of a tract of land fronting on the western bank of the Mississippi opposite Bayou Manchac, having four leagues front on the river, and extending back in the rear to the river Atchafalaya. That soon after this, Duvernay fitted out a company of sixty men, under the direction of his agent Dubuisson, all of whom arrived at New Orleans in the spring of 1716, and immediately thereafter settled upon the tract; the settlement was known as the "Bayou Goula Concession," the principal establishment being in the neighborhood of the village of the Bayou Goulas Indians. That the settlement was kept up by Duvernay for many years at great expense, and under many difficulties, and contributed materially towards the establishment of the French dominion in Lower Louisiana.

The petition further states, that in 1765, Duvernay, through his agent, Tremonay De Chamfret, sold the tract in question to Bernard D'Auterieve, the ancestor of the present claimants, and delivered to him the possession. That in 1769, after O'Reilly had taken possession of the province, on behalf of the King of Spain in pursuance of the treaty of 1762, he gave orders that the Bayou Goula Concession should be reduced from four leagues to twenty arpens front, but that Unzaga, his successor, in 1772, enlarged it to forty-four arpens on the river, and ordered a survey of the same by Luis Andry, the government surveyor, which was made accordingly on the 12th of March, 1772, and approved by the Governor, 12th July, of the same year. D'Auterieve continued to occupy and improve the tract, making it his place of residence, from 1765, the date of his purchase, till his death, 24th of March, 1776. That the widow remained in possession with her children till 1779, when she married Jean Babtiste Degruys, who resided at Attakapas, to which place they removed.

The petition further states, that about this time, Galvez, the then Governor of Louisiana, desirous of introducing some Spanish families from the Canary Islands as colonists, and to provide a settlement for them, made contracts with various persons for the construction of small houses, and, among others, with Degruys; who undertook to build a number on the Bayou Goula Concession, and to give up the front on the river to the use of these colonists, with forty arpens in depth; that he built a number of these houses, and delivered them to the Governor, and was paid for them; but not in accordance with the agreement. That the government having become engaged in a war

against the province of of West Florida, the Governor changed his purposes in behalf of the Spanish families, and assigned a different location for their accommodation, but subsequently set apart this tract with the cabins erected, to a number of Acadian emigrants, who had been some years previously driven from their ancient possessions in Nova Scotia by the British government. The petition states, that Degruys and his family continued to reside at Attakapas, where they had other property; that the back land in Bayou Goula Concession, being either low swamp land, or nearly inaccessible, and of little value, was neglected by the family, and especially by Degruys, the head of it, and some portions were subsequently granted to others by the Spanish government, in ignorance of the rights of the ancestors of the present claimants. The petitioners admit that no claim was set up to these back lands, from the time the front was surrendered to Governor Galvez, which must have been about the year 1780, down till 1821 or 1822, when the heirs employed the late Mr. Edward Livingston, as their attorney, to inquire into their claims. They state that the children of D'Auterieve, at the time of his death were under age; that there were four of them; and at the time of the removal of the family from the Concession to Attakapas, the eldest, Antoine, was only fourteen years old, the second, Louis, twelve, the third, Marigny, six; the fourth, Dubrelet, died in infancy. Antoine died in 1812, leaving four children; Marigny in 1828, leaving no issue; Louis, in 1814, leaving four children. These descendants of D'Auterieve have instituted the present proceedings. The widow died in 1811. Degruys, the husband, was living at the commencement of this suit, and has been examined, as a witness, on behalf of the claimants.

These are the facts substantially, as stated in the petition; and the title of the petitioners, as will be seen from the statement, is founded, 1st, upon the grant or concession to Duvernay by the Western or Mississippi Company, in 1717, and the purchase from Tremonay de Chamfret, his agent, in 1765, by D'Auterieve the ancestor, together with the possession and occupation of the tract, from 1717 down to 1780, when the family left it, and removed to Attakapas; and 2d, upon the order of survey of Unzaga, in 1772, the survey made accordingly by Andry, and the approval of the same by the Governor in the same year.

As it respects the first ground of title, the grant to Duvernay in 1717, no record of it has been produced, and, after a thorough examination of the archives of that date, both at New Orleans and at Paris, and in the appropriate offices for the deposit of such records, none can be found. The only proof furnished is to be found in the historical sketches given to the public, of the

first settlement of Louisiana by the French government, under the direction of the Western or Mississippi Company, together with some documentary evidence relating to the settlement of the plantation by Duvernay, through his agents, such as powers of attorney, and some intermediate transfers of the titles, in the course of the agency. But unfortunately, neither the historical sketches, or documentary evidence, furnish any information as to the extent of the grant or its boundaries.

The several historians of the transactions of the Western Company in Louisiana of that date, concur in stating that agriculture was one of the first objects of encouragement in the colony; that the company thought the most effectual mode of accomplishing it would be to make large concessions of land to the most wealthy and powerful personages in the kingdom. Accordingly, one of four leagues square, on the Arkansas river, was made to John Law, the famous projector of the company, and its Director-General, together with twelve others in different places in the province, and among them, one on the right bank of the Mississippi, opposite Bayou Manchac, to Paris Duvernay, the grant in question. The extent of these grants is given only in the instance of Law. Duvernay at the time was one of the counsellors of the king, and Intendant of the Royal Military Academy in France. In the course of the first year after the grant was made, he shipped with his agent, Dubuisson, some sixty emigrants, and settled them upon the tract, with the necessary provisions and implements for clearing the plantation, for the erection of cabins, and for husbandry, and in a few years after, 1724, he purchased and sent to Louisiana, some fifty slaves to supply labor upon it. Large sums of money were also expended by him in other improvements. But, notwithstanding the exertions and large expenditures of the proprietor, the establishment turned out unprofitable, became embarrassed through the neglect and dishonesty of the agents, and involved in litigation, so that in 1765 he made a sale of part of it to D'Auterieve, as already stated, and in the next year, 1766, gave the residue and all his interest in the concern, to Claude Tremonay, his nephew, he agreeing to indemnify him against any claims or demands arising out of it, and for which he might be liable.

Now, as it respects this branch of the title set up, and relied on by the petitioners, there are two objections to their proceedings under the act of 1844, either of which is fatal to a recovery. In the first place, the title, as derived from Duvernay, if still a subsisting one in them, is a complete and perfect one, and consequently not within the first section of that act, which confers the jurisdiction upon this court. The place to litigate it is in

the local jurisdiction of the State by the common-law action of ejectment, or such other action, as may be provided for the trial of the legal titles to real estate. For, although we are not able to speak of the nature or the character of the title from the terms of the grant, in the absence of that instrument, all the evidence which has been furnished in relation to it leads to the conclusion that the full right of property passed to the original grantee. Even the length of possession, which is relied on, lays a foundation for the presumption of such a grant, and cannot therefore avail the petitioners here.

And in the second place, the tract claimed as derived from Duvernay is without boundaries or location. The only description that has been referred to, or which we have been able to find, after a pretty thorough search, even in historical records, is that it was a grant of a large tract upon the right bank of the Mississippi river, opposite Bayou Manchac, a point some thirty leagues above New Orleans. In the intermediate transfers and powers of attorney, found in the record, it is referred to as a plantation or concession, known by the name of "Le Dubuisson," the name of the first agent, or by the name of "Bayou Goula Village," the name of an ancient Indian village at that place on the river. We have no evidence of the extent of the concession on the river, or of its depth back, or of any landmarks designating the tract, by which it can be regarded as severed from the public domain.

Without, therefore, pursuing this branch of the case further, it is sufficient to say, that no title or claim of title has been made out under the French grant, or concession, to Duvernay, that could have been recognized or dealt with by the court below, under the limited jurisdiction conferred by the act of 1844, and of course no ground for the decree in that court, in favor of the petitioners under it. The title, if any, is a legal one, not cognizable under this act.

The next branch of the title set up and relied on by the petitioners, is that derived from the Spanish government in 1772.

It appears that O'Reilly, who first established the Spanish authority in Lower Louisiana in 1769, after the cession by France in 1762, assumed the right to reform and modify several of the large grants that had been made by the old goverment upon the Mississippi river, and required of the occupants to confine themselves within fixed and determined boundaries. His avowed object was to secure a denser population upon the margin of that river, especially above New Orleans, with a view to protect the province against the incursions of hostile Indians, and also against the border settlements of the English, in case of a war between Great Britain and Spain. Amongst others,

he reduced the possession of D'Auterieve under the grant to Duvernay, to twenty arpens front on the river. Unzaga, however, who succeeded him as governor of the province in 1772, enlarged it to forty-four arpens front, and ordered a survey of the same by Andry, the public surveyor. This survey was made, returned, and approved by Unzaga in the same year.

These acts of O'Reilly and Unzaga have been urged as a confirmation by the Spanish government, *pro tanto*, of the French grant to Duvernay; and it may be admitted that they are entitled to great weight in that aspect of the case. But this view cannot avail the petitioners here, as the effect would be simply the confirmation of a complete and perfect title, which we have seen cannot be dealt with under this act of 1844. The title thus confirmed must necessarily partake of the nature of the one derived under the French concession or grant.

It has also been urged, that this order of survey by Unzaga may be properly regarded as an incipient step in the derivation of a title under the Spanish government, independently of any previous grant — hence an incomplete title, and therefore an appropriate case for examination by the District Court, under the act of 1844. This, we think, cannot be denied, and shall therefore proceed to examine the claim to the tract in question, under this survey by Andry.

We have before us the field-notes of this survey, together with the lines protracted upon the map accompanying them. They furnish full evidence, that the tract assigned to D'Auterieve by O'Reilly and Unzaga, was severed from the royal domain, and its boundaries determined; and, were there nothing else in the case, there would be but little difficulty as it respects the title within these boundaries. But, as we have already seen, it is admitted that the front of the tract on the river within the limit of this survey, and for forty arpens back, was given up to Governor Galvez, in or about the year 1780, and was subsequently assigned by him to the Acadian emigrants, under whom it is still held. No part of this is claimed by the petitioners. But it is insisted that this survey extended back from the river beyond the forty arpens, and even to the Atchafalaya river, a distance of some twelve or fifteen miles. The claim is confined to this part of the tract. It becomes material, therefore, to ascertain the extent of this survey, especially the depth back from the river. The upper side line is the boundary between this and the adjoining lot, which then belonged to Vincente Delpino. This lot was surveyed by Andry, in February, 1772, the month previous to the survey of D'Auterieve in question; and, it is stated in the field-notes that the two lots are separated by a strait which appears to extend back from the river to the north-

west, and will serve as a common boundary between the adjacent owners. Andry further states that no landmarks have been made upon the line, as the channel of the bayou or strait is taken as the boundary; and may serve as a common canal for both habitations to get wood from the mountains. In a note to this survey it is stated, that D'Auterieve and Delpino had agreed between themselves, that in case the said bayou instead of following the direction of the course of the line which was north-west, should incline more towards the west, that is, upon the concession of D'Auterieve, then this canal should remain the property of the latter.

This survey of Delpino's lot extended back from the river the usual depth, which was forty arpens, or one mile and a half. It was made in February, 1772. The survey by Andry of D'Auterieve's lot was made in the next month. The field-notes of that survey adopts this bayou or canal as the common boundary between him and Delpino in case the course of its channel should be north-west; but if it should incline more west, then it was to belong exclusively to D'Auterieve. No other boundary was designated on this line, this bayou, as said by Andry, being supposed to be the division until its course may be perceived or ascertained after the land has been cleared. The bayou is drawn upon the map giving to it the course supposed; and the note of Andry appended, explaining it as follows: "Bayou or strait which separates the lands of the party interested from the lands of Vincente Delpino, under the stipulation expressed in the certificate."

Now this is the upper side line of D'Auterieve, which it is insisted on behalf of the petitioners, extends back from the river not only the depth of forty arpens, but back to the Atchafalaya river, a distance of some twelve or fifteen miles. This river is not mentioned in the field-notes, nor is it delineated on the map, nor anywhere referred to as the terminus of the line. On the contrary, the lower side line of Delpino, the next neighbor above, is adopted as a common boundary between them, and that line, it is admitted, extends in depth but forty arpens, leaving, therefore, a very strong, if not controlling inference, that this was also the depth of D'Auterieve's.

In making the survey, Andry run out the two lots of D'Auterieve separately, that is the twenty arpens as limited by O'Reilly, and adjoining these, the addition made by Unzaga, his successor. This mode was adopted as enabling the surveyor the better to make the requisite allowance for the sharp bend in the Mississippi river at this stretch of it. Accordingly, after ascertaining the lower point on the river, of the twenty arpens and course of the line back, Andry states in the field-notes, that

he traced the line back, marked E, B, X, as a common limit between the two aforesaid grants; but he says he placed no landmarks on it, as both the grants belonged to the same master, and the interested party so desired.

This line is also drawn upon the map, and corresponds with the upper side line in depth, and of course with the rear line of Delpino's lot, which was but forty arpens back.

The field notes then set out in detail the survey of the remaining twenty-four arpens conceded to D'Auterieve by Unzaga, and after ascertaining the lower point on the river and course of the lower side line back, describes it as a line marked Q, R, S, and as separating the lot from Antonio Dorval, the neighbor below. On referring to the map, it will be seen that this line corresponds in depth with the two preceding back lines of the survey. Dorval's lot extended in depth only forty arpens.

The field notes further state, that adopting this line as the true boundary between D'Auterieve and Dorval, his neighbor below, the former would be deprived of a road of four leagues in extent, which he had made through the mountains and swamps, to enable him to go to the Atchafalaya and attend to his cattle which he had on a vachary at Attakapas; and this being so, Andry changed this lower line so as to include the road within the limits of the lot.

This completed the survey; and it will be seen, from the examination, that there is not the slightest ground for the claim set up, on the part of the petitioners, that the tract as surveyed under the Spanish order extended back to the Atchafalaya, or further than the usual depth of forty arpens. This river is not drawn upon the map as the boundary in the rear, nor is it designated or even referred to as such boundary in the field-notes, on the contrary the rear line of the tract as drawn on the map corresponds with the termini of the lines traced back from the Mississippi, and which we have already described.

Andry, in his report of the survey to Unzaga, mentions his departure in tracing the lower line of the lot from his instructions, with a view to include the road, and observes, that he had bounded him in the said road and its adjoining lines as far as the river Atchafalaya, subject to the approbation of his Excellency. This survey was approved by Unzaga, and it is argued, that this communication of Andry implies that this lower line of the tract was intended to reach back to the Atchafalaya. The answer to this is, that no such intention is to be found in the minutes of the survey kept at the time it was made, nor as indicated upon the map, but the contrary. And all that can be properly understood from the letter, is what Andry had previously stated in the field-notes, namely, that the

lower side line had been depressed so as to give to D'Auterieve, the benefit of his road of four leagues, which extended to the Atchafalaya. Had this alteration not been made, the road leading from the Mississippi back for the forty arpens, would have fallen within the limits of Dorval's lot below, and thus D'Auterieve be deprived of the benefit of it for the mile and an half, the depth of that lot. Beyond that limit he could have used it as before, as it then ran through the royal domain.

We cannot infer, from the ambiguous expressions in the letter to Unzaga, the object of which was to explain the reasons for the depression of this side line contrary to his instructions, so as to include the road, an intention to carry the survey back to that river, when in contradiction of the description as given in the field-notes, and as delineated on the map. If Andry had intended the side lines should be thus carried back, it would have been a simple matter to have said so in the field-notes, and to have designated the river as the rear boundary on the map. The difference in the result is not so slight as to have been overlooked, or accidental. The survey, as actually made, contains probably some twenty-five hundred, or three thousand acres. As claimed under the construction attempted to be given to the letter, it would contain but little short of half a million, a difference depending upon the fact, whether the side lines which run north-west and south-west and widened therefore ninety degrees, should be extended back one mile and an half, or from twelve to fifteen miles.

We think the field-notes and map should control, rather than this casual phrase in the letter accompanying them to Unzaga. The field-notes described this lower line by letters Q, R, S, and we have the delineation of it on the map corresponding to these letters; and both fix the terminus in conformity with the upper back lines of the tract as already run and delineated, and all this without any mention or allusion to this river as the boundary in the rear. Instead of this, the rear line is protracted on the map at the termini of the back lines, thereby expressly excluding the idea of a river boundary.

A good deal of stress has been laid upon the idea, that as the French grant extended back to the Atchafalaya, the order of survey by the Spanish authorities was intended only to limit or diminish the front upon the river, leaving the depth as before. But the difficulty in giving any force to the suggestion is, that there is no evidence before us that the French grant extended back to this river. Even the historical records, mostly relied on in the case, furnish no such suggestion. This idea, therefore, cannot aid us in giving the construction claimed to the order of survey.

The acts of the parties tend strongly to confirm the view we have taken of this order of survey. Two of the sons of D'Auterieve were of age at the time this concession was given up to Galvez in 1780, and the family removed to Attakapas, and the youngest became of age in a few years thereafter. The eldest died in 1812, the second in 1814, and the youngest in 1828.

All of them resided, in the neighborhood of the tract, and during this whole period, a lapse of some thirty-three years, no claim was made to it; nor indeed ever by any of the members of the family who had the best opportunity of knowing the facts and circumstances under which it was surrendered, and of the extent and character of the title. The presumption is very strong, they must have been impressed with the belief that all the right that belonged to the family under the order of survey, had been given up to Galvez by the arrangement entered into with him.

The acts of the Spanish government also in making concessions subsequently within the limits of the claim, as was done, show that no such right as is now set up was recognized by it.

In any view, therefore, that we have been able to take of the case, we think that the decree of the court below is erroneous, and should be reversed.

Mr. Justice CURTIS.

Justices McLean, Wayne, Campbell, and myself, do not understand the opinion which has been delivered by Mr. Justice Nelson as intended to express the judgment of this court upon the validity of the complete French grant, alleged by the petition to have been made by The Western Company to Paris Duvernay in 1717, or upon the effect of the alleged confirmation of such alleged complete French title, or any part thereof, by the Spanish Governors, O'Reilly and Unzaga. The trial of such a title not being within the jurisdiction of this court upon this petition, according to the repeated decisions of this court, and the plain terms of the act of May 26, 1824, under which we derive our authority, it seems equally clear, that the questions whether there is any sufficient evidence that such a grant was made, or whether it could be located, or whether it embraced the premises in question, or whether it had been in part or in whole confirmed; and how extensive such confirmation, if made, was, are questions not judicially before us. For these questions belong exclusively to the trial of that legal title.

In our judgment, this embraces the whole case. It exhausts every allegation in the petition, which makes no claim to any incipient or imperfect French or Spanish title. It alleges only

a complete French grant, and a confirmation to D'Auterieve, who was then in possession under it, of part of the land.

Now, the first section of the act of 1824, provides that a person, claiming lands by virtue of a French or Spanish grant, concession, warrant, or order of survey, which might have been perfected into a complete title, may present a petition to the District Court, setting forth, fully, plainly, and substantially, the nature of his claim to the lands, particularly stating the date of the grant, &c., under which he claims; and then it continues: "and the said court is hereby authorized and required to hold and exercise jurisdiction of every petition presented in conformity with this act, and to hear and determine the same." Unless, therefore, the petition is presented in conformity with this act, the special and limited jurisdiction which the act confers does not exist. The title shown by this petition being a complete title, derived from the Western Company, and confirmed by the Spanish authorities, and the petitioner not having shown, fully, plainly, and substantially, or even by the most obscure suggestion, any other title, we cannot perceive how this court has any jurisdiction under the act of 1824. We add, however, that if, as in the case of Davenport's Heirs, at the present term, the petition did duly aver facts, constituting in point of law an imperfect title, we should not consider the petition defective, though it might state an erroneous legal conclusion from those facts, and call the title a perfect one. That is not this case, as may be seen by recurring to the petition.

Our opinion is, that this petition should be dismissed for want of jurisdiction, without prejudice to any legal title of the petitioners, and that no opinion should be expressed by this court upon any question of fact or law arising upon the evidence.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to that court to dismiss the petition of the claimants.

THE UNITED STATES, APPELLANTS, v. CHRISTIAN ROSELIUS, ABIAL D. CROSSMAN, WILLIAM E. LIVERIDGE, FRANCOIS B. D'AUTUIN, BENJAMIN C. HOWARD, JOHN SPEAR SMITH, BRANTZ MAYER, JOHN GIBSON, AND R. R. GURLEY, EXECUTORS OF JOHN McDONOGH, DECEASED.

Under the laws of 1824 and 1844, relating to the confirmation of land titles, where a claimant filed his petition, alleging a patent under the French government of Louisiana, confirmed by Congress, and claiming floats for land which had been sold, within his grant, by the United States to other persons, the mere circumstance, that the court had jurisdiction to decree floats in cases of incomplete titles, did not give it jurisdiction to decree floats in cases of complete titles.

This title having been confirmed by Congress, without any allowance for the sales of lands included within it, the confirmation must be considered as a compromise accepted by the other party who thereby relinquished his claim to floats.

If the title be considered as a perfect title, this court has already adjudged (9 How. 143) that the District Court had no jurisdiction over such titles.

The claimant in this case prayed that the side lines of his tract might be widened by diverging instead of parallel lines; but this court, in this same case, formerly (3 How. 693) recognized the validity of a decree of the Supreme Court of Louisiana, which decided that the lines should be parallel and not divergent. The District Court of the United States ought to have conformed its judgment to this opinion.

Moreover, the claimant in this case did not state in his petition what lands had been granted by the United States, nor to whom, nor did he make the grantees parties; all of which ought to have been done before he could have been entitled to floats.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana.

The facts are stated in the opinion of the court.

It was argued by *Mr. Cushing*, (Attorney-General,) for the United States, who made the following points:

I. That the grant under which the claim is made being a complete and perfect grant, the court below had no jurisdiction.

II. That if the court had jurisdiction the grant is void, having been made by the French authorities subsequent to the treaty of Fontainbleau of 3d November, 1762, by which France ceded Louisiana to Spain, and the order of delivery, dated 21st April, 1764. 1 Clark's Land Laws, Appendix, 976; Montault v. United States, 12 How. 47; United States v. Pellerin, 13 How. 9.

III. That the Spanish authorities after the cession did not confirm or recognize the said grant as valid.

The proceedings before Livaudais did not operate as a confirmation. Under the Spanish rule, the authority over the lands was vested first in the governors of the province. See the Marquis of Grimaldi's Letter to Unzaga, of 24th August, 1770; 2 White's Recop. 460. The authority was subsequently vested

in the intendant. See the royal order of 22d October, 1798; Ibid. 477-478. The certificates of Trudeau were not sufficient evidence to show that Governor Miro had confirmed or recognized the grant as valid.

Under the acts of 1824 and 1844, the District Court had no power to act, except in cases of claims under grants, concessions, warrants, or orders of survey.

V. With respect to the allegation in the petition, that the grant has been confirmed by an act of Congress of 11th January, 1820. Whether this be so or not cannot arise in this case, the jurisdiction of the court under the act of 1824, as revived by that of 1844, being limited to incomplete claims originating with the Spanish, French, or British authorities, which might have been perfected into a complete title under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States. Act of 1824; 4 Stat. at Large, 52; Act of 1844; Ibid. 676.

VI. But as the petition claims opening and diverging side lines from the front to the rear, and avers that a large portion of the land had been sold by the United States, and claimed floats therefor, and the court below has decreed in favor of the claimant on both points, it may be that the object of the petition was to have these points determined under the grant. With respect to the first, there is nothing in the grant which calls for diverging side lines, and when this is the case, the side lines run parallel to each other. That the side lines in this grant run parallel was decided in the Supreme Court of Louisiana, in McDonogh v. Millaudon, which will be found reported in 3 How. 693.

As to the claim for floats, no individuals claiming lands under title from the United States having been made parties in the case, no decree for floats could be made. United States v. Moore, 12 How. 209

Mr. Justice CATRON delivered the opinion of the court.

John McDonogh claimed to be confirmed in a tract of land bounded in part by the river Mississippi; the front being 40 arpens more or less; bounded on the upper side, by a line running back from said river a distance of seventeen miles, and two hundred and twenty-seven perches, more or less, until it strikes the river Amitie, on a course by compass of north 35° west; on the lower side, by a line running back from said river Mississippi a distance of eighteen miles and twenty-two perches, more or less, until it strikes lake Maurepas, on a course by the compass of north nine degrees fifty minutes east; and bounded on the rear line by the river Amitie and lake Maurepas.

The petitioner represents that in the year 1739 Duport purchased the land from the Collopissa nation of Indians; and that said purchase was confirmed in the year 1769 by the French government by a regular and formal patent: and secondly, that the claim was duly presented to and approved by the board of land commissioners of the United States, who confirmed it for the whole quantity claimed, according to a plan of survey. And that said titles were also recognized and confirmed by an act of Congress of the 11th May, 1820. But the petitioner avers, that a large portion of said tract of land has been sold by the United States, or confirmed to actual settlers.

The district court found that McDonogh held under Duport by regular mesne conveyances, and showed a title to the land by patent, which was granted by the highest authorities in the province; that it was a complete and full title; and furthermore, "that the land claimed as per plan of survey on file herein was confirmed by the report of the land commissioners of the United States on the 20th of November, 1816."

The court below then proceeded to pronounce the grant of 1769 to be valid; and that the survey thereof, filed as an exhibit in the cause, indicates the metes and bounds, and the land is ordered to be located according to said survey, and to that extent the claim is confirmed. And then the decree proceeds to adjudge that for all lands within these bounds which have been sold or otherwise disposed of by the United States, the petitioner shall be authorized to enter other lands by floating warrants.

Assuming the foregoing facts to be true, the question presented is, whether jurisdiction existed to make the decree?

The mere fact, standing alone, that the United States had sold or otherwise disposed of any part of the land here claimed, and that compensation could be made as provided by the 11th section of the act of 1824, does not give jurisdiction, as the power to award floating warrants is an incident to a case where jurisdiction exists to decree the lands claimed and to order that a patent therefor shall issue; and if the power to divest title out of the United States is wanting, none exists to decree the floating warrants, because it must be first found and adjudged, that the petitioner has the better equity to the land of which the United States have deprived him by their grant to another. But, there is another consideration why this petitioner could not claim floating warrants. He sought a confirmation of his title from the United States, for the obvious reason that his grant from the French government, made in 1769, was invalid, as that government had no interest in the country in 1769, it having been ceded to Spain in 1763. And if McDonogh was

forced to go behind his French grant, and rely on his Indian pretension to claim, the probability was that he could establish nothing to support his assumption of title, and must fail altogether. Under these circumstances, the United States confirmed McDonogh's claim, without allowing him any compensation for such land as had been previously sold or disposed to others within the boundaries confirmed. He accepted the confirmation on these terms; and as we are substituted by the acts of 1824 and 1844, for the political power, and required to adjudge these claims, as Congress adjudged them before the act of 1844 was passed, we are bound to hold that, when our predecessors decided McDonogh's claim favorably, they awarded him all that he had a right to demand, and which he sanctioned by accepting the confirmation on the terms it was offered.

Nothing could be fraught with worse consequences as regards confirmations by Congress, or by commissioners acting by its authority, than to hold, that when a doubtful claim was confirmed on certain terms, and the claimant accepted these terms, and took the full benefit of the confirmation, that still he could come into the courts of justice and enforce his entire claim for the deductions made by Congress, as if no adjustment had been made. Such cases must stand on the footing of compromise, and all equities existing when the compromise was made, and not provided for by it, must be deemed to have been abandoned. If it were otherwise, then there would be no end of these pretensions to compensation, before Congress and the courts. But to hold that the confirmation was final, and conclusive of the whole claim, (as we think it clearly was,) then the country will, at last, find repose, and the cultivator of the soil will know from whom to buy, and take title. McDonogh's claim being compromised, the government had no duty imposed on it to compensate him in case of loss.

Jurisdiction is also wanting on other grounds. If the grant of the French government to Duport was a complete title, then no act on the part of the American government was required to give it additional validity, as the treaty of 1803, by which Louisiana was acquired, sanctioned perfect titles: nor was jurisdiction vested in the District Courts to adjudge the validity of perfect titles. This is the settled construction of the act of 1824, as was held by this court in the case of the United States v. Reynes, 9 How. 143, 144.

In the next place, McDonogh alleges that his title was confirmed by the United States in 1816, and again in 1820. The act of 1824 conferred jurisdiction on the District Courts to adjudge and settle the validity of imperfect claims against the United States as already stated. But where the claim had been

granted by an act of Congress, or by officers acting under the authority of Congress, and a perfect legal title vested in the grantee, no power was conferred on the courts to deal with such title, because it needed no aid. And because such an assumption would of necessity claim power in the courts to modify the grant made by Congress, in every respect, or to set it aside altogether.

On this assumption, the District Courts might have been called on to readjudge every claim that Congress had confirmed. The legislature contemplated none of these things, when passing the acts of 1824 and 1844.

McDonogh informs us, in his petition, that he did not claim a decree for any land covered by his grant, but that he sought a decree for land warrants to be located on other lands for such parts as had been sold or disposed of by the United States within the bounds of his claim. And as incident to this claim for compensation, he prayed that his side lines might be widened, so that the upper line would run north 35° west; and the lower line, north 9° 50′ east. These side lines are about eighteen miles long, and commence on the Mississippi forty arpens apart, but by widening the tract claimed, as decreed by the District Court, is something like fifteen miles wide where the lines terminate on the river Amitie, and lake Maurepas. The boundaries were thus settled by the court below, according to the power conferred by the second section of the act of 1824, sweeping over a large tract of country, and covering many lands granted to others by the United States.

The petition in this case was filed in June, 1846; at the previous term of the Supreme Court of the United States, the cause of John McDonogh, against Milaudon, was decided, on which this court was asked to revise a decision of the Supreme Court of Louisiana, which settled the boundaries of McDonogh's grant; holding that the side lines could not diverge, but that the land must be of equal width in front and rear, and the side lines parallel to each other throughout. The question in the State Court being one of boundary, and not involving any consideration that could give this court cognizance, under the 25th section of the Judiciary Act, the writ of error was dismissed for want of jurisdiction.

As the decision of the Supreme Court of Louisiana had settled the question of boundary, we think the District Court should not have disregarded that decision, and involved the government in such serious consequences as that of making compensation for lands not covered by McDonogh's grant.

If none of these objections existed, however, there is another, that would preclude the petitioner from having compensation

in land warrants. He does not state what lands the United States have granted to others, within his claim; nor who the owners are; neither does he make them parties. These steps were required by the act of 1824, and not having been taken in this instance no general decree could be made for floating warrants, as was done by the District Court. We so held in the case of the United States v. Moore, 12 Howard, 223.

For the reasons stated, it is ordered, that the decree be reversed, and the petition dismissed without prejudice to McDonogh's claim.

Order.

This cause came on to be heard on the transcript of the record, from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed, by this court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to that court to dismiss the petition in this case, without prejudice to the rights of the petitioner.

THE UNITED STATES, APPELLANTS, v. CHRISTIAN ROSELIUS, ABIAL D. CROSSMAN, WILLIAM E. LIVERIDGE, FRANCOIS B. D'AUTUIN, BENJAMIN C. HOWARD, JOHN SPEAR SMITH, BRANTZ MAYER, JOHN GIBSON, AND R. R. GURLEY, EXECUTORS OF JOHN McDONOGH, DECEASED.

Where a party claimed title to a tract of land in Louisiana, under a judicial sale in 1760, and alleged that he and those under whom he claimed, had been in peaceable possession ever since the sale, a case of perfect title is presented which is not within the jurisdiction of the District Court, under the acts of 1824 and 1844.

Upon the sufficiency of the evidence to sustain the title, no opinion is expressed.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana.

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

It was argued by *Mr. Cushing*, (Attorney-General,) for the United States.

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

This is an appeal from the decree of the District Court for

the Eastern District of Louisiana, in a proceeding instituted in that court by John McDonogh, in his lifetime, to try the validity of his claim to certain land mentioned in his petition. The proceeding was under the acts of 1824 and 1844.

The petition was presented on the 15th of June, 1846, and sets forth that he has a good and valid title to a tract of land in the parish of Jefferson, near the city of New Orleans, and on the same side of the river Mississippi, commencing at a distance of eighty arpens from the river, and running back or in the rear from thence, with the continuous lines of the front tract of twenty-one arpens on the river, a distance of about forty-nine and one third arpens in depth, until one of the side lines intersects with the other in a point, including about one hundred and seventy-seven and one third superficial arpens. That said tract of land is a portion of a larger tract which was adjudicated and sold on or about the 17th of April, 1760, to De Pontalba, by order of the highest tribunal of the government of France, in Louisiana, called the Supreme Council of the province of Louisiana, by Charles Marie Delalande Dapremont, Counsellor and Assessor of the Supreme Council of the Province, and Attorney-General of the King of France for said Province of Louisiana; that said sale and adjudication by the order and authority aforesaid, is fully equivalent to a patent to said land; the Supreme Council of the Province being at the head of the land-office, granted the lands and issued the patents; that after passing through various mesne conveyances, the petitioner finally acquired said tract of land; that his title and claim had been presented and proved before the Board of Land Commissioners, who reported that it ought to be confirmed, but the said report was never acted on by Congress; and that said tract of land has always been in the peaceable and undisturbed possession and enjoyment of the petitioner, and those under whom he derives his title, ever since the date of the original grant thereof. The petitioner therefore prays confirmation.

These are the facts stated in this petition; and if they are true, the District Court had no jurisdiction of the case, and no right to pronounce judgment upon the validity of the title. The acts of 1824 and 1844, authorize a proceeding of this kind in those cases, only where the title set up is imperfect, but equitable. It has been repeatedly so held by this court, and was so decided in the case of the United States v. Moore, 12 Howard, 209; and again in the case of the United States v. Pillerin and others, 13 Howard, 9, as well as in other cases to which it is unnecessary to refer. Indeed the words of the act of 1824, conferring this special jurisdiction on the District Courts, appear to be too plain for controversy.

Now the title set up by the petitioner is a complete legal title; and if he can establish the facts stated in his petition his title is protected by the treaty itself, and does not need the aid of an act of Congress to perfect or complete it. For undoubtedly, if the possession of the land has been held continually by the petitioner and those under whom he claims, under the judicial sale made by the French authorities in 1760, the legal presumption would be that a valid and perfect grant had been made by the proper authority, although no record of it can now be found.

We of course express no opinion as to the sufficiency of the evidence to maintain the complete and perfect title claimed in the petition. That question is not before us on this appeal; for as the District Court had no authority to decide upon it, the decree must be reversed for want of jurisdiction, and the petition dismissed. But we shall dismiss it without prejudice to the legal rights of either party; leaving the petitioner at liberty to assert his rights in any court having competent jurisdiction to decide upon the validity or invalidity of the complete and perfect title set up in his petition.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed, for the want of jurisdiction in that court, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to that court to dismiss the petition without prejudice to the legal rights of either party.

The United States, Appellants, v. Joseph Marcel Ducros, Alfred Ducros, and Louis Toutant Beauregard.

A grant of land in Louisiana by the French authorities in 1764, is void. The province was ceded to Spain in 1762. (See 10th Howard, 610.)

In 1793, certain legal proceedings were had before Baron de Carondelet in his judicial capacity, wherein the property now claimed is described as part of the estate of the grantor of the present claimant. But this did not amount to a confirmation of the title in his political character; and if it did, the title would be a perfect one, and beyond the jurisdiction of the District Court, under the acts of 1824 and 1844.

This was an appeal from the District Court of the United States for the Eastern District of Louisiana.

The facts are set forth in the opinion of the court.

It was argued by *Mr. Cushing*, (Attorney-General,) for the United States.

The following were the points made on behalf of the appellants.

1. That the court below had no jurisdiction, and its decree is, therefore, void. The grant is a complete French grant, and not an incomplete title. See first section of the act of 1824, United States *v.* Reynes, 9 How. 144, 145; United States *v.* Power's Heirs, 11 How. 580.

2. That there was no sufficient evidence of the making of the grant produced in the case. The copy certified by the register is not evidence. See 3d section of the act of 1824, and the brief in the case of McCarthey's Heirs, No. 21, of the present term.

3. That even if the court had jurisdiction, and the evidence were sufficient, the grant is void, having been made by the French authorities after Louisiana had been ceded by France to Spain, in 1762. United States *v.* D'Auterive, 10 How. 610.

4. That the proceedings had before Carondelet, in 1793, operated no confirmation of the grant. They were merely proceedings in the settlement of the estate of Louis Toutant Beauregard, in which in no way was the extent of the plantation in issue. The front of the land was held at this time, under the grant to Le Sassier. Besides, it is to be remembered, that by the 13th article of O'Reilly's regulations, approved at Madrid, it was provided, that "all grants shall be made in the name of the King, by the Governor-General of the province," &c. No land could, therefore, be divested out of the King, except by a grant.

5. That from the great lapse of time before the grant was brought forward and insisted on, it must be held that the petitioners and their ancestors had abandoned all claim to the lands embraced within its limits.

6. That the grant is void under the fourteenth section of the act of 26th March, 1804. 1 Land Laws, 114; United States *v.* D'Auterive, 10 How. 624.

Mr. Justice GRIER delivered the opinion of the court.

The appellees filed their petition in the District Court for Louisiana, against the United States, under the act of Congress of May 26, 1824, as revived by the act of June 17th, 1844. It sets forth that they are the owners of a tract of land of twenty arpens front on the Mississippi river, lying about twelve miles below the city of New Orleans, and extending in depth to lake Borgne.

That the said tract of twenty arpens front is derived from one title, and until after the year 1800 had but one proprietor. That, in that year it was the property of the widow Toutant Beauregard, who thereafter sold an undivided half to Rodolph Joseph Ducros, who subsequently made partition thereof, by which the upper half was assigned to the widow, and the lower to Ducros. That the rights of the former have since been acquired by the petitioner, Louis Toutant Beauregard, and the rights of the latter, by Joseph Marcel and Louis Alfred Ducros.

That the widow Beauregard and Rodolph Joseph Ducros, heretofore filed their claims to said lands for confirmation with the board of commissioners, but that being then ignorant of the full extent of their rights, they claimed and obtained the confirmation of their titles only to the depth of a league and a half from the Mississippi river. The petitioners claim that the confirmation should have been to the depth of lake Borgne, because that on the 2d of March, 1764, Madame Marie Gaston, the widow of Rochemore, who then was owner of the front tract, obtained from the French government of the province of Louisiana a grant, of the rear of her said front tract, with the entire depth to lake Borgne, and that the said entire tract was, on the 16th of November, 1793, in a judicial proceeding before Baron Carondelet, adjudicated to said widow Toutant Beauregard, under whom petitioners claimed.

In support of their claim, the petitioners gave in evidence a grant from D'Abbadie, Director-General, &c., of Louisiana, under the King of France, dated 2d of March, 1764, for all the land lying in rear of her estate, running towards the lake, (the said estate having a front of sixteen arpens on the river Mississippi, about four leagues below New Orleans,) to Madame Marie Gaston.

The next muniment of title consists of copies from the Spanish records of the province, showing an inventory and appraisement of the estate of Don Louis Toutant Beauregard, in which this tract of land is described as part of his estate, and as running back to the lake; and a legal proceeding before Baron de Carondelet, by which it is vested in Donna Magdalena Cartier, in 1793. And again in 1799, an inventory and appraisement of the estate of Donna Magdaleno Cartier and sale of the same (describing said tract of land as before) to Donna Victoria Ducros, widow of Don Louis Toutant Beauregard.

On the 1st of February, 1802, deed from the widow to Rodolph Joseph Ducros for one half, describing the tract as of the ordinary depth of forty arpens. And in all the numerous partitions and mesne conveyances, bringing down the title to the petitioners, the tract is described as forty arpens deep, till, in

1836, in a conveyance in partition, it is again described as running back to lake Borgne.

Without laying any stress on the want of any mesne conveyance or connection between widow Gaston and Don Louis Toutant Beauregard, and on the descriptions of the deeds from the widow Beauregard and those claiming under her, there are two objections, which are fatal to the recovering of the petitioners in this case.

1st. It has been decided by this court in the United States v. D'Auterive, 10 Howard, 610, that a grant by the French authorities after the cession of Louisiana by France to Spain in 1762, is void.

And 2dly. The proceedings before Carondelet in 1793, in the settlement of the estate of Louis Toutant Beauregard, could not be construed as a confirmation of the French grant, from the mere circumstance that in the inventory, decedent's estate is described as running back to the lake. Carondelet could not be said to confirm, in his political capacity, a title which is not even stated in the mere formal proceedings before him in his judicial capacity. And if it had the effect of a confirmation of the original French grant, as that purports to be a perfect title in fee, it is not the subject of jurisdiction of the United States courts under the acts of Congress under which this suit is brought. This has been so frequently decided by this court, that a reference to cases, or the reasons for the decision, may now be considered superfluous.

The decree of the District Court of Louisiana is therefore reversed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the petition of the claimants.

JOSEPH K. EYRE AND ALGERNON E. ASHBURNER, EXECUTORS OF ELIZABETH E. POTTER, DECEASED v. SAMUEL R. POTTER AND MAUGER LONDON.

Where a widow filed a bill in chancery, complaining that immediately upon the death of her husband, the son of that husband, together with another person, had imposed upon her by false representations, and induced her to part with all her right in her husband's estate for an inadequate price, the evidence in the case did not sustain the allegation.

It is not alleged to be a case of constructive fraud, arising out of the relative position of the parties towards each other, but of actual fraud.

The answers deny the fraud and are made more emphatic by the complainants having put interrogatories to be answered by the defendants, and the evidence sustains the answers.

It will not do to set up mere inadequacy of price as a cause for annulling a contract made by persons competent and willing to contract, and, besides, there were other considerations acting upon the widow to induce her to make the contract.

The testimony offered to prove the mental imbecility of the widow, should be received with great caution, and is not sufficient.

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

The bill was filed by Elizabeth E. Potter, during her lifetime, to which her executors afterwards became parties.

The opinion of the court contains an explanation of the case as it is set forth in the bill, and it is not necessary to repeat it.

The cause was argued by *Mr. Badger* for the appellants, and by *Mr. Bryan* and *Mr. Graham* for the appellees.

The points of law which were raised by the counsel upon each side respectively, were so intermingled with their views of the facts and evidence, that it is impossible to separate them.

The view of the case presented on behalf of the appellants was as follows: —

The consideration of the deed, dated May 31, 1847, was evidently and grossly inadequate.

The defendant, Samuel R. Potter, in his answer admits that he had formed the opinion, that the estate of his late father was worth $120,000.

The statements and estimates in the answer of the said defendant, and the schedules therein referred to, show that the real and personal estate of the said Samuel Potter, at the time of his death, must have been nearly that sum. They certainly show that the estate was so large and valuable that the price agreed to be paid to the plaintiff for her interest therein, was shockingly inadequate.

In relation to the debts of the intestate, no account has been

filed by the administrator, Samuel R. Potter, and no vouchers exhibited or proved. If the witness Burr were competent to speak in a general way, when the vouchers and exhibits, if any, are withheld, then he proves that the whole amount of disbursements by the administrators was about $15,938: he is defendant's witness.

It is insisted, in behalf of the appellants, that her interest in the estate of her said husband was worth from $1,800 to $1,900 per annum, and from $13,000 to $14,000 absolutely. The result is arrived at from the answer of the defendant, Samuel R. Potter, and from the evidence in the cause. This valuable interest she transfers in the said deed for the sum of $1,000, in cash, and the personal covenant of the defendant, Samuel R. Potter, to pay her $600 per annum during her life, she being at the time nearly seventy years of age, and in infirm health. It is true, as stated in the answer of the defendant, Mauger London, that the defendant Samuel R. Potter, as administrator of the said Samuel Potter, afterwards allowed the plaintiff to obtain a decree or order in the proper court for her year's provision out of the said estate, and that said provision was of the value of $1,000, but this has nothing to do with the merits of said deed. It is also true that the said Samuel R. Potter, in the instrument executed by him, also covenants with the plaintiff to furnish her with a competent livelihood and maintenance at his own house, but nothing of this kind is mentioned in the said deed, dated May 31, 1847.

Notwithstanding the facts immediately above mentioned, it is still insisted, in behalf of the said plaintiff, that the consideration received by her, or secured to her for her interest in said estate, was grossly inadequate. The price of board and lodging in Wilmington, N. C., is from $20 to $25 per month in hotels and boarding-houses.

Mere inadequacy of consideration is not of itself a sufficient ground to set aside a contract, unless the inadequacy be such as amounts to apparent fraud, or unless the situation of the parties be so unequal as to give one the opportunity of making his own terms. A court of equity looks upon inadequacy of consideration as a mark of fraud or imposition; and where the inadequacy is so gross as to excite an exclamation, &c., it is of itself proof of imposition. If, for instance, there be such inadequacy of price as that it must be impossible to state it to a man of common sense without an exclamation at its inequality, a court of equity considers that a sufficient proof of fraud to set aside the conveyance. 1 Bro. C. C. 9, &c.

If the inadequacy be such as to show that the person did not understand the bargain, or was so oppressed that he was

glad to make it, knowing its inadequacy, that shows a command over him amounting to fraud. Heathcote *v.* Paignon, 2 Bro. C. C. 175; Chesterfield *v.* Janssen, 2 Vez. 125.

The deed cannot be supported by evidence of the natural love and affection cherished by the plaintiff for her granddaughter Marion, who is the wife of the defendant, Samuel R. Potter.

The rules for determining upon a deed of sale, and a deed of gift are not the same in equity. Upon principle, therefore, where a deed purports to be a sale, the party interested therein cannot escape from the appearance of fraud by setting it up as a gift, and *vice versa.* Were this allowed, the court would be cheated, and its rules would be prevented or rendered unavailing by the arts of those very persons whom its rules were intended to reach. Though a deed may, in equity, be impeached by averments negativing the consideration therein expressed, yet the converse of the proposition does not hold good, and a deed cannot be supported by evidence of a consideration different from that expressed in the deed. 2 Hovenden on Frauds, 103, 43, 14, and cases there cited; vide 6 J. C. R. 232; 2 P. Wms. Rep. 204; Clarkson *v.* Hanway, 3 P. Wms. Rep. 129, n.; Watt *v.* Green, 2 Sch. & Lef. Rep. 501; 2 Vez. Rep. 402; Chesterfield *v.* Janssen, 2 Vez. Rep. 125.

Indeed it may be said that, where a deed purports to be a valuable consideration, and the contrary is averred and proved, it is thereby falsified and discredited; and it would be dangerous, if not absurd, to admit proof of averments in its support as a gift. These consequences would follow, that after the plaintiff has falsified the deed, and established by evidence that he was imposed upon when he put his seal to a false pretence of a sale, the defendant might escape and retain the spoils by admitting the falsehood of the deed, and thereby withdrawing himself out of the rules of the court, and insisting upon his own falsehood as the basis of a right to support the deed as a gift. A deed which expresses a valuable consideration, and no other, when impeached for inadequacy of price, cannot be supported by any evidence of natural love and affection. Vide 2 Hov. on Frauds, 14, 43, 102, and the cases there cited; Newland on Contracts, 359, 360, vide 2 Dev. Eq. 376; Jones *v.* Sasser, 1 D. & B. Rep. 452; 1 D. & B. Eq. 496; Chesson *v.* Pettijohn, 6 Ired. 121.

It ought to be remembered that the consideration of natural love and affection is not only not expressed in the deed, but it has not been proved, nor is any thing secured in the deed to the separate use of the granddaughter of the plaintiff.

There are many circumstances in this case, either admitted in

the answers or proved, which tend strongly to show fraud, imposition, and undue influence, practised upon the plaintiff at the time of the execution of the deed. She was at the time an old woman. The deposition of her son, Joseph K. Eyre, taken on the 15th day of November, 1848, shows that she was then sixty-nine or seventy years of age, and that she was always of a very weak mind and incompetent to transact business; and that her mind had been for many years, especially the last four or five years, materially affected by age, disease, and infirmity. And if any thing in addition were needed to show the incompetency and the imbecility of the complainant, it will be found in the allegation in Samuel R. Potter's answer, that she said she knew all about her husband's estate, and its value, and the value of her own interest in it, at the very time when she was parting with that interest for a consideration so utterly inadequate.

The same facts are in substance proved by the depositions of Emma L. Allibone, Maria Ashburner, Anna Worrell, J. L. Kay, E. C. Crowley, Josephine K. McCammon, Hannah B. Drummond. The same witnesses prove that the plaintiff had, at the date of the said conveyance, five children, one of them insane, and two of them in indigent circumstances.

They also prove that she was a tender and affectionate mother, and by no means so destitute of sensibility, as the defendants and some of their witnesses have insinuated.

The said deed bears date two days after the death of the husband of the plaintiff, before she could have an opportunity to reflect deliberately upon the very important step which she was about to take, before she could consult with her friends, and when her feelings must have been too much disturbed and agitated to enable her to act with care and caution in the disposition of her property.

Her mind could hardly have been calm and composed immediately after the burial of her husband, whether she lived happily with him or not. She resided in the house of the defendant, Samuel R. Potter, and was without money enough in her pocket to pay for a piece of mourning. At such a time, and under such circumstances, the plaintiff might easily have been imposed upon by her step-son and the other defendant, and it seems she had no aid from any other person prior to the date of the conveyance. On Sunday morning no one was present but the defendant Potter and his wife, and when the agreement was entered into, nobody was present but the plaintiff and the defendant Potter.

At the time when the deed was signed, no one was present but the plaintiff, the two defendants, and Mrs. Potter.

The depositions of Everett, Baker, London, and others, show that the plaintiff was not the object of affection to the family of her deceased husband.

There was unusual haste in making the contract and in the execution of the deed. The husband of the plaintiff died on Saturday, was buried on Sunday, and the contract was completed and the instrument signed on Monday morning.

The said deed makes a disposition of all the property of the plaintiff.

The conveyance was in a very high degree unwise and imprudent, as regards the plaintiff, and unjust and unnatural towards her children, two of whom were poor, and one of them insane.

A disposition of property so revolting to common sense and natural affection ought to be looked upon with suspicion. If the plaintiff married her late husband under the influence of the mercenary motives which have been attributed to her, the execution of the said deed would be no less extraordinary and unaccountable. If property was so dear to her, why should she dispose of it upon such ruinous terms, if she in fact understood what she was about? The parties did not deal with each other upon equal terms. The defendant Potter was much more competent than the plaintiff to transact business, and was much better acquainted with the estate. He admits in his answer that he had had the management of a portion of his father's property, to wit, the rice plantation, known as Point Peter, and Love Grove, and the hands belonging to the same.

The defendant, Potter, misrepresented the value of the estate to the plaintiff, before she signed the deed. The defendant, Potter, says in his answer that, on Monday morning, 31st of May, 1847, the plaintiff said that she had concluded to sell her interest in her husband's estate to him for the benefit of her granddaughter. How then does it happen that the property was not conveyed for the benefit of the granddaughter of the plaintiff? By what influence did she sign a deed contrary to her own conclusion and in violation of the agreement? Where, and when, and with whom, and for what price, did she consent to change her purpose?

This pretended consideration of love and affection for her granddaughter, at the expense of her more needy and equally beloved children, was probably introduced to save the agreement from the imputation of shocking inadequacy, but like all similar pretexts, it puts upon the deed a brand of fraud and a mark of surprise or imposition. Neither by general nor special words does this leading motive find a place in her deed, and yet she signed it, according to the statement of the defendant Pot-

ter, gladly and eagerly. The name of Mrs. Marion Potter is not even mentioned in the deed.

Again. The defendant, Potter, says the bargain was that he would pay her one thousand dollars in cash. How happens it that the writing only gave her his note without interest, and left her obliged to borrow money from her granddaughter to buy clothes?

Again. Said defendant says that the bargain was that he would "give her board," as a part of the price. How does it happen that the covenants for her board and the other writings, do not recite this as a part of the price, but, on the contrary, recite that she is to be boarded at the house of said defendant, simply because she "deserved it," thereby making it a voluntary covenant? And wherefore did plaintiff consent to turn her privilege of boarding with Marion into a condition that she was to board with Mr. Potter, no matter whither he might go?

Again. Said defendant says that the agreement was, that he was to "find her a servant." Why is this omitted in the writings?

Again. The said defendant says that it was a part of his original agreement with the plaintiff, that she was to have her year's allowance. And yet she conveys away her entire interest in the estate.

The statements of the two defendants concerning the circumstances attending the transaction, do not in all respects agree with each other, and their statements are in many respects extraordinary and suspicious.

The deed, dated June 21, 1847, is no confirmation of the deed previously executed by the plaintiff. It is not relied upon as a confirmation. But if it were relied upon as such, there is a ready answer. On the 21st of June, 1847, the defendant, Samuel R. Potter, was administrator of his father, Samuel Potter, and supposing his deed of the 31st of May, 1847, to be void, he was a trustee of the property in his hands, and by the established rules of a court of equity, this agreement could not stand for a moment, at least so far as the personal estate is concerned.

In order to make an express confirmation available, it must appear that the party was then aware of his rights, and knew that the first transaction was impeachable. Lord Chesterfield v. Janssen, before cited; Boyd v. Hawkins, 2 Dev. Eq. Reps. 215.

If it be competent to look beyond the deed itself for a consideration to support it, and if there be sufficient proof to show that natural love and affection for the wife of the defendant Potter, constituted any part of the consideration, then the deed,

dated 31st of May, 1847, ought to be considered as a gift so far as it conveys any thing over and above the value of the price paid or secured, and it ought to be governed by those rules which relate to voluntary conveyances.

Competency of Evidence.

It is insisted by the plaintiff that the deposition of Mauger London, one of the defendants, is not competent, because his answers were written by him, before he came before the commissioners.

Plaintiff insists that the correspondence between herself and her children, after the execution of the deed, dated May 31, 1847, is competent.

The defendant, Potter, in his answer says, that she received letters reproaching her before the 21st of June, 1847. The letters are thereby made evidence to disprove it. Defendant Potter said she loved none of her children; said letters are evidence to show the contrary. Said letters are evidence to discredit London, witness for the defendant, Potter.

The counsel for the appellees made the two following points, before examining the case upon its merits:

1st. The rights of these very parties have been adjudicated upon in a State court. Potter *v.* Everett, 7 Iredell, Eq. Ca. 152.

2d. All the children, and the grandchild of Samuel Potter, the deceased, intestate, who are his heirs at law, and next of kin, ought to be parties to this suit. Story's Eq. Pl. sect. 72 to 76, inclusive; Poor *v.* Clark, 2 Atk. 515; Mitford, Eq. Pl. by Jeremy, 164.

As to the merits: These depend upon the pure principles of English equity. There is nothing in the jurisdiction of this court, or the laws of the State from which it comes, to give to it any peculiarity. And its solution involves, mainly, the question, what guardianship, either for relief or restraint against their own action, do courts of equity assume over persons of either sex, who are of mature age, of sound mind, and, in the case of women, not under coverture.

The execution of the deed, which it is sought by this bill to set aside, being admitted, it must stand here, as in a court of law, unless there were circumstances attending its execution which establish fraud and surprise in its procurement. The circumstances relied on are stated in the bill, from the lower part of page 2 to 5 of the record; and, as summed up in the brief of the plaintiff's counsel, are, that on the 31st of May, 1847, when the deed was executed, she was sick, nervous, and

afflicted; without counsel; ignorant of her rights, and of the value of the estate of her husband; not competent to transact business; that the defendants availed themselves of the advantage afforded by this, her condition, and surprised and defrauded her into the execution of the deed, disposing of her whole worldly estate for a greatly inadequate consideration; and that the value of her interest in her husband's estate was misrepresented and underestimated by the defendants, Samuel R. Potter and London, who was his attorney.

The answers of both defendants are directly responsive to the bill, and both deny every material allegation in support of these charges, and explain every fact relied on to give them color. They deny that she was sick, nervous, or afflicted, to their knowledge, during the illness, or at the time of the death, of her husband, or at the time of the execution of the deed. On the contrary, they state circumstances, showing ordinarily good health, and extraordinary indifference and composure. They deny that she was ignorant of her rights, and of the value of the estate of her husband, and that she was not competent to transact business. They both state that she informed them, in conversation, that she had managed two estates of deceased persons in Philadelphia, before her marriage to Samuel Potter; that the defendant, London, expressly informed her of her legal rights, as the widow of her husband, before her execution of the deed; that she declared she knew what the estate was worth; verified this declaration by enumerating most of the articles of property of which it consisted, and said the whole was worth $130,000, and that her dower was worth $1,000 a year, (all of which, defendants allege is an overestimate,) but that a primary motive with her for making the conveyance, was to benefit her granddaughter, the wife of the defendant, Potter, and himself.

As to being without counsel, they respond, that she was cautioned by the defendant, London, as to the importance of the business, and advised to call in D. B. Baker, Esq., an eminent lawyer, and P. K. Dickinson, Esq., an eminent man of business, both of whom were near to her house, the former, the son-in-law, and the latter, a partner of her late husband; but that she declined, preferring to act on her own judgment, and desiring to keep the affair secret.

They deny, secondly, that either of them misrepresented or underestimated the value of her interest in the estate of her husband, or advised or influenced her to make the conveyance in question; but, on the contrary, they aver, that the whole arrangement originated with, and was proposed by her first, while the funeral ceremonies of her husband were in progress, and was persevered in and carried out with perfect composure and deli-

beration. They deny that London was the attorney of S. R. Potter in general, or of the intestate Samuel Potter. The former states that he was averse to employing London as his counsel, in conducting the administration of his father's estate, and only consented to retain him upon the advice of his brother-in-law, the aforesaid D. B. Baker, himself a lawyer. They state that she, on returning from her husband's burial, requested London to call and see her the next morning on particular business; that he did so call; that she then mentioned the sale she proposed to make of her interest in her husband's estate to Samuel R. Potter, and gave him instructions to prepare the conveyances; that whatever circumstances of secrecy attended his visits to her house, were occasioned by her special request. They admit that the pecuniary consideration recited in the deed was not equal to the interest thereby conveyed, but allege that the plaintiff was so told by both of them, and was well aware of that fact, as she then declared, from her own knowledge of the estate. They state that the plaintiff, at the time of its execution, was well satisfied with her deed, and so continued until, a few weeks thereafter, she received a letter from her relatives in Philadelphia, complaining that she had made no provision for her lunatic daughter, Mrs. Babcock. This becoming known to the defendant, Potter, he told the plaintiff if she was dissatisfied with what she had done, he would surrender the deed to her. She declined this; but it was then agreed that the defendant, Potter, should pay to the said Mrs. Babcock an annuity of $150 per year, to commence immediately on the death of the plaintiff, and that the plaintiff should therefore confirm the conveyance to him; that she then sent again for the defendant, London, gave him instructions for written instruments to carry this agreement into effect, and that the annuity bond being signed by the defendant, Potter, she then, to wit, on the 21st of June, 1847, by her solemn deed, reaffirmed the conveyance of the 31st of May preceding. They deny that this last arrangement was made by either of the defendants with a view to avoid odium, which had been incurred by them on account of the original conveyance; but the defendant, Potter, alleges, that he entered into it because the plaintiff had been liberal to him, was and expected to continue an inmate of his family, and to enable her to silence the reproachful clamors of her friends in Philadelphia; that, upon its being completed, she professed herself fully satisfied, and said her Philadelphia friends could no longer complain.

Thus the parties are at issue, and the decree to be rendered depends wholly upon the finding of the facts as alleged by the one party or the other. The judges in the court below found in favor of the defendants. This being a court of errors in law,

will not reverse the decision there made upon a mere difference of opinion as to the conclusion to be drawn from the evidence upon the facts.

But supposing the questions of fact to be retried here, what evidence is there to sustain any material allegation in the bill, or to contradict any material averment in the answers?

That of the plaintiff consists mainly of the depositions of certain persons in Philadelphia, (for the most part her children and connections,) who depose that she had children by her first marriage, and manifested for them, in her intercourse, the usual family affection; that she was a delicate person, not of strong mind, and had some relatives who were lunatics; and that she could not transact business; that the defendant, Potter's wife, is the daughter of a man of wealth, and has an estate independently of her father, and that the plaintiff had no estate, except her interest in the fortune of her husband.

In addition to these, she has taken the depositions of certain persons in Wilmington, which are found in the record, to show of what her husband's estate consisted, what was its value, the relations of friendship between S. R. Potter and London, and the state of London's credit in 1847, &c.

There is no witness who supports the allegations of her bill, which constitute her claim to be relieved, against her solemn deed, by the rules of justice administered in courts of equity. Namely, that at the time of its execution she was sick, run down with fatigue and watching, distressed, ignorant of her rights concerning her husband's estate, and of the value thereof, in need of counsel, which she would have had but for the fraudulent acts of the defendants; that the defendants, or either of them, misrepresented or underestimated the amount of the estate, almost all the articles of which are enumerated in her deed; or that they, or either of them, advised or urged her to make the conveyance to the defendant, Potter; or that the defendants conspired or colluded to defraud her. The bill should therefore be dismissed, for want of proof to sustain its material charges, which are contradicted by the answers of the defendants. The answers being directly responsive to the allegations and interrogatories of the bill in evidence for them, which must prevail, unless overborne by the testimony of two witnesses, or its equivalent. Story's Eq. 528; Lewis *v.* Owen, 1 Ired. Eq. Cas. 290; Arnsworthy *v.* Cheshire, 2 Dev. Eq. 456. But the defendants have, moreover, disproved the plaintiff's charges by positive testimony. Their depositions show that the plaintiff was not sick, distressed, fatigued, or in anywise disconcerted by the sickness or death of her husband; that the defendant, Samuel R. Potter, was much grieved; that she was well acquainted with her hus-

band's estate, and estimated it at its full value. That she told a witness, on her return from her husband's burial, on Sunday, that she had determined on the disposition of her property as conveyed by this deed. That she had been reading the Revised Statutes the same day while the company was at the burial. That she made a similar declaration to another witness, on the next morning, before London came to her house. That she afterwards expressed satisfaction with this arrangement, and gave good reasons for it: Namely, 1st, that she was much attached to Mrs. S. R. Potter, and intended to live with her; 2d, that she had made over her property to her children, at the time of marrying Mr. Potter, and thought it but right that his children should have his; 3d, that most of his property consisted in slaves, and she would not own one for any consideration. 4th, that the management of the property would be troublesome to her, and that the amount to be paid her by Potter was as much as she wanted. 5th, that Samuel R. Potter might be enabled to buy the Point Peter plantation, and thus have an ample provision for his wife. The deposition of D. B. Baker, taken by plaintiff, shows that she was a person of bad disposition and temper, self-willed, and dictatorial. They prove, also, that she was content with the disposition of her property until she received a letter from her son, Joseph Eyre, in Philadelphia. That upon the new arrangement being made, by which an annuity was secured to her daughter, Mrs. Babcock, she was entirely satisfied, and deliberately ratified her conveyance, with a full knowledge of every thing pertaining to the subject. This was on the 21st of June. In August ensuing, her son, Joseph Eyre, came to Wilmington, and she left with him for Philadelphia.

Aware of the effect of these proofs, the learned counsel for the plaintiff devotes the main stress of his argument to the inadequacy of the consideration of the deed, as a ground of relief. It will be insisted that the inadequacy, though considerable, is not gross, and that, regard being had to the nature of the property, and the relative capacities of the plaintiff and Samuel R. Potter to render it profitable, the arrangement as a sale was not so disadvantageous to her as it has been represented. With this object, reference will be made to the inventory of the administrator. But suppose the inadequacy, as a question of pecuniary value, to be gross, it alone affords no ground for relief, and requires some other accompaniment to taint the deed with fraud. 2 Coxe, 320; Coles *v.* Trecothick, 9 Ves. 246; Underhill *v.* Howard, 10 Ves. 219; Lord Thurlow, in Fox *v.* Macreth, 16 Ves. 512, 517; Story's Eq. 245; Burrowes *v.* Lock, 10 Ves. 471; Greene *v.* Thompson, 2 Ired. Eq. 365; Moore *v.* Reid, Ib. 580; Osgood *v.* Franklin, 2 Johns. C. R. 23. There is

no such accompaniment here. On the contrary, it is clearly shown that the pecuniary consideration was accompanied by that of affection. It is said that this circumstance cannot be taken into the account, because it only appears by parol evidence, and thus to prove it violates the rule that parol evidence cannot be received "to vary, add to, or contradict" a deed. The fallacy of this argument consists in applying a salutary rule in the construction of deeds, and the determination of rights under them, to inquire into the fraud or fairness of their execution; in fact, to the inquiry whether the alleged deed is a deed. If this circumstance attending the execution cannot be proved by evidence *dehors* the deed, what other can? How does the consideration appear to be inadequate, but by parol evidence? Is it to be allowed to impeach but not to sustain? In investigations of this kind nothing is excluded which shows the acts or motives of either party. That it is admissible for this purpose is considered as settled. Springs *v.* Hawks, 5 Ired. 33; 6 Ired. Eq. 38; 1 Phillips on Ev. 482, n. and cases cited; 3 Stark. Ev. 1004, *et seq.;* 1 Greenleaf, 408; 2 Story's Eq. 1531; Sugden on Vendors, 87; Potter *v.* Everitt, 7 Ired. 152; Hinde *v.* Longworthy, 11 Wheat. 199; Runyon *v.* Leary, 4 Dev. & B. 233. Even conveyances, voluntary on their face, may be shown by parol to have been for valuable consideration, and thus defeat the claims of creditors. Sugden, 438; Chapman *v.* Emery, Cowp. 278. And the cases are numerous where conveyances, absolute in their terms, have been allowed, by parol, to be shown to be mere securities for money. Streder *v.* Jones, 3 Hawks, 423; 2 Dev. 558; 1 Ired. Eq. 369; 6 Ired. Eq. 38. The cases cited by the plaintiff's counsel on this point do not sustain his position.

There is a well-established distinction between the cases in which a specific performance will be refused in equity, where a contract is executory, and those in which it will be rescinded being executed. The circumstances of this case may class it with the former, but not the latter.

But, whatever may be thought in regard to the original transaction, there has been such complete recognition and confirmation on the part of the plaintiff that she cannot impeach her deed. Moore *v.* Reid, 2 Ired. Eq. 580; Chesterfield *v.* Janssen, 2 Ves. 125; Cole *v.* Gibbons, 3 P. W. 289.

As to Competency of Evidence.

Loudon's deposition was properly allowed as evidence. After the certificate of the commissioners, dated April 14, 1849, of the execution of their commission, they were *functi officio,* and no other certificate of theirs can be heard. If they are to be fur-

ther heard, it must be upon oath as witnesses. But if their certificate of the 12th November, 1844, is to be respected, the fact it sets forth is neutralized by their third certificate, on the same page that the irregularity of writing out the answers of witness, while out of their presence, was occasioned by themselves.

No observation is deemed necessary on the complaint, that the plaintiff was not permitted to introduce as evidence the correspondence between herself and her children.

Mr. Justice DANIEL 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 North Carolina, by which decree the bill of the appellant (the complainant in the Circuit Court) was dismissed with costs.

The allegations in the bill, on which the interposition of the court was invoked, are substantially as follow: That Samuel Potter, deceased, the late husband of the complainant, died on the 29th of May, 1847, possessed of a large real and personal estate, consisting of houses in the towns of Wilmington and Smithville, in North Carolina, of a productive rice plantation, of an interest in one or more valuable saw-mills, of a large number of slaves, of a considerable amount of bank and railroad stocks, and of other personal property; that the complainant who, at the time of her husband's death, was ignorant of the value of his property, had, from recent information, ascertained that the annual value of the real estate was more than $6,000, perhaps equal to twice that sum, and that her share in her husband's personal property was worth not less than $15,000; that by the laws of North Carolina the complainant, in addition to one year's maintenance for herself and family, (in this instance amounting to not less than $1,000,) was entitled, in right of her dower, to one third of her husband's real estate during her life, and to an absolute property in a child's part, or one sixth of the personalty, her husband having left surviving him four children and one grandchild; that by the laws of the same state, she had the prior right of administration upon the estate of her husband, and thereby the control of his assets, and a right to all the regular emoluments resulting from that administration; that the complainant is an aged and infirm woman, predisposed to nervous affections, and wholly inexperienced in the transaction of business; that during the last illness of her husband, being overwhelmed by daily and nightly watchings and anxiety, she became ill; that, whilst she was thus sick and oppressed with affliction and infirmity, Samuel R. Potter, the son of her late husband, professing great sympathy and affection for the complainant, availing himself of her dis-

tressed and lonely condition, and of her ignorance of the value of the estate, with which he was familiar, having been several years the manager of it, combined with a lawyer by the name of Mauger London to defraud the complainant, and to deprive her of her rights and interest in the estate, and succeeded in accomplishing this scheme in the following manner: In the prosecution of their plan they in the first place induced the complainant under an assurance that the measure would be in accordance with the wishes of her late husband, and would prove the best means of protecting and securing her interests, to relinquish to the said Samuel R. Potter, her right to administer upon her husband's estate. In the next place by false representations as to the value of the estate, and the expense and trouble of managing it, they prevailed upon her to sell and convey to the said Samuel R. Potter, by a deed bearing date on the 31st of May, 1847, her entire interest in this wealthy and productive estate, for the paltry consideration of $1,000, and a covenant for an annuity of $600 during the complainant's life; and that even this small allowance was not otherwise secured to the complainant than by the single bond of said Samuel R. Potter, for the sum of $2,000. That in the eagerness to effect their iniquitous purposes, the said Potter and London, in total disregard of her feelings and even of decency, did, on the day of her husband's death and before his interment, urge her acquiescence in their scheme, and on that day or the day succeeding, accomplished it, by extracting from the complainant a deed bearing date on the 31st of May, 1847, conveying to Samuel R. Potter the complainant's entire interest in her late husband's estate, and the instrument of the same date, whereby she relinquished to the same individual her right to administer upon that estate. The bill makes defendants the said Samuel R. Potter and Mauger London; charges upon them a direct fraud by deliberate combination, by misrepresentation, both in the suppression of the truth and the suggestion of falsehood, and in the effort to profit by the ignorance, the sickness, the distress and destitution of the complainant. The bill calls for a full disclosure of all the facts and circumstances attending the transactions therein alleged to have occurred; prays that the deed of May 31st, 1847, from the complainant to said Samuel R. Potter may be cancelled; that the property thereby conveyed may be released and reconveyed to the complainant, and concludes with a prayer for general relief.

It is now the office of this court to determine how far the foregoing allegations are sustained upon a proper construction of the pleadings, or upon the evidence adduced by either of the parties.

And here it may be proper to premise, that in the examination of the case made by the bill, it cannot be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and therefore to be dealt with by the law under the necessity for protecting such relation, but it is one of actual, positive fraud, charged, and to be judged of, according to its features and character, as delineated by the complainant, and, according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of Price *v.* Berrington, decided by Lord Chancellor Truro, in 1851. *Vide* English Law and Equity Reports, vol. 7, p. 254.

The defendants, in this case, were clothed with no special function, no trust which they were bound to guard or to fulfil for the benefit of the complainant; they were not even the depositaries of any peculiar facts or information as to the subject matter of their transactions, or which were not accessible to all the world, and by an omission or failure in the disclosure of which, they could be regarded as perpetrating a fraud.

Recurring to the pleadings in this case, there is not alleged in the bill one fact deemed material to the decision of this controversy, which is not directly met, and emphatically denied, by both the defendants.

Although the age assumed for the complainant seems to be controverted by none of the parties, yet the assertions that, at the period of her husband's death, she labored under any unusual infirmity; that she was exhausted by fatigue and by anxious watchings at the bed of sickness, or was overwhelmed with grief, or even discomposed by the event which severed forever her connection with her husband, are assertions directly met, and positively contradicted; and in further contravention of these statements by the complainant, are the averments that the intercourse of the complainant with her late husband, was of a very unhappy character, evincing not indifference merely, but signs of strong antipathy. Equally direct and positive are the denials in the answers of both the defendants, of the charges of

persuasion or inducement of any kind, or of any concealment or misrepresentation moving from the defendants, by which the complainant was or could have been influenced; and it is expressly denied by each of the defendants, that any proposition was by them, or either of them, submitted to the complainant for the sale of her interest in the estate, or for the relinquishment of her right to the administration. These positive denials in the answers, being directly responsive to the charging part of the bill, the latter, by every rule of equity pleading, must be displaced by them, unless those denials can be overcome by evidence *aliunde.* But by the peculiar frame and structure of the bill, in this case, the complainant has imparted to the answers, a function beyond a mere response to the recitals or charges contained in the bill. The complainant has thought proper specifically to interrogate the defendants, as to the origin, progress, and conditions of the transactions impugned by her; and as to the part borne in them, both by the defendants and the complainant herself. By the answers to these interrogatories, the complainant must, therefore, be concluded, unless they can be overthrown by proofs. How stands the case, in this aspect of it, upon the interrogatories and the evidence? The defendants, being called on to disclose minutely, and particularly, their knowledge of, and their own participation and that of the complainant in, the transactions complained of, declare, that when those transactions took place, the complainant was in her usual health; was in possession of all her faculties, was exempt from any of those influences, such as grief and depression, which might have rendered her liable to imposition; was in possession, likewise, of all the knowledge as to the subject-matter of the transactions requisite to judge of her own interests; that with such capabilities, and such knowledge, the complainant herself proposed the arrangement which was adopted, and although informed by both the defendants, that the consideration she proffered to receive was less than the value of her interests in the estate, she urged and insisted upon that arrangement, assigning for it, reasons, which are deemed neither unnatural nor improbable, and which, although they might, to some persons, appear not to be judicious, she had the right, nevertheless, legally, and morally, to yield to.

How does the history, thus given by the defendants, accord with the proofs in this cause?

And first as to the state of complainant's health, and the condition of her mind and spirits as affected by the illness and death of her husband.

Benjamin Ruggles, who says that he is acquainted with the parties, states that he was with the husband of the complainant

every day during his illness, (which lasted eight or ten days,) and sat up with him two nights; that he saw the complainant every day; that she did not sit up either night that the witness was there; that she exhibited no sign of distress at the sickness of her husband, nor devoted much of her time to him, nor showed any sign of grief at his death; that on the night of her husband's death, the complainant attended to getting his burial-clothes, which she handed to the witness, seeming calm and composed. The complainant was not sick during the witness's stay.

Josephine Bishop, also acquainted with the parties, was at the house of the deceased on the day of his death, returned there on the second day after that event, and remained three or four weeks. On the morning of the witness's return, the complainant, in a conversation, informed her that complainant intended to propose to the defendant, Samuel E. Potter, to make over to his wife all the complainant's interest in her husband's estate. Some two or three weeks after, the complainant said to the witness that she had sent for Mr. London to arrange her business for her, and felt greatly relieved and satisfied at the manner in which he had arranged it; that she had conveyed her interest in her husband's estate to Samuel R. Potter, who was to give her two thousand dollars in cash, six hundred dollars a year during her life, to furnish her board and a servant, and would have given her more if she had asked it, but she was satisfied with the amount, which was as much as she would have use for. The complainant spoke of the defendant, London, in the strongest terms of approbation. She farther remarked to the witness, that she knew her interest in the estate of her late husband was worth much more than she had asked for it. Yet at the time of her marriage with him, she had made over her own property to her children by a former marriage, and thought it nothing but right that his children should have the benefit of his property, besides that the greater part of the property consisted of slaves, and she would not own one for any consideration. Witness saw the complainant every day during the time she was at the house; she did not complain of ill health nor appear to be at all distressed; and witness had never seen her in better spirits. The conversations in which these declarations of complainant were made, were introduced by the complainant herself.

Margaret H. Wade, who is acquainted with the parties, states that she was three or four times at the house of defendant during his illness, and remained three or four hours during each time. Witness saw the complainant once only in the room of her husband; she staid in an adjoining room. Witness did not perceive that the complainant was indisposed in any way, nor

did the complainant appear to be grieved during the illness of her husband nor after his death. In a conversation with witness some three or four days before decedent's death, the complainant asked the witness if she thought the decedent could live, and upon the reply of the witness that she did not think he could, the complainant observed that she was provoked at Samuel (the defendant) for forcing him to take first one thing and then another, "and make him live any how." Afterwards, on board of the steamboat returning from Smithville from the funeral of the decedent, the complainant told the witness, that she had made over her property to Samuel R. Potter, or intended so doing, on account of his wife Marian; that she was very fond of her, and wished to stay with her the residue of her life, though she did not know that her friends at the north would be willing that she should do so.

Without a farther and more protracted detail of the testimony adduced on the part of the defendants, it may be sufficient merely to advert to the depositions of Julia and Caroline Everett, of Edwin A. Keith, and of Sterling B. Everett, (the last for many years the physician in the family of the decedent,) and of the complainant herself, as fully sustaining the averments in the answers of the defendants, and the statements of the witnesses previously named, in relation to the capacity of the complainant, to her disposition and deportment towards her late husband, the effect of his illness and death upon her health and spirits, her knowledge of her rights and interest in the subject of her transactions with the defendants, the origin and fairness of those transactions, the objects for which, and the means and instrumentality by which, they were consummated. Nor can it escape observation, as a circumstance of great if not of decisive weight, that all this testimony is derived from persons familiar with the parties, living upon the immediate theatre of the transactions in controversy, many of them more or less acquainted with the subjects embraced by them, witnesses, all of them free from imputation on the score of interest, and against whose veracity or intelligence no exception is even hinted.

Against an array of evidence like this, the question of equivalents or of exact adequacy of consideration cannot well be raised. The parties, if competent to contract and willing to contract, were the only proper judges of the motive or consideration operating upon them; and it would be productive of the worst consequences if, under pretexts however specious, interests or dispositions subsequently arising could be made to bear upon acts deliberately performed, and which had become the foundation of important rights in others. Mere inadequacy of price, or any other inequality in a bargain, we are told, is not to

be understood as constituting *per se* a ground to avoid a bargain in equity, for courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet or otherwise, or profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon. Vide Story's Equity, § 244, citing the cases of Griffiths v. Spratley, 1 Cox, 383, Copis v. Middleton, 2 Maddox, 409, and various other cases.

Again, it is ruled, that inadequacy of consideration is not of itself a distinct principle of equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. One man, in the disposal of his property, may sell it for less than another would. If courts of equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the injustice and impracticability of adopting the doctrine, that mere inadequacy of consideration should form a distinct ground for relief. Still, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon satisfactory ground of fraud; but then, such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. Vide Story's Equity, § 245-246, and 9 Ves. 246; 10 Id. 219; and other cases there cited.

But the contract between the parties in this case should not be controlled by a comparison between the subject obtained and the consideration given in a mere pecuniary point of view; added to this, were the motives of affection for the wife of the grantee, the granddaughter of the grantor, a conviction in the latter of what justice dictated towards the children of the decedent in relation to his property; the prospect of ease and independence on the part of this elderly female; her exemption from the expense, the perplexities, and hazards of managing a species of property to the management of which expense and energy and skill were indispensable; property to the tenure of which she entertained and expressed insuperable objections. Here, then, in addition to the sums of money paid, or secured to be paid, we see considerations of great influence which,

naturally, justly, and lawfully, might have entered into this contract, and which we think cannot be disregarded in its interpretation, upon any sound construction of the testimony in the cause. Upon the first view of this case, it may, in the spectacle of the widow and the son bargaining over the unburied corpse of the husband and the father for a partition of his property, be thought to exhibit a proceeding revolting to decorum, and one, therefore, which a court of equity, equally with a court of morals, would be cautious in sustaining, or be inclined to condemn; yet, upon testing this proceeding by any principle of decency, as well as of law or equity, it is manifest that it could not be disturbed without benefit to the chief offender against such a test; for the evidence incontestably shows, that whatever in the conduct of the parties was inconsistent with the highest and most sacred relations in life — whatever may be thought to have offended against the solemnity and decorum of the occasion, — was commenced and pressed to its consummation by the plaintiff in this case. Tried, then, by this standard, she should be left precisely where she has placed herself.

To avoid the consequences flowing from the acts of the complainant touching the matters of this controversy, the testimony of several witnesses, taken in the city of Philadelphia, has been introduced, to prove the mental as well as physical incompetence of the complainant. With respect to the character and purposes of this testimony, it may be remarked, that a position in a court of justice founded upon what is in effect the stultification of the person who assumes that position, is one to be considered with much diffidence, as it admits in general the *factum* which it seeks to invalidate; and if the averments on which such position rests be true, the person occupying that position should be in court by guardian or committee. But in truth this testimony establishes no such position, either directly or inferentially, in reference to the complainant. In the first place, all these witnesses resided in a different State, and at the distance of many hundreds of miles from the complainant; and not one of them appears to have had any intercourse with her or to have seen her even for a series of years preceding the contract which it is essayed to vacate; nor to have had any knowledge of the existence of that contract until after its completion; nor of the state of mind or of the health of the complainant at the period at which that contract was found. In addition to this ignorance of these witnesses, of the transaction under review, and of all the circumstances surrounding it, there is no fact stated by one of them which amounts to proof of incapacity on the part of the complainant to comprehend the character of her acts, and of the legal consequences incident to

them; and much less do they establish, as to her, such an aberration or imbecility of mind as would justify a presumption, and much less a legal conclusion, against the validity of any and every act she might perform. To such a conclusion only could the general expressions of opinion and belief of these witnesses apply, and such a conclusion they come very far short of establishing.

We are therefore of opinion, that the decree of the Circuit Court should be affirmed, and the same is hereby affirmed with costs.

Order.

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

HENRY O'REILLY, EUGENE L. WHITMAN, AND W. F. B. HASTINGS, APPELLANTS, *v.* SAMUEL F. B. MORSE, ALFRED VAIL, AND FRANCIS O. J. SMITH.

Morse was the first and original inventor of the electro-magnetic telegraph, for which a patent was issued to him in 1840, and reissued in 1848. His invention was prior to that of Steinhiel of Munich, or Wheatstone or Davy of England.

Their respective dates compared.

But even if one of these European inventors had preceded him for a short time, this circumstance would not have invalidated his patent. A previous discovery in a foreign country does not render a patent void, unless such discovery or some substantial part of it had been before patented or described in a printed publication. And these inventions are not shown to have been so.

Besides, there is a substantial and essential difference between Morse's and theirs; that of Morse being decidedly superior.

An inventor does not lose his right to a patent because he has made inquiries or sought information from other persons. If a combination of different elements be used, the inventors may confer with men as well as consult books to obtain this various knowledge.

There is nothing in the additional specifications in the reissued patent of 1848, inconsistent with those of the patent of 1840.

The first seven inventions, set forth in the specifications of his claims, are not subject to exception. The eighth is too broad and covers too much ground. It is this. "I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for making or printing intelligible characters, signs or letters at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer."

The case of Neilson and others *v.* Harford and others, in the English Exchequer Re-

ports, examined; and also the American decisions. The acts of Congress do not justify a claim so extensive.

But although the patent is illegal and void so far as respects the eighth claim, yet the patentee is within the act of Congress, which gives him a right to disclaim, and thus save the portion to which he is entitled. No disclaimer having been entered before the institution of this suit, the patentee is not entitled to costs.

In 1846 Morse obtained a second patent for the local circuits, which was reissued in 1848. It is no objection to this patent that it was embraced in the eighth claim of the former one, because that eighth claim was void. Nor is it an objection to it, that it was an improvement upon the former patent, because a patentee has a right to improve his own invention.

This new patent and its reissue were properly issued. The improvement was new and not embraced in the former specification.

These two patents of 1848, being good with the exception of the eighth claim, are substantially infringed upon by O'Reilly's telegraph, which uses the same means both upon the main line, and upon the local circuits.

(*Mr. Justice Curtis*) having been of counsel, did not sit in this cause.

This was an appeal from the Circuit Court of the United States for the district of Kentucky, sitting as a Court of Equity.

It is difficult to make a fair report of this case without writing a book. The arguments of counsel would fill a volume by themselves.

The history of the case was drawn up by the learned Judge, who presides over the District Court of the United States in Kentucky, and whose decree was under review. Permission has been given by Judge Monroe that the reporter may use his statement as preliminary to this report, and he avails himself with pleasure of this kindness; because, although the narrative is occasionally interpersed with the opinions which induced the judge to decree an injunction in favor of Morse yet the history is given with great precision and clearness.

The following statement is extracted from the opinion of Judge Monroe:

The complainants, in their bill, allege that Samuel F. B. Morse, one of them, was the true and original inventor of the Electro-Magnetic Telegraph, worked by the motive power of electro-magnetism, and of the several improvements thereon, by which intelligence which is in one place is transmitted to other distant places, and that by the letters-patent of the United States, duly issued to him, Samuel F. B. Morse, and by his partial assignments to F. O. J. Smith and Alfred Vail, the other complainants, they together are lawfully invested with the exclusive right of constructing and employing such telegraph for such purpose, throughout the United States, for the terms in the letters-patent mentioned, and which have not yet expired—and they exhibit the letters-patent.

They show that the practicability and great utility of the in-

vention was fully established by the telegraph constructed under the superintendence of Morse, by means of an appropriation made by the Congress of the United States for the purpose, and put in operation between the cities of Washington and Baltimore, in the year 1844.

That afterwards there had been constructed, by the agency and means of joint-stock companies, promoted by the complainant, and operating under contracts and license of the patentee, Morse and his assignees, telegraphs along lines, amounting, in the aggregate, to upwards of four thousand five hundred miles, whereby telegraphic communication was established between the principal cites of the United States, from New Orleans to Boston; and that there were now in progress of construction, numerous additional and other lines, under contracts with them, for more widely extending the benefits of the invention, and they believe that if they are protected in the lawful use of their rights, every section of the United States will, in a short time, have the benefits of their improvements in telegraphic correspondence.

They represent that, in all the lines of telegraphic communication now in successful operation in the United States in transmitting intelligence by means of electro-magnetism, the improvement of S. F. B. Morse, or the chief and essential principles and parts thereof, are employed.

They show that they had caused to be established, a line of telegraphic communication from Louisville, by way of Frankfort and Lexington, to Maysville, Kentucky, which was in successful operation.

They represent that they had caused to be constructed, lines of posts and wires from Louisville in the district of Kentucky, by way of Bardstown, Glasgow, and Scottsville, in Kentucky, and thence by way of Gallatin to Nashville, in the district of Tennessee, for the transmission of intelligence, by means of their improved telegraph; and that they had expended great sums of money therein; and that this line is in the extension to New Orleans, State of Louisiana; and is connected by another line, with Memphis, Tennessee; and that large sums of money will be expended in this work; and all the lines in a short time completed, and the assignments.

They represent that their rights have been repeatedly and explicitly acknowledged and admitted in divers ways and by individuals and large bodies of associated citizens in various sections of the United States; that these had treated with them for the purchase of their rights, or parts thereof, and of licenses to use their patented improvements; and that they had made extensive sales, or licenses, to use them to companies and indi-

viduals, upon various lines, and amongst others, to the New York, Albany, and Buffalo line; the Washington and New York line; the New York and Boston line; the Washington and Petersburg line; the line from Petersburg to New Orleans; besides numerous shorter and side lines.

They state that they had been thus in the successful and uninterrupted exercise of the rights granted to them by the letters-patent of the United States, and had been in nowise disturbed therein, until, by the operations of the defendant, O'Reilly, and the committing of the wrongs presently mentioned, by him and his co-defendants.

This defendant, O'Reilly, they state, had, as early as 1845, entered into a contract with the complainants, and another, then having an interest in the patent, whereby he, O'Reilly, acknowledged their right; and that he had afterwards, in various ways, and for a long period of time, manifested his acquiescence in, and admissions of, the rights and privileges of them, the complainants, and even insisted on his right to the use of them himself, under his contract with them; that he had, under this contract and his claims under it, in fact, used and employed the improved telegraph of the complainants, and persisted in such, his claim, to employ it on all the lines embraced by his contract, without questioning the validity of their patents. But,

They allege that this defendant, Henry O'Reilly, had, by himself, his agents and servants, constructed a line of posts and suspended metallic wires thereon, from the city of Louisville, in the District of Kentucky, by way of Bardstown, to Nashville, in the State of Tennessee, and well knowing all the facts by the complainants' set forth, he and his co-defendants had worked and employed upon said line, a telegraph substantially the same with the Electro-Magnetic Telegraph, invented by the complainant, Morse, and in his patents mentioned, against the will and without any authority from them, the complainants. They show that the terms of the contract, under which O'Reilly claimed their right to the use of the telegraph, on certain other lines where he employed it, did not extend to any country north of the Ohio river, and that there was no color for any claim by the defendants to the use thereof, within the District of Kentucky, or on any part of the lines by them lately constructed.

They represent, especially, that the defendants, in the operation and working of their line of telegraph, so by them constructed, used and employed instruments, apparatus, and means, which are, in the material, substantial, and essential parts thereof, so upon the principle and plan of the said several improvements patented by the complainant, Morse, or the plan and principle of some of said improvements, and not other or different. And,

They state, that by such means the defendants, their servants and agents, had been for the space of more than four months past, and were still, transmitting intelligence over said line, for any person who desired the same; and for such service, had been, and are yet, receiving compensation from the persons for whom the same is performed; all which they allege is in violation of the rights granted by the letters-patent, or of some of the parts thereof.

They further represent, that the defendant, O'Reilly, was extending the line from Nashville to New Orleans, and had extended it to Memphis, and was operating upon the last mentioned line to Memphis, in violation of the rights of them, the complainants, by the use of their patented improvements, or the principle and essential parts thereof; and that he had declared his intention of completing the other line from Louisville to New Orleans, and of then employing the same instruments as he was then using on the line from Louisville to Nashville.

They state that they are informed that the defendants sometimes give out in speeches, that the patents of the complainant, Morse, are void; and at other times, give out and pretend that the machinery and apparatus which they use for the transmission and the reception of the intelligence upon the said line, is a distinct and separate invention, which they, the complainants, are informed the defendants call the Columbian Telegraph:

Whereas, the complainants charge that the patents are good and valid in law, and that the defendant, O'Reilly, by his contract with the patentee, and by his having exercised, and his persisting in his claim to exercise, under it, the exclusive privileges by the patents granted, is estopped from denying their validity. And,

That the said pretended new invention is, in its essential principles, identical with, and upon, the plan of the patented improvements of Morse, and that the use of the same is a violation and infringement of the patent issued to the complainant, Morse.

They allege that the defendants had received, and were then receiving, considerable sums of money for transmitting intelligence on the line from Louisville, within the District of Kentucky, in violation of the rights of the complainants; and they complain that the defendants had, by their unlawful operations, greatly disturbed them in the lawful exercise of their rights, so granted and held by them, and had caused a great diminution of the business of them, the complainants, on their line of telegraph, which they had caused to be constructed, and had now in operation within the District of Kentucky; and that the defendants refuse to desist from such violation of the complainants' rights. Wherefore,

The complainants pray that the defendants, by an order, and the process of the court, may be enjoined from hereafter using or employing such telegraphs in the violation and infringement of the rights of them, the complainants, within the District of Kentucky; that they may be compelled to account for the money received by them in consideration of their unlawful operations and wrongful exercise of the rights, privileges, and property of the complainants; and that on due proceeding and final hearing, such order of injunction may be made final and effectual; and that the complainants may have such other relief as their case may require. And,

They propound numerous interrogatories, framed on all the material allegations of the bill, and pray that each defendant may be compelled to answer, on his oath, such as are for him designated, and, to this end, and that they may have the relief which shall be adjudged them, they pray the writ of subpœna.

Answer and Grounds of Defence.

The defendants appeared by their counsel, and admitted that they had sufficient notice. O'Reilly read his answer to the complainants' bill.

The respondent admits the contract with the complainants, of 1845, stated in the bill, and seems to admit that he had used, under it, portions of the "machine or combinations" described in the patent to Mr. Morse, of 1840; but denies he had used others under this contract.

He says he was not scientific, and had not seen the patent until after the complainants had alleged he had forfeited his contract, and instituted a suit to have it vacated; and insists that he is not estopped to deny the validity of the patents.

He sets up no defence under this contract, and disclaiming any license from the complainants in respect to the line of telegraph in question, answers, that he believes, on grounds which he sets forth, that Mr. Morse is not the original and first inventor of the telegraph described in his patents, and insists that his patents are, on that ground, and upon their face, and for other causes he states, null and void.

He admits the construction and operation of the lines of telegraph in Kentucky, and elsewhere, by himself and others; but denying that the instruments employed on them are within the description of the complainants' patents, even on the supposition of their validity, denies the infringement.

But other grounds of defence, not presented by the answer, were assumed in the argument; and, the matter of the answer will be more fully stated under the several heads of the whole defence. The defendants all united in opposition to the motion.

The parties respectively read, without objection, a great mass of documentary proof, in support of their positions, and a model of the telegraph described in the letters-patent, to Mr. Morse, and of the telegraph employed, and proposed, to be employed by the defendants, was exhibited and subjected to the application of the proofs, the explanation of the parties, and the inspection of the tribunal.

The grounds of defence presented by the answer of O'Reilly, and assumed on the proofs, will be comprehended under these heads of primary division:

I. The complainant, Morse, was not the true and original inventor of this telegraph.

II. The letters-patent to him are null and void upon their face, and for other causes *dehors*.

III. The telegraph constructed and employed by them, the defendants, is substantially and in law, different from the telegraph described in the letters-patent, to Morse, and of which he can lawfully claim the exclusive employment: And, therefore, on the supposition of the validity of the patents to any extent, there has been no infringement.

IV. The case on the pleadings and proofs, is not one, whatever might be considered of it on a final hearing of the bill, which will justify an order for injunction presently.

These subjects in their order.

Is Mr. Morse the original inventor of this telegraph, and of the several improvements thereon described in his letters-patent?

It is necessary that we now ascertain and settle, what is the thing which was invented; and to this end it will be most convenient to begin at its conception, and accompany it in its progress down to its present state of apparent maturity and completeness.

History of the Invention.

Its conception is fixed by Mr. Morse himself, in October, 1832, on board the packet ship "Sully," on her passage from Havre, France, to New York.

He says that he was by profession, a historical painter, and had, in 1829, gone to Europe for perfecting himself in that art; that on his return home, in October, 1832, there were among the passengers in the ship, the Hon. William C. Rives, Minister of the United States to the Court of France, Dr. C. T. Jackson, James Fisher, Esq., of Philadelphia, William Constable, Esq., and other gentlemen of extensive reading and intelligence; and that soon after the voyage commenced, the then experiments and discoveries in relation to electro-magnetism, and the

affinity of electricity to magnetism, or their probable identity, became a subject of conversation.

In the course of this discussion, it occurred to him that, by means of electricity, signs representing figures, letters, or words, might be legibly written down at any distance, and that the same effect might be produced by bringing the current in contact with paper saturated with some saline solution. These ideas took full possession of his mind, and during the residue of the voyage he occupied himself, in a great measure, in devising means of giving them practical effect.

Before he landed in the United States, he had conceived and drawn out in his sketch book, the form of an instrument for an electro-magnetic telegraph, and had arranged and noted down a system of signs composed of a combination of dots and spaces, which were to represent figures; and these were to indicate words to be found in a telegraphic dictionary, where each word was to have its number. He had also conceived and drawn out the mode of applying the electric or galvanic current, so as to mark signs by its chemical effects.

This is the account of the inventor himself; but it is supported by the testimony of disinterested witnesses.

Mr. Rives, under date of September 27, 1837, addressing himself to Mr. Morse, says:

"I remember perfectly, that you explained to me the idea of your ingenious instrument, during the voyage which we made together in the autumn of 1832. I also remember that during our many conversations on this subject, I suggested several difficulties to you, and that you obviated them with promptness and confidence."

Captain Pell, the commander of the ship, says, on the same day, addressing himself to Mr. Morse:

"When I examined your instrument a few days since, I recognized in it the same mechanical principles and arrangements which I had heard you explain on board of my vessel in 1832." And,

It appears by the depositions of two brothers of Mr. Morse, that on their meeting him on board the ship, immediately she had moored at New York, the greeting had hardly passed between the three brothers, and before they had reached the house of one of them, which they immediately proceeded to from the ship, he announced to them his discovery, and told them that he had, during his voyage, made an important invention, which had occupied almost all his time on ship-board, one that would astonish the world, and of the success of which he was perfectly sanguine; and that he said this invention was a means of communicating intelligence by electricity, so that a

message could be written down in characters, in a permanent manner, at any distance; and he took from his pocket and showed them, in his sketch-book, a representation of his invention.

And this was the invention in October, 1832.

Mr. Morse further says: —

"Immediately after his landing in the United States, he communicated his invention to a number of his friends, and employed himself in preparations to prove its practicability and value, by actual experiment. To that end, he made a mould, and cast, at the house of his brother, in New York, before the commencement of the year 1833, a set of type, representing dots and spaces, intended to be used for the purpose of closing and breaking the circuit in his contemplated experiments."

And this statement is also supported by other testimony.

But he was unable to proceed, for the want of money, to purchase the materials for a galvanic battery and wire, and was compelled, for subsistence, to return to his pencil; and having been led, in pursuit of employment, from place to place, from 1832 to the latter part of 1835, he had no opportunity of making experiments of his invention. But, he affirms, he never lost faith in its practicability, or abandoned his intention of testing it as soon as he could command the means.

"In 1835, he was appointed Professor in the New York city University, and about the month of November, in that year, occupied rooms in the University buildings. Here he immediately commenced, with very limited means, to experiment upon his invention.

"His first instrument was made up of an old picture or canvass-frame fastened to a table; the wheels of an old wooden clock moved by a weight to carry the paper forward; three wooden drums, upon one of which the paper was wound and passed thence over the other two; a wooden pendulum suspended to the top piece of the picture or stretching frame, and vibrating across the paper as it passed over the centre wooden drum; a pencil at the lower end of the pendulum in contact with the paper; an electro-magnet fastened to a shelf across the picture or stretching frame, opposite to an armature made fast to the pendulum; a type rule and type for closing and breaking the circuit, resting on an endless band, composed of carpet binding, which passed over two wooden rollers moved by a wooden crank, and carried forward by points projecting downwards into the carpet binding; a lever with a small weight on the upper side, and a tooth projecting downwards at one end, operated on by the type and a metallic fork, also projecting downwards, over two mercury cups; at the other end a galvanic battery of one

cup, and a short circuit of wire embracing the helices of the electro-magnet, connected with the positive and negative poles of the battery, and terminating in the mercury cups.

"When the instrument was at rest, the circuit was broken at the mercury cups. As soon as the first type in the type rule, (put in motion by turning the wooden crank,) came in contact with the tooth on the lever, it raised that end of the lever and depressed the other, bringing the prongs of the fork down into the mercury, thus closing the circuit. The current passing through the helices of the electro-magnet, caused the pendulum to move and the pencil to make an oblique mark upon the paper, which, in the mean time, had been put in motion over the wooden drum. The tooth in the lever falling into the space between the two first types, the circuit was broken, when the pendulum returned to its former position, the pencil making another mark as it returned across the paper. Thus as the lever was alternately raised and depressed by the points of the type, the pencil passed to and fro across the strip of paper, passing under it, making a mark resembling a succession of V's, the points only, of which however, were considered as telegraphic signs. The spaces between the types caused the pen to mark horizontal lines, long or short, in proportion to their own length.

"With this apparatus, made as it was, and completed before the first of the year 1836, he was enabled to mark down, intelligibly, telegraphic signs; and having arrived to that point, he exhibited it to some of his friends early in that year, and first of all, to Professor Leonard D. Gayle, who was a colleague Professor in the University.

"Here was an actual operation of the instrument, and a demonstration of its capacity to accomplish the end of the invention." And,

This statement is fully supported by the affidavit of Dr. Gayle. He says:

"That in the month of January, in the year one thousand eight hundred and thirty-six, I was a colleague Professor in the University of the city of New York, with Professor Samuel F. B. Morse, who had rooms in the University buildings, on Washington Square, in said city. That during the said month of January, of the year aforesaid, the said Professor Morse invited me into his private room, in the said University, where I saw for the first time, certain apparatus, constituting his Electro-Magnetic Telegraph. The invention at that time consisted of the following pieces of apparatus."

Here the witness gives a full description of the apparatus, and of its operation, and of the result, and this result was the making of the permanent and legible record. And,

This was the state of the invention in January, 1836.

Thus far it had not been ascertained what was the limit of the magnetic power, and therefore it was not known on what length of wire it would be found of sufficient force to make the record, and there had been no means devised of extending the operation, further than the magnetic current of one battery would be effectual. But this matter had not escaped the attention of Mr. Morse, and he had been devising means for the supply of whatever defect might be found in this respect.

He says: "Early in 1836, he procured forty feet of wire, and putting it in circuit, found that his battery of one cup, was not sufficient to work his instrument. This result suggested to him the probability that the magnetism to be obtained from the electric current would diminish in proportion as the circuit was lengthened, so as to be insufficient for any practical purpose at great distances; and to remove that probable obstacle to his success, he conceived the idea of combining two or more circuits together, each with an independent battery, making use of the magnetism of the first to close and break the second; that of the second to close and break the third, and so on.

"His chief concern, therefore, in his subsequent experiments, was to ascertain at what distance from the battery, sufficient magnetism could be obtained to vibrate a piece of metal to be used for that purpose, knowing that if he could obtain the least motion at the distance of eight or ten miles, the ultimate object was within his grasp."

A mode of communicating the impulse of one circuit to another analogous to the receiving magnet now in use, was matured early in the spring of 1837, and then exhibited to Professor Gayle, his confidential friend. And,

This statement is also fully confirmed by the statement of Dr. Gayle. He says:—

"It was early a question between Professor Morse and myself, where was the limit of the magnetic power to move a lever? I expressed a doubt whether a lever could be moved by this power at the distance of 20 miles, and my settled conviction was, that it could not be done with sufficient force to mark characters on paper at 100 miles distance. To this, Professor Morse was accustomed to reply, 'If I can succeed in working a magnet ten miles, I can go around the globe.' The chief anxiety, at this stage of the invention, was to ascertain the utmost limits at which he, Morse, could work or move a lever by magnetic power. He often said to me, 'It matters not how delicate the movement may be, if I can obtain it at all, it is all I want.' Professor Morse often referred to the number of stations which might be required, and which he observed would

add to the complication and expense. The said Morse always expressed his confidence of success in propagating magnetic power through any distance of electric conductors which circumstances might render desirable. His plan was thus often explained to me: 'Suppose,' said Professor Morse, 'that in experimenting on twenty miles of wire, we should find that the power of magnetism is so feeble that it will but move a lever with certainty a *hair's breadth*, that would be insufficient, it may be, to write or to print, yet it would be sufficient to close and break another, or a second circuit 20 miles further, and this second circuit could be made in the same manner, to close and break a third circuit, and so on around the globe.'

"This general statement of the means to be resorted to, now embraced in what is called the *Receiving Magnet*, to render practical, writing or printing by telegraph, through long distances, was shown to me more in detail, early in the spring of the year 1837, (one thousand eight hundred and thirty-seven,) and I am enabled to approximate the date very nearly, from an accident that occurred to me, in falling on the ice formed of late snow in the spring of that year.

"The accident happened on the occasion of removing to Professor Morse's rooms in the New York University, some pieces of apparatus to prepare a temporary receiving magnet.

"The apparatus was arranged on a plan substantially as indicated in the drawings on sheet 2, accompanying this affidavit. 1 is a battery at one terminus of a line of conductors representing 20 miles in length, from one pole of which the conductor proceeds to the helix of an electro-magnet at the other terminus, (the helix forming part of the conductor); from thence it returns to the battery, and terminating in a mercury cup o, from the contiguous mercury cup p, a wire proceeds to the other pole of the battery. When the fork of the lever c, unites the two cups of mercury, the circuit is complete, and the magnet b, is charged and attracts the armature of the lever d, which connects the circuit of battery 2 in the same manner, which again operates in turn lever c, twenty miles further, and so on.

"This I depose and say, was the plan then and there revealed and shown to me by the said Professor Morse, and which, so far as I know, has constituted an essential part of his Electro-Magnetic Telegraph from that date till the present time."

The diagram referred to by the witness, is attached to the deposition, and exhibits the combination of the circuits of electricity claimed by Mr. Morse, as a part of his invention. Their construction is fully described, and their operation having been witnessed by the deponent, is described in his deposition. And,

This was the state of the invention early in the spring of 1837.

It fully appears that the completing of the invention had been retarded by the want of means by Mr. Morse. But in the spring of this year he appears to have been excited by the publication of an account of the invention of a telegraph by two French gentlemen, M. Gonon and Servel, which it was at first apprehended, from the terms of its announcement, was no other than the Electro-Magnetic Telegraph; but which afterwards turned out to be only a form of the common telegraph formerly in use, and he consented to a notice being taken in one of the newspapers of New York, of his invention, and renewed and increased his exertions to perfect and demonstrate its great superiority and value.

He was assisted by his fellow Professor, Dr. Gayle, in trying experiments, and in consideration thereof, and of his further assistance in such work, he presented him an interest in the invention, and by the united work of the two, from April to September, they were enabled to exhibit it in an improved form.

In the latter part of August, Dr. Gayle states the operations of the instrument were shown to numerous visitors, in the University. And he continues:

"It was on Saturday, the second day of September, 1837, that *Professor Dauberry, of the English Oxford University*, being on a visit to this country, was invited, with a few friends, to see the operations of the Telegraph in its then rude form, in the Cabinet of the New York City University, where it then had been put up, with a circuit of 1,700 feet of copper wire, stretched back and forth in that long room. I well remember that Professor Dauberry, Professor Torrey, and Mr. Alfred Vail, were present among others. This exhibition of the Telegraph, although of very rude and imperfectly constructed machinery, demonstrated to all present, the practicability of the invention; and it resulted in enlisting the means, the skill, and the zeal of Mr. Alfred Vail, who early the next week called at the rooms and had a more perfect explanation from Professor Morse, of the character of the invention."

"The doubt to be dispelled in Mr. Vail's mind, as he then stated, and has since frequently stated, was, whether the power by magnetism could be propelled to such a distance as to be practically effective. This doubt was dissipated in a few minutes' conversation with Professor Morse; and I have ever been under the full conviction that it was the means then disclosed by Professor Morse to Mr. Vail, to wit, the plan of repeating the power of magnetism at any distance required, which I have stated, that induced Mr. Alfred Vail and his brother, George Vail, at once to interest themselves in the invention, and to furnish Professor Morse with the means, material, and labor for an experiment on a larger scale." And,

This was the state of the invention in September, 1837.

Mr. Morse accordingly proceeded to have constructed a new, larger, and more perfect instrument for exhibition on an application for a patent to Washington.

Caveat.

In the mean time, on the — day of October, 1837, in order to protect his right to his invention, he filed his caveat in the Patent Office.

It is in these words:

"*To the Commissioner of Patents.*

The petition of Samuel F. B. Morse, . . . represents:—That your petitioner has invented a new method of transmitting and recording intelligence by means of electro-magnetism, which he denominates The American Electro-Magnetic Telegraph, and which he verily believes has not been known or used prior to the invention thereof by your petitioner. Your petitioner further states, that the machinery for a full, practical display of his new invention is not yet completed, and he therefore prays protection of his right till he shall have matured the machinery; and desires that a caveat for that purpose may be filed in the confidential archives of the Patent Office, and preserved in secrecy, according to the terms and conditions expressed in the act of Congress in that case made and provided; he having paid twenty dollars into the Treasury, and complied with other provisions of the said act.

New York, Sept. 28th, 1837."

These are the specifications annexed to the caveat:

"The nature of my invention consists in laying an electric or galvanic circuit or conductors of any length to any distance. These conductors may be made of any metal, such as copper or iron wire, or strips of copper or iron, or of cords or twine, or other substances, gilt, silvered, or covered with any metal leaf, properly insulated in the ground, or through or beneath the water, or through the air, and by causing the electric or galvanic current to pass through the circuit, by means of any generator of electricity, to make use of the visible signs of the presence of electricity in any part of the said circuit, to communicate any intelligence from one place to another.

"To make the said visible signs of electricity available for the purpose aforesaid, I have invented the following apparatus, namely:

"First. A system of signs, by which numbers, and consequently words and sentences, are signified.

"Second. A set of type adapted to regulate and communicate the signs, with cases for convenient keeping of the type, and rules in which to set up the type.

"Third. An apparatus called a Port Rule, for regulating the movement of the type rules, which rules, by means of the type, in their turn regulate the times and intervals of the passage of electricity.

"Fourth. A register, which records the signs permanently.

"Fifth. A dictionary or vocabulary of words, numbered and adapted to this system of telegraph.

"Sixth. Modes of laying the conductors, to preserve them from injury."

Here is a description of each of the articles of the invention, after which he concludes in these words:

"What I claim as my invention, and desire to secure by letters-patent, and to protect for one year, is a method of recording permanently electrical signs, which, by means of metallic wires, or other good conductors of electricity, convey intelligence between two or more places."

The new instrument, which Mr. Morse was enabled to have constructed by his arrangement with Mr. Vail, was completed in the latter end of this year, and in the succeeding February, 1838, it was exhibited in the Franklin Institute at Philadelphia, where it operated with success through a circuit of ten miles of wire; and a committee of the Institute made a report of its success.

It was thence removed to the city of Washington, where it was publicly exhibited in the hall of the House of Representatives, and a committee having been appointed to examine it, made a favorable report, and recommended an appropriation of thirty thousand dollars, to have effectually tested the utility of the invention. And,

This was the state of the invention early in the spring of 1838.

Petition for Patent and its Specifications.

The caveat was followed, on the 7th of April, 1838, by the petition of Mr. Morse for the patent. It is to this effect:

"Be it known, that I Samuel F. B. Morse, of the city, county, and State of New York, have invented a new and useful machine and system of signs for transmitting intelligence between distant points, by the means of a new application and effect of electro-magnetism, in producing sounds and signs, or either, and also for recording permanently, by the same means and application and effect of electro-magnetism, any signs thus pro-

duced, and representing intelligence, transmitted as before named, between distant points, and I denominate said invention the American Electro-Magnetic Telegraph, of which the following is a full and exact description, to wit:

"It consists of the following parts: First, Of a circuit of electric or galvanic conductors from any generator of electricity or galvanism, and of electro-magnets at any one or more points in said circuits."

Here he gives the several parts of which his invention consisted, and adds a long description of each of them, and then sums up what he had affirmed he had himself invented, in these words:

"What I claim as my invention, and desire to secure by letters-patent, is as follows:

"1st. The formation and arrangement of the several parts of mechanism constituting the type rule, the straight port rule, the circular port rule, the two signal levers, and the register lever, and alarm lever with its hammer, as combining, respectively with each of said levers, one or more armatures of an electro-magnet, and as said parts are severally described in the foregoing specification.

"2ndly. The combination of the mechanism constituting the recording cylinder, and the accompanying rollers and train wheels, with the formation and arrangement of the several parts of mechanism, the formation and arrangement of which are claimed as above, and as described in the foregoing specification.

"3dly. The use, system, formation, and arrangement of type and of signs, for transmitting intelligence between distant points, by the application of electro-magnetism, and metallic conductors combined with mechanism, described in the foregoing specification.

"4thly. The mode and process of breaking, by mechanism, currents of electricity or galvanism in any circuit of metallic conductors, as described in the foregoing specification.

"5thly. The mode and process of propelling and connecting currents of electricity or galvanism in and through any desired number of circuits of metallic conductors, from any known generator of electricity or galvanism, as described in the foregoing specification.

"6th. The application of electro-magnets by means of one or more circuits of metallic conductors, from any known generator of electricity or galvanism, to the several levers in the machinery described in the foregoing specification, for the purpose of imparting motion to said levers and operating said ma-

chinery, and for transmitting, by signs and sounds, intelligence between distant points, and simultaneously to different points.

"7thly. The mode and process of recording or marking permanently signs of intelligence transmitted between distant points and simultaneously to different points, by the application and use of electro-magnetism or galvanism, as described in the foregoing specification.

"8th. The combination and arrangement of electro-magnets, in one or more circuits of metallic conductors, with armatures of magnets, for transmitting intelligence by signs and sounds, or either, between distant points, and to different points simultaneously.

"9th. The combination and mutual adaptation of the several parts of the mechanism and system of type and of signs, with and to the dictionary or vocabulary of words, as described in the foregoing specification."

It appears that no objection was found to the issuing of the patent immediately, except that there had not been filed with the specifications a duplicate set of the drawings, and that the commissioner wrote in answer to an application for it, to this effect, on the 1st of May.

In England and France.

But Mr. Morse had conceived a hope, that he might secure a consideration for the use of his invention in foreign countries, as well as in the United States, and on the 15th of May he returned this answer to the commissioner, and departed the next day for Liverpool:

"*New York City University, May* 15, 1838.

"Hon. Henry L. Ellsworth.

"Dear Sir, — Excuse the delay in answering your letter of the 1st instant, relative to a duplicate set of drawings for my letters-patent. May I ask the favor of you to delay issuing the letters-patent until you hear from me in Europe, as I fear issuing them here will at present interfere with my plans abroad.

"I sail to-morrow in the ship Europe for Liverpool. Farewell."

In England a patent was refused to the American inventor, on the ground that some description of his invention — the substance of which will appear hereafter — had been published in the London Magazine.

But he was otherwise received in France.

In the French Academy of Science.

He communicated a description of his invention, and exhi-

bited the instrument in operation, before the French Academy of Sciences, on the 10th of September, 1838. And,

This is the account of the invention published in the "*Comptes Rendus*," the weekly journal of the Academy:

"*Applied Physics.*—Electro-Magnetic Telegraph of Mr. Morse, Professor in the University of New York."

"The instrument has been put in operation under the eyes of the Academy. The following is a literal translation of a large portion of the notice delivered by Mr. Morse to the Perpetual Secretaries:

"Mr. Morse conceives that his instrument is the first practicable application which has been made of electricity to the construction of a telegraph.

"This instrument was invented in October, 1832, whilst the author was on his way from Europe to America, in the packet ship Sully. The fact is attested by the captain of the ship and several of the passengers. Among the number of the latter, was Mr. Rives, the Minister of the United States near the French government.

(Here is given the account of Mr. Rives and Captain Pell, already set out. After which the account proceeds.)

"The idea of applying galvanism to the construction of telegraphs, is not new; Dr. Coxe, a distinguished citizen of Philadelphia, makes mention of it in a note inserted by him in February, 1816, in the Annals of Dr. Thompson, page 162, First Series: but he did not give any means of effecting it.

"Since the period to which the invention of Mr. Morse's telegraph goes back, other arrangements, founded on the same principles, have been announced, of which the most celebrated are those of Mr. Steinheil, of Munich, and of Mr. Wheatstone, of London. They differ very much in mechanism.

"The American Telegraph employs but one circuit,* the following is an abridged description of it:

"At the extremity of the circuit where the news is to be received, is an apparatus called the Register. It consists of an electro-magnet, the wire covering of which forms the prolongation of the wire of the circuit.

"The armature of this magnet is attached to the end of a small lever, which at its opposite extremity holds a pen; under this pen is a ribband of paper which moves forward as required,

* "Suppose the places to be put in communication with each other occupy the three angles of a triangle, the four angles of a quadrilateral, or certain points of a line inclosing a space, a single wire passing through all those points would be sufficient, at least according to theory."

by means of a certain number of wheels. At the other extremity of the circuit, that is to say, at the station from which the news is to be sent out, is another apparatus called the Port Rule; it consists of a battery or generator of galvanism, at the two poles of which, the circuit ends; near the battery a portion of this circuit is broken; the two extremities disjoined, are plunged into two cups of mercury near each other.

"By the aid of a bent wire attached to the extremity of a little lever, the two cups may be, at will, placed in connection with each other, or left separated; thus the circuit is completed and interrupted at pleasure. The movement of the mechanism is as follows:

"When the circuit is complete the magnet is charged; it attracts the armature, the movement of which brings the pen into contact with the paper. When the circuit is interrupted, the magnetism of the horseshoe ceases, the armature returns to its first position and the pen is withdrawn from the paper. When the circuit is completed and broken rapidly in succession, mere dots are produced upon the moving paper; if, on the contrary, the circuit remain complete for a certain length of time, the pen marks a line, the length of which is in proportion to the time during which the circuit remains complete. This paper presents a long interval of blank if the circuit remain interrupted during some considerable time. These points, lines, and blanks, lead to a great variety of combinations. By means of these elements, Professor Morse has constructed an alphabet and the signs of the ciphers. The letters may be written with great rapidity, by means of certain types which the machine causes to move with exactness, and which give the proper movements to the lever bearing the pen. Forty-five of these characters may be traced in one minute.

"The register is under the control of the person who sends the news. In fact, from the extremity called the Port Rule, the mechanism of the register may be set in motion and stopped at will. The presence of a person to receive the news is, therefore, not necessary, though the sound of a bell which is rung by the machine, announces that the writing is about to be begun.

"The distance at which the American Telegraph has been tried, is ten miles English, or four post leagues of France. The experiments have been witnessed by a committee of the Franklin Institute of Philadelphia, and by a committee appointed by the Congress of the United States. The reports of these committees, which we have not copied, are extremely favorable. The committee of Congress recommended the appropriation of thirty thousand dollars."

French Patent, 1838.

A patent was accordingly granted to Mr. Morse by the French government, but it yielded him no pecuniary profit.

It is dated on the 20th August, 1838, and was delivered to him on the 30th October afterwards. But,

The law of France required the invention to be put into use in two years, and on failure, the exclusive privilege of the patentee was forfeited. Mr. Morse had not the means of complying with the condition, and he returned home in 1838, with the hope of inspiring in his own countrymen sufficient confidence in his great invention. But the embarrassed condition of the country caused him to despair of success at that time, and being compelled to betake himself again to his pencil, he made no farther movement until the succeeding year.

American Patent, 1840.

On recurring to his former application for his patent, which had remained on the files of the office, the duplicate set of his drawings were still wanting; but having supplied this, and complied with some other directions of the Commissioner, the patent was issued.

It was sealed, and bears date June 20th, 1840.

The specifications filed in 1838, on the application for the patent, are annexed to it as part thereof. These specifications, or so much of them as may be necessary, will be set out hereafter, before or when they become the subject of discussion. But,

The confidence of the capitalists in an invention so extraordinary, and one promising such incredible results, could not be inspired, and the patentee was not able, himself, to construct a line of telegraphs, and introduce it into actual use, and he again applied to the Congress of the United States. This resulted in the appropriation of thirty thousand dollars, according to the recommendation of the committee in 1838, for the purpose of testing the practicability and utility of the system, under the superintendence of Mr. Morse. And,

This resulted in the construction of the line of telegraph from Baltimore to Washington, and a complete demonstration of the practicability and great public utility of his invention. And,

This was the state of the invention in June, 1844, twelve years after its conception.

Efforts were then made for the extension and multiplication of its advantages, but difficulties were encountered in the introduction and establishment of an affair of such novelty, and

requiring such a large amount of capital, and some time was necessary to overcome them.

The exertions were, however, continued, and with the success which the progress in the establishment of the telegraphs stated in the bill exhibits. And,

In the mean time, as will be presently seen, Mr. Morse continued his exertions to improve and perfect this great invention.

1840 *Patent Reissued*, 1846.

In January, 1846, the specifications of the invention and description of the mode of its operation having been supposed to be in some respects, defective, the patent was surrendered, and a new patent taken out in its stead.

The specifications annexed to this patent will be adverted to hereafter. It will be sufficient, for the present, to state that, in the summing up of what the patentee affirmed he had invented, there is found one article corresponding to the fifth and some of the other clauses in the specifications of the patent of 1840. He says,

"I also claim the combination of two or more circuits of galvanism or electricity, generated by independent batteries, by means of electro-magnetism, as above described."

It appears that, originally, the design was that this part of the invention was to be resorted to only in case the galvanic current of one battery should be found insufficient on a long line, to afford the motive power necessary to work the register and record the intelligence, and it does not appear that it had been, before this date, ascertained that the one battery and circuit would not be sufficient for any distance.

Patent of 1846 *for New Improvement.*

But, on the 16th April, 1846, Mr. Morse applied for, and obtained another patent for an improvement on his own original invention. And,

It appears from his representations, contained in the specifications annexed to this patent, that it had then been ascertained that the galvanic current generated by one battery, would be sufficient to continue the electric current on any length of line, and afford sufficient motive power to open and close the battery; but that it would not be sufficient, at any considerable distance, to work the register and make the record, unless this battery was made of great magnitude; and that by such battery the expense of the operation would be greatly increased.

He had, therefore, contrived what he called a receiver or receiving magnet, worked by a local battery, or battery situated

at the place to which the intelligence is transmitted, by which a second, but short, local circuit, connected with the main circuit, was opened and closed, and sufficient force given to the register to make the record.

The second patent is for this, and for other improvements, which he sums up in these words:

"What I claim as my invention, and desire to secure by letters-patent, is the receiving magnet, or a magnet, having a similar character, that sustains such a relation to the register magnet, or other magnetic contrivances for registering, and the length of the current or telegraphic line as will enable me to accomplish, with the aid of a main galvanic battery, and the introduction of a local battery, such motion or power for registering as could not be obtained otherwise, without the use of a much larger galvanic battery.

"I claim, as my invention, the use of a local battery and magnet, in combination with a battery and magnet connected with the main line or lines of conductors for the purpose above specified.

"I also claim the combination of the apparatus connected with the clock-work, for setting off the paper and stopping it with the pen lever, [M].

"I also claim the combination of the points affixed in the pen lever, with the grooved roller, [N] for marking on paper as above described."

But, on the 13th June, 1848, on the supposition there were some defects in the specifications of each of these two patents then extant, they were both surrendered and cancelled, and new patents obtained in the stead of each respectively. And,

These are the patents upon which the exclusive right to the employment of the telegraph now before us, is claimed by the complainant. But,

It is necessary, to a fair and intelligible statement and discussion of the case, that large portions of the schedules be set out in their own words.

1840 *Patent Reissued* 1848.

The patent itself, which is a reissue of the patents of 1846, which was a reissue of the original patent of 20th June, 1840, will be given at length, because the terms of it will be the subject of discussion hereafter, in connection with the statute. It is in the following words:

THE UNITED STATES OF AMERICA,

To all to whom these letters-patent shall come:

Whereas, Samuel F. B. Morse, Poughkeepsie, New York,

has alleged that he has invented a new and useful improvement in the mode of communicating information by signals, by the application of electro-magnetism, (for which letters-patent were granted on the 20th June, 1840, which letters-patent were surrendered and rescinded on the 15th day of January, 1846, which last letters-patent are hereby cancelled on account of a defective specification,) which he states has not been known or used before his application; has made oath that he is a citizen of the United States, that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same has not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of fifteen dollars, and presented a petition to the Commissioner of Patents, signifying a desireof obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose.

These are therefore to grant, according to law, to the said Samuel F. B. Morse, his heirs, administrators, or assigns, for the term of fourteen years from the twentieth day of June, one thousand eight hundred and forty, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement — a description whereof is given in the words of the said Samuel F. B. Morse, in the schedule hereunto annexed, and is made part of these presents.

The schedule annexed is in these words:

To all to whom these presents shall come:

Be it known that 1, Samuel F. B. Morse, now of . . . . , the State of New York, have invented a new and useful apparatus for, and a system of, transmitting intelligence between distant points by means of electro-magnetism, which puts in motion machinery for producing sounds or signs, and recording said signs upon paper or other suitable material, which invention I denominate the American Electro-Magnetic Telegraph, and that the following is a full, clear, and exact description of the principle or character thereof, which distinguishes it from all other telegraphs previously known; and of the manner of making and constructing said apparatus, and of applying said system, reference being had to the accompanying drawings making part of this specification. . . . . . .

Here follows a description of the instruments, and of the mode of their operation, which will be omitted here and adverted to hereafter.

These particular specifications and descriptions completed, the patentee sums up what he intends it should be understood

he had and had not invented; and after disclaiming all pretensions to the invention of what he says was before known,

He specifies what he affirms he had himself discovered or invented, and thus designates his improvement or improvements, a description whereof he had just before given in this his schedule, and which is made part of the patent.

"First. Having thus fully described my invention, I wish it to be understood that I do not claim the use of the galvanic current, or current of electricity, for the purpose of telegraphic communications, generally; but what I specially claim as my invention and improvement, is making use of the motive power of magnetism, when developed by the action of such current or currents, substantially as set forth in the foregoing description of the first principal part of my invention, as means of operating or giving motion to machinery, which may be used to imprint signals upon paper or other suitable material, or to produce sounds in any desired manner, for the purpose of telegraphic communication at any distances.

"The only ways in which the galvanic currents had been proposed to be used, prior to my invention and improvement, were by bubbles resulting from decomposition, and the action or exercise of electrical power upon a magnetized bar or needle; and the bubbles and deflections of the needles, thus produced, were the subjects of inspection, and had no power, or were not applied to record the communication. I therefore characterize my invention as the first recording or printing telegraph by means of electro-magnetism.

"There are various known modes of producing motion by electro-magnetism, but none of these had been applied prior to my invention and improvement, to actuate or give motion to printing or recording machinery, which is the chief point of my invention and improvement.

"Second. I also claim as my invention and improvement, the employment of the machinery called the register or recording instrument, composed of the train of clock-wheels, cylinders, and other apparatus, or their equivalent, for removing the material upon which the characters are to be imprinted, and for imprinting said characters, substantially as set forth in the foregoing description of the second principal part of my invention.

"Third. I also claim, as my invention and improvement, the combination of machinery herein described, consisting of the generation of electricity, the circuit of conductors, the contrivance for closing and breaking the circuit, the electro-magnet, the pen or contrivance for marking, and the machinery for sustaining and moving the paper, altogether constituting one ap-

paratus of telegraphic machinery, which I denominate the American Electro-Magnetic Telegraph.

"Fourth. I also claim as my invention, the combination of two or more galvanic or electric circuits, with independent batteries, substantially by the means herein described, for the purpose of obviating the diminished force of electro-magnetism in long circuits, and enabling me to command sufficient power to put in motion registering or recording machinery at any distance.

"Fifth. I claim, as my invention, the system of signs, consisting of dots and spaces, and of dots, spaces, and horizontal lines, for numerals, letters, words, or sentences, substantially as herein set forth and illustrated, for telegraphic purposes.

"Sixth. I also claim as my invention the system of signs, consisting of dots and spaces, and of dots, spaces, and horizontal lines, substantially as herein set forth and illustrated, in combination with machinery for recording them, as signals for telegraphic purposes.

"Seventh. I also claim as my invention, the types, or their equivalent, and the type rule and post rule, in combination with the signal lever or its equivalent, as herein described, for the purpose of breaking and closing the circuit of galvanic or electric conductors.

"Eighth. I do not propose to limit myself to the specific machinery, or parts of machinery, described in the foregoing specifications and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for making or printing intelligible characters, letters, or signs, at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer."

1846 *Patent Reissued* 1848.

This patent is the reissue of the patent of April, 1846, and is for a new and useful improvement in "electro-magnetic telegraphs." It grants the exclusive use to the patentee for the term of fourteen years, from the eleventh day of April, 1846, and refers in the common form to the schedule annexed for the specifications of the improvement. This schedule is in these words:

"Be it known that I, Samuel F. B. Morse, ... have invented a new and useful improvement in the Electro-Magnetic Telegraph, and I do hereby declare that the following is a full, clear, and exact description of the object, construction, and operation thereof, reference being had to the accompanying drawings, and making part of the same.

"Object of the invention.

"The original and final object of all telegraphing, is the communication of intelligence at a distance by signs or signals.

"Various modes of telegraphing, or making signs or signals at a distance, have for ages been in use. The signs employed heretofore have had one quality in common. They are evanescent—shown or heard a moment, and leaving no trace of their having existed. The various modes of these evanescent signs have been by beacon fires of different characters, by flags, by balls, by reports of firearms, by bells heard from a distant position, by movables, arms from posts, &c.

"I do not, therefore, claim to be the inventor of telegraphs generally. The electric telegraph is a more recent kind of telegraph, proposed within the last century, but no practical plan was devised until about sixteen years ago. Its distinguishing feature is the employment of electricity to effect the same general result of communicating intelligence at a distance by signs or signals.

"The various modes of accomplishing this end by electricity have been,

"The employment of common or machine electricity, as early as 1787, to show an evanescent sign by the divergence of pith balls.

"The employment of common or machine electricity, in 1794, to show an evanescent sign by the electric spark.

"The employment of voltaic electricity, in 1809, to show an evanescent sign by the evolution of gas bubbles, decomposed from solution in a vessel of transparent glass.

"The employment of voltaic electricity in the production of temporary magnetism, in 1820, to show an evanescent sign by deflecting a magnet or compass needle.

"The result contemplated from all these electric telegraphs was the production of evanescent signs or signals only.

"I do not, therefore, claim to have first applied electricity to telegraphing for the purpose of showing evanescent signs and signals.

"The original and final object of my telegraph is to imprint characters at any distance as signals for intelligence; its object is to mark or impress them in a permanent manner.

"To obtain this end, I have applied electricity in two distinct ways. 1st. I have applied, by a novel process, the motive power of electro-magnetism, or magnetism produced by electricity, to operate machinery for printing signals at any distance. 2dly. I have applied the chemical effects of electricity to print signals at any distance.

"The apparatus or machine with which I mark or imprint

signs or letters for telegraphic purposes at a distance, I thus describe."

Here follows a description of the instruments, and of how they are employed. After which the patentee sums up, and specifies what he affirms he had invented, and desires to have secured to him by the grant, in these words:

"First. What I claim as my invention, and desire to secure by letters-patent, is the employment, in a main telegraphic circuit, of a device or contrivance called the receiving magnet, in combination with a short local independent circuit or circuits, each having a register and register magnet, or other magnetic contrivances, for registering, and sustaining such a relation to the register magnet, or other magnetic contrivances for registering, and to the length of circuit of telegraphic line, as will enable me to obtain, with the aid of a galvanic battery and main circuit, and the intervention of a local battery and local circuit, such motion or power for registering as could not be obtained otherwise without the use of a much larger galvanic battery, if at all.

"Second. I also claim as my invention, the combination of the apparatus called the self-stopping apparatus, connected with the clock-work by the register, for setting said register in action, and stopping it with the pen lever F, as herein described.

"Third. I also claim as my invention the combination of the point or points of the pen and pen lever, or its equivalent, with the grooved roller, or other equivalent device, over which the paper, or other material suitable for marking upon, may be made to pass for the purpose of receiving the impression of the characters; by which means I am enabled to mark or print signs or signals upon paper or other fabric, by indentation, thus dispensing with the use of coloring matter for marking, as specified in my letters-patent of January 15th, 1846."

But the Telegraph itself, constructed according to the specifications of the patents, and in actual use, having been exhibited and given in proof, it is necessary, in order to put on paper the case which has been heard, that the instruments themselves be described.

Description of the Telegraph.

It consists of, —

1. The main circuit with its battery
2. The key with the signal lever.
3. The local circuit with its battery.
4. The receiver, or mutator, with its electro-magnet.
5. The register, with its electro-magnet, pen lever, and grooved roller.

It will be observed, that in this description the relay magnet, as it was called, by which the combination of the circuit was originally effected, will not be found. It has been substituted by the subsequently invented receiver or mutator, on the same principle by which the main circuit is combined with each local circuit, or circuit in the telegraph office, whereby sufficient motive power is obtained to work the register. And,

That the port rule is also absent. It has been supplied by the improved register and pen lever, with its pen point and grooved rollers in connection. And,

It will be observed that the telegraphic dictionary has been also abandoned; and that the characters indented by the pen constitute an alphabet, differing in little else beside the figure of the letters from the common alphabet; and which is therefore read, not by a peculiar dictionary, but as common manuscript.

Nothing occurred in the case which makes it necessary to describe the self-stopping apparatus.

The main circuit of conductors, in connection with the principle battery, and key with its pen lever, which operates upon it, may be thus described.

It is begun in a plate of copper buried in the ground under the first telegraph office, and consists of these conductors:

A copper wire, having one end inserted in the copper plate, and the other in one pole of the galvanic battery, in a room of the office.

Another copper wire, with one end inserted in the other pole of the battery, and after passed through the rooms as may be convenient, with the other end of it extended up and inserted in and under one end of a short bar of brass, which is part of the instrument called the key.

We will here stop the description of the circuit of conductors, and describe this instrument.

Key with its Signal Lever.

This key consists of a cross formed of two flat bars of brass, about two or three inches long, screwed down upon the table, or upon a pedestal fixed upon the table; on each end of the arms of this cross there rise similar bars, after the manner of the sights of a surveyor's compass, about a couple of inches high. These support the fulcrum of the signal lever. This fulcrum of the lever is a steel cylinder extended between the two upright bars on the arms of the cross, with its ends terminating in axles extending through the bars near the upper ends, so that it may be turned when the lever is worked.

The lever is a bar of brass fixed with its centre upon this ful-

crum. It is horizontal when at rest, and is kept in its position by a spring fixed under its fulcrum and extended back. A sort of button of brass is fixed immediately under the front end of the lever, and in proximity to the foot of the cross; so that when the lever is pressed down it is brought into contact with it and the end of a wire which is extended up through its centre. This button is so contrived that, by a short lever extended from it, it is turned from or brought into contact with the cross. We now return to the circuit of conductors.

It is in and under the head of this cross that the wire from the battery was inserted; and this bar constitutes the next conductor.

There are now here two conductors — one the conductor when intelligence is not being transmitted from the office, and the other when intelligence is being transmitted from the office. When intelligence is not being transmitted, then, after this bar of the key, the button having the brass wire through its centre is the conductor. But when the position of the button is so changed that it is not in contact with this bar, then it is not the next conductor, and the right and left hand arms of the cross and the fulcrum are the next conductors, and the signal lever pressed down and brought into contact with the button, is the conductor to it and the wire projecting up through it.

When intelligence is to be transmitted from the office, the operator changes the position of the button, brings it out of contact with the foot of the cross, and the circuit at this point is broken, and the lever constituted the conductor next the button towards the key. The operator has then command of the circuit for his operation. By pressing the key down into contact with the button, the circuit is closed; and the pressure off, the circuit is broken. This produces the corresponding action of the pen lever, which registers the intelligence he sends off.

We now return to the circuit of conductors.

The wire extended from the button is the next conductor. It is copper, and is extended down under the table, and then up through it near the pedestal of the receiving magnet, situated on the table at a convenient distance from the key, and inserted in a brass standard near its upper end, which stands on one corner of the pedestal of this receiver, which will be presently described. And,

This standard is the next conductor.

The next is a small brass wire, extending from the foot of this standard up through the pedestal into proximity to the horseshoe magnet. This wire, prolonged and covered with silk, is wound around the shanks of the horseshoe, first around the one end, and then around the other, and made to constitute

the helices of the magnet; after which it is returned down through the pedestal, and inserted in the foot of another standard on another corner of the pedestal of the magnet. And,

This standard is the next conductor.

The next, is the brass wire with one end inserted into the standard near its upper end, and the other, after its extension out of the office, united to the iron wire on the posts.

This iron wire is the next conductor to the next office. On entering this office, it is united to the end of a copper wire, which has its other end inserted in and under the head of the cross of the key in the office. Thence the circuit is continued through the instruments of this office as in the first office, when it is again extended out upon the posts to another office; and thus through any number, and over any distance, to the last office, of the circuit. It is then, after being passed through the instruments of this office, as in the other offices, extended down and fastened in a plate of copper in the ground.

The earth, it is said, constitutes the conductor from this copper-plate to the other, from which we set out, and thereby the circuit is completed.

We will now return and describe the receiver, more properly called the mutator.

Receiving Magnet.

This magnet rests on the pedestal, which has been already mentioned, eight or ten inches long, and four or five broad, with the axis of its helices horizontal, and parallel to the sides of its pedestal, and with what corresponds to the front part of the horseshoe presented to the left, in proximity to the two standards we passed on the circuit.

It is kept in its position by a brass bar extended across the helices, near the heels of the horseshoe, and pressed, and kept firmly upon them, by a screw extended down from either end, into the pedestal.

Its heels present themselves to a horizontal armature of a movable upright lever, within their attractive power; and which, it will be presently found, is one of the conductors of the local circuit.

This local circuit can now be described. It begins in a galvanic battery in the office, and consists of these things:

A copper wire, with one end inserted in one pole of the local battery in a room of the office, and the other end brought up through the table, and screwed into an upright brass bar or standard near its upper end, standing on the back right hand corner of the pedestal of the receiver.

The next conductor is this standard. And then,

A copper wire extended from its lower end under the pedestal

and there connected with a steel cylinder; which constitutes the fulcrum, on which stands the movable lever already mentioned in describing the main circuit.

This cylinder is horizontal, parallel to the heels of the magnet, but below them, is fixed in a channel across the pedestal; and has its ends in sockets, in which it turns and allows the lever which stands upon it, to move forward and back. And,

This lever is the next conductor.

It stands perpendicular, and is held in this position by a spiral spring extended from behind it and holding it back against the end of a screw, projected in like manner against its back; but which, when the armature, fixed across it, is attracted by the heels of the magnet, readily consents to its motion forward, to meet near its upper end another conductor, which will be presently described, and when the attraction is not, as quickly withdraws it to its former position.

We will now return back to the local battery, and commence at its other pole.

The first conductor thence, in this direction, is another copper wire.

This has one end inserted in the battery, and after being extended around, according to the situation of the room, has its other end brought up under the table near the electro-magnet of the register, where it is united to a small wire, which is the next conductor.

It is prolonged and wound on the horseshoe bar, in like manner with the wire on the main circuit, and made to constitute the helices of this magnet, and then has its other end fastened to a large wire. And,

This wire is the next conductor.

It is extended under the table, and afterwards brought up, and has its other end screwed into a brass standard, upon the right-hand front or remaining corner of the pedestal of the receiver. And this standard is the next conductor.

It is succeeded by a brass wire, extended from its lower end under the pedestal, and brought up between the helices of the receiving magnet, to the under side of the horizontal bar, which we lately left extended across the helices near the heels of the magnet, and there inserted in this bar.

Immediately over this end of this wire, and fixed upon this horizontal bar, stands a perpendicular bar, which is the next conductor. And,

The last conductor, is a brass screw, which passed through this bar, near its upper end, and extended out horizontally from it, presents its platina point to the movable lever, which we lately left in describing the conductors from the other end of the

battery, ready to close the circuit whenever attracted forward by the heels of the magnet presented to its armature below.

When, by the act of the operator on his signal key, the main circuit is complete or "closed," as it is called, the horseshoe is instantly an electro-magnet, and the armature of the lever, attracted towards, not to, its heels, the lever is brought into contact with the platina point of the brass screw, presented to its front, and the local circuit of conductors is "closed;" and the horseshoe whereon we just said the wire of the local circuit had formed the helices, being converted into an electro-magnet, for the register, instantly acts upon the pen lever, in the register, in the mode we will presently describe, and records the intelligence which the operator proposed.

This done, and the main circuit broken, the spiral spring behind the lever, which had before readily assented to its attraction forward, as quickly withdraws it to its former position, and awaits another signal.

Register, Pen Lever, and Grooved Rollers.

The register consists of a horseshoe magnet, the pen lever, a spiral spring, the grooved rollers, and the clock-work, all fixed in a proper frame upon a brass pedestal ten or twelve inches long, and about half that breadth, fixed down upon the table at a convenient distance from the other instruments.

The magnet is fixed on the right-hand end of the pedestal, the axis of the helices perpendicular, and the heels upwards, presenting themselves to an armature of the pen lever within their attraction above.

The pen lever is a brass bar. It rests in a horizontal position, with one end extended to the right, across the heels of the magnet, where its armature is fixed across it, and the other extended to the left towards the rollers.

It has for its fulcrum a steel cylinder, fixed across its centre, with its ends in sockets in the frame work. It is held to the position by the spiral spring, extended from the lower end of a bar fixed in, and extended down from, the centre of the fulcrum, and thence extended back towards the magnet, and made fast, which, by its facile extension, instantly assents to the action of the lever with its pen; and as quickly withdraws it.

The rollers are fixed each with its axis in the frame work, one with its axis on a level with the lever, the other with its axis over the line of the periphery next the lever of the lower roller.

The pen, fixed upon this end of its lever, and projected forward, presents its point upwards, in proximity to the centre of this upper roller, in proper direction for action upon the paper in its transit over it, when cast up by the attraction, down, of the other end of the magnet.

The paper is guided from above this upper roller, and passed around it, and between the two rollers, and by their revolution is drawn forward at a rate suited to the action of the pen.

There is around each roller, under the paper and exactly opposite the pen, a narrow groove of such depth that the pen point, in making its indentations on the paper, does not extend to the metal of the roller, whereby its point is preserved, and the line of characters on the paper is kept from contact with either roller, and protected from being dimmed by the compression of the paper, in its transit between them.

The revolution of the rollers is by the clock-work on the left.

The rollers having been put in motion, the electro-magnet charged, the armature with that end of the lever attracted down, and the other cast up, the pen with its point indents a character upon the paper, and the magnet discharged, the spiral spring has brought down the pen, and holds it in position for a repetition of the act.

But we will return to the signal key, or correspondent, stationed in the distant office whence the intelligence is to be transmitted, and follow it in its course and see it recorded.

The operator, having been put in possession of the intelligence, and broken the circuit in the lower conductors of his key, and thereby made his signal lever a conductor of the main circuit, applies his hand upon the signal lever and presses it down upon the conductor below, the main circuit is instantly closed, the horseshoe within the helices of this main circuit is a magnet, the armature has drawn its movable lever into contact with the platina point, the local circuit is closed, the horseshoe within the helices of this circuit is an electro-magnet, the armature of the pen lever is upon its heels, the other end of the lever has cast up the pen, and indented an intelligible character upon the paper.

The operator's hand taken off, and the main circuit is broken, the receiver within it is not a magnet, the movable lever has been withdrawn, by its spring, from the platina point, the local circuit is broken, the register magnet is no longer a magnet, and the pen has been sprung down from the paper, and stands ready to repeat and add another character of the intelligence.

The operator's hand upon his lever, and another character is added. And,

These are the characters recorded, and how they are read: ·— is A, —··· is B, ··· is C, —·· is D, · is E, ·—· F, ——· is G, ···· is H, ·· is I, —·—· is J, —·— is K, —— is L, —— is M, —· is N, ·· is O, ····· is P, ··—· is Q, ··· is R, ··· is S, — is T, ··— is U, ···— is V, ·—— is W, ·—·· is X, ···· is Y, ···· is Z, ···· is &, and such is the alphabet.

Then -——-is 1, --—-- is 2, ---—- is 3, ----— is 4, —
—— is 5, ------ is 6, ——-- is 7, —---- is 8, —--— is 9,
——— is 0; and these are the numerals.

The holding down the lever an instant indented one dot, (-), the holding it longer made a dash (—) of a length corresponding to the time. The dots were made at distances corresponding to the time the hand was held *off* the lever. And,

This is the Telegraph and its operations before us.

(Judge Monroe then proceeded to examine the law and evidence upon all other points in the case, and then passed the following decree.)

Decree of the Circuit Court, 12*th November,* 1849.

It is found and adjudged by the court that the letters-patent of the United States to the complainant, Samuel F. B. Morse, for his invention of a new and useful improvement in the mode of communicating information by signals, by the application of electro-magnetism, originally issued June 20th, 1840, but reissued on the 15th day of January, 1846, and afterwards finally reissued on the 13th of June, 1848, in their bill exhibited and read on the hearing of this cause, are valid and effectual acts of the government; and that the complainants are thereby, and by the assignments by them in their bill alleged, vested with the exclusive rights thereby granted. And

It is found and adjudged by the court, that the defendants have, in those rights, disturbed the complainants as in their bill alleged; that they, the defendants, after the grant thereof to the patentee, Samuel F. B. Morse, and his assignments to his co-complainants, and after the final reissue of the letters-patent above mentioned, did, within the district of Kentucky and elsewhere, wrongfully construct, and unlawfully employ, a telegraph, consisting of combined circuits of electricity, worked by the motive power of electro-magnetism, substantially the same plan of construction and principle of operation with the telegraph of the said Morse in his letters-patent described and specified; and by which intelligence, which was in one station, was, by the defendants, transmitted to other distant stations, by making thereat a permanent record thereof in the alphabetical characters described and specified in the letters-patent to the said Morse, and did thereby violate and infringe the exclusive rights so granted by the United States to him, the said Samuel F. B. Morse, and invested in the complainants as above found; and it is considered that the injunction heretofore granted herein was rightfully awarded and enforced.

It appears, however, by the document itself, read by the com-

plainants among their proof, that the patentee, Samuel F. B. Morse, had, on the 30th day of October, 1838, prior to the issuing of his original patent, awarded by the United States for his original invention, obtained of the government of France a patent for the invention of his Electro-Magnetic Telegraph, in principle and plan of construction the same with that described in his said letters-patent so afterwards obtained of the United States. And

It seems to the court that the exclusive right of the complainant, in respect to his original invention, is limited by this foreign patent to the term of fourteen years from its date.

It is therefore ordered, adjudged, and decreed, that the defendants, their servants, and agents, be, and they are hereby, enjoined and commanded that they, and each of them, do still desist, and shall for and during the term of fourteen years from the 30th day of October, 1838, altogether refrain, from all and every use of the Electro-Magnetic Telegraph, which the complainants in their bill charged was, by the defendants, employed in violation of their rights, which, in its several forms is described in the proofs of the cause, and denominated by the witness in the depositions, and by defendant, O'Reilly, in his answer, the Columbian Telegraph, in the transmission of intelligence which is in one place to another distant place, by making thereat a permanent record in the alphabetical characters in the patent of Samuel F. B. Morse for his original invention specified; or by making thereat, with the action of the instrument which would make such characters, alphabetical sounds, and out of them composing such characters or words in the ordinary alphabet; and from the using of such telegraph, or any part thereof, in any other mode, in violation of the exclusive rights so granted by the United States and vested in the complainants; and that they shall, for and during the said term of fourteen years, refrain from making, constructing, or vending to be used within the district of Kentucky, any other telegraph consisting of combined circuits of electricity, worked by the motive power of electro-magnetism, on the plan and principle of the Electro-Magnetic Telegraph of the complainant, Morse, described and specified in his letters-patent, by which intelligence shall or may be transmitted by making, in the mode above stated, a record thereof in the said alphabetical characters of the said Samuel F. B. Morse, or in an alphabet formed on the same plan and principle, or by making in such mode sounds, whereof such characters shall or may be composed, in the violation and infringement of the exclusive right of the complainants as they are above adjudged.

It is also found and adjudged by the court, that the letters-patent of the United States to Samuel F. B. Morse, for his in-

vention of "a new and useful improvement in electro-magnetic telegraph," originally issued on the 11th day of April, 1846, but afterwards reissued on the 13th of June, 1848, with the amended specifications of the improvements invented, which is in the bill of the complainants exhibited, and made part of the record of this cause, is a valid and effectual act of the government; and that the complainants are thereby, and by the assignments in their bill alleged, vested with the exclusive rights thereby granted. And

It is found and adjudged, that the defendants have disturbed the complainants in these their exclusive rights. It is found that the defendants, before and after the issuing of the said last mentioned letters-patent of the 13th June, 1848, in renewal of the said former patent, did, within the district of Kentucky and elsewhere, wrongfully cause to be constructed, and did unlawfully use and employ as a part of the Electro-Magnetic Telegraph, denominated the Columbian Telegraph, an instrument denominated by them the mutator, in plan of construction, principle of operation, and in the purpose accomplished by it, substantially the same with the improvement described and specified in the said last mentioned letters-patent to the complainant, Morse, which consists of the contrivance called, in his schedule to his patent, the receiving magnet, and which is by this denomination described and specified under the head of the first claim of the improvements in his schedule. And

That they did, in like manner, cause to be constructed, and unlawfully employ, as another part of the said Columbia Telegraph, certain other apparatus and instruments and combinations thereof, in plan of construction, principle of operation, and purpose, substantially the same with the improvements of the register invented by him, the said Samuel F. B. Morse, and in the schedule described and specified as the third thing claimed by him as his invention, consisting of the combination of the point of the pen and pen lever, with the grooved roller over which the paper is passed, and receives the indentations of his alphabetical characters, and whereby is dispensed with the use of the coloring material, as specified in the patent for the original invention of the telegraph, first above mentioned, issued and bearing date January 15th, 1846. And

It is found that the said telegraph, called the Columbia Telegraph, containing and consisting in part of the said two improvements of the said Morse, described and specified in his said last mentioned letters-patent, was by the defendants employed, before and after the last issue of the said last mentioned letters-patent, within the district of Kentucky and elsewhere, in the transmission of intelligence in the mode above mentioned,

in violation and infringement of the exclusive right so granted by the United States by these last mentioned letters-patent, and held by the complainants as by them alleged and by the court adjudged.

It is therefore ordered, and adjudged, and decreed, that the defendants, their servants and agents, be and they are hereby enjoined and commanded that they and each of them do still desist, and shall forever, and during the term of fourteen years from the eleventh day of April, eighteen hundred and forty-six, altogether refrain from all and every use and employment of the above-mentioned telegraphic instruments, denominated the mutator, in the combination with the other above-described instruments of such telegraph, or in any other combination on the same plan and principle, in the transmission of intelligence in the district of Kentucky. And

That they do still desist, and for and during the said term of fourteen years, refrain from all and every such employment in the transmission of intelligence within the district of Kentucky, of the above-mentioned improvement of the complainant, Morse, in the register of his telegraph, whereby is accomplished the making of his alphabetical characters before mentioned, described, and specified by indentation instead of by coloring matter, in violation of the exclusive rights of complainants, by them held under the aforesaid letters-patent as above adjudged. And

That the defendants shall, for and during the said term of fourteen years from the said eleventh day of April, eighteen hundred and forty-six, refrain from constructing or vending to be employed in such transmission of intelligence, within the district of Kentucky, any of the above-mentioned improvements, either the instrument denominated the mutator, the improved register of said Morse, or any other of the improvements in the Electro-Magnetic Telegraph, so described and specified in said letters-patent as the invention of the said Samuel F. B. Morse, and whereof the exclusive right is granted him; and that they shall in no otherwise, for the term aforesaid, violate, or in anywise infringe, the aforesaid rights of the complainants within said district of Kentucky. And

It is ordered, that the complainants may have the proper writs of execution on what is above decreed.

(The decree then went on to provide for damages, which part is omitted.)

The defendants appealed from this decree.

The cause was argued in this court by *Mr. Gillet* and *Mr. Chase* for the appellants, and *Messrs. Campbell* and *Harding* of Philadelphia, and *Mr. Gifford* of New York for the appellees.

It is impossible for the reporter to do more than merely state the positions assumed by the respective counsel.

The counsel for the appellants contended

First. Morse's patent of 1840 is void, because it runs fourteen years from the date of its issue, instead of that length of time from the date of his French patent.

Second. In construing a patent, and deciding what are the inventions patented thereby, the summing up is conclusive. Nothing is patented but what is expressly claimed, in the summing up, as the invention.

Third. What is described in a patent and not claimed, whether invented by the patentee or not, is dedicated to the public, and cannot be afterwards claimed as a part of his patent, in a re-issue or otherwise.

Fourth. A patent void in part is void in whole, except when otherwise provided by statute.

Fifth. An invention is not complete, so as to be patentable, or to bar the obtaining a patent by another inventor, until it is perfected and adapted to use.

Sixth. Where a patent is for a combination of parts, and not for the different parts composing the combination, the use of any of those parts less than the whole is not an infringement.

Seventh. Morse's patents of 1846 and 1848 are void, because he was not the first inventor of the things patented, or of substantial and material parts thereof.

Eighth. Morse's reissued patents, dated June 13, 1848, are void, because he has not shown that the surrendered patents were inoperative or invalid for defective specification, or otherwise, so as to confer on the commissioner, jurisdiction to make such reissues. The surrendered patents being set out, disprove any such jurisdiction.

Ninth. The patent of 1840, as secondly reissued, is void, because the commissioner had no authority to accept a second surrender and make a second reissue.

Tenth. Morse's patent of 1840, as secondly reissued, is void, because it is broader than the invention originally patented.

Eleventh. Morse's patent of 1846 is void,

1. Because material parts of it had been known and in public use before his application.

The first claim covers the inventions for connecting circuits used by Davy, Wheatstone, and Henry, in 1837.

2. Because the same was described by Henry in Silliman's Journal, and in the London Mechanics' Magazine, containing an account of Davy's invention; and by Vail, in giving Morse's and others.

3. Because the same invention, or a substantial part thereof,

was patented by Wheatstone, Davy, and Morse himself, prior to his application for his patent of 1846.

This first claim in the reissue of the patent of 1846, is the same thing as the fourth claim of the last reissue of the patent of 1846.

The account given by Henry and Moss shows that Henry's, Wheatstone's, and Davy's, were the same as Morse's first claim of the reissue of the patent of 1846.

Twelfth. Morse's reissue of 1846 is void, because it is broader than the original.

1. He claims the employment of a receiving magnet, or its equivalent, in combination with a short, local, independent circuit, having a register magnet, to obtain power.

There is no such claim in the original. He there claimed the invention of the receiving magnet, or registering contrivances, which sustained certain relations, as would enable him to obtain power, &c., without mentioning a short, local, independent circuit. He now claims two short local circuits. The claim is materially enlarged.

2. His third claim is for a combination which includes the pen lever or "its equivalent," and for any thing over which paper may be passed for the purpose of receiving the impression of characters, &c., by indentation on paper and other fabrics, dispensing with coloring matter, &c.

Here is a palpable enlargement of his claim.

3. His historical recital is an unauthorized addition, and not necessary to perfect his specification.

Thirteenth. The surrender and reissue on account of a defective specification authorizes amendments only, and not changing the specification into a new one, nor does it authorize new claims.

Fourteenth. In the second reissue of the letters of 1840, Morse patents a principle or effect, and not a machine, manufacture, or composition of matter, or an improvement upon either; and it is therefore void.

The counsel for the appellees considered the patents separately, viz.

Patent of 1840. Reissued 1848.
Patent of 1846. Reissued 1848.
Patent of 1840. Reissued 1848.

To this patent, and the claim under it, five defences are presented:

It is alleged by the appellants

I. That it is void by reason of an alleged error in date— (*i. e.* not date of French patent.)

II. That the things claimed in the fifth, the sixth, and the eighth claims are not patentable.

III. That Morse was not the inventor of substantial parts of the improvement as claimed.

IV. That the description in the specification is insufficient.

V. That the appellants do not infringe.

(Each one of these heads was examined separately. The particular attention bestowed by the court to the following head, renders the insertion of the view of the counsel proper.)

II. *Are the 5th, 6th, and 8th Claims Patentable?*

1. Of the 5th and 6th. The fifth, is a claim to the system of signs, composed of dots, spaces, and horizontal lines, (susceptible of being variously combined, representing numerals, words, and sentences,) for telegraphic purposes; being an improved instrumentality in the art of telegraphing by electricity or galvanism.

The sixth, is a claim to the art — consisting of the marking the signs, composed of dots, spaces, and horizontal lines, (susceptible of being variously combined, representing numerals, words, and sentences,) by closing and breaking a galvanic circuit more or less rapidly for telegraphing; combined with machinery to record them.

An art is patentable by the act of 1836, and so is an improvement on it. Whittemore *v.* Cutter, 1 Gall. 478; Phillips on Patents, 102, 110; King *v.* Wheeler, 2 Barn. & Ald. 349; Crane *v.* Price, Webster's P. C. 409; Sch. Bk. *v.* Kneass, 4 W. C. C. R. 9 and 12; McClurg *v.* Kingsland, 1 Howard, 204; Curtis on Patents, sect. 37; French *v.* Rogers, Opinion Judges Grier and Kane; Pamphlet, Kane, J., Parker *v.* Hulme, p. 7.

The art is distinct from the means employed in its exercise; both may be, and under this patent are, patented.

II. Of the eighth claim.

This claim is declaratory, and is to the effect that, having been the first to conceive and carry into effect a plan for imprinting telegraphic characters by the power of electro-magnetism, he negatives the idea that the mere instrumentalities described in his patent constitute the whole of the invention claimed by him, or even the most important part thereof, or that he intended to surrender to the public the conception he had reduced to practical utility, should anybody else be able to devise other means for accomplishing the same end, by the use of the same power, but claims it as his property.

He who discovers a principle and devises one mode by which the same can be rendered practically useful, is entitled to a patent which shall protect him to the full extent of his invention and against all other devices for using it.

If Morse, therefore, was the first to discover that the power of electro-magnetism could be used for the purpose of recording telegraphic signs, and devised one practical mode for using it, he may, by a general claim, secure to himself the right of so applying it, as well as the particular devices by which he did so.

London Jour. and Rep. Arts, 1850, p. 130; Jupe *v.* Pratt, Webster's P. C. 145, 146; Forsyth's Patent, Webster's P. C. 96, 97; Crane *v.* Price, Webster's P. C. 409, 410; Park *v.* Little, 3 Wash. C. C. Rep. 197.

See the cases collected in Lund on Patents, Law Lib. Sept. 1851, p. 37, illustrating the proposition that the rights of the patentee are not restricted to the particular application or embodiment of his invention, but extend to the exclusion of other like applications.

Judge Kane's opinion, Blanchard's case; Fr. Inst. Jour. 1847; and Pamphlet, Parker *v.* Hulme, Judge Kane's opinion.

Patent of 1846. *Reissued* 1848.

The defences suggested by the appellants to this patent are,

I. That the improvement is not sufficiently described, and that the improvement is not sufficiently discriminated.

II. That it is for the same invention that was patented to Morse in the patent of 1840.

III. That it was in use and on sale with patentee's consent, before his application for a patent.

IV. That Morse was not the inventor.

As to the 4th head, the counsel for the appellees contended that the following list was shown by the evidence to have been invented by Morse:

1. He was the first person who employed an electro-magnet placed in a long circuit for telegraphic purposes.

2. He was the first person who devised suitable machinery for recording, and adapted such machinery to an electro-magnet placed in a long galvanic circuit.

3. He was the first person who employed an electro-magnet placed in a long galvanic circuit to open and close another long galvanic circuit for telegraphic purposes.

4. He was the first person who employed an electro-magnet placed in a long galvanic circuit, to open and close a short local circuit at a distance for telegraphic purposes.

5. He was the first person who placed in the course of a long galvanic circuit at various distances apart, a series of electro-magnets, to open and close, at one and the same time, a corresponding series of short recording circuits, by means of which arrangement an operator at one station could simultaneously record at a series of distant telegraphic stations.

6. He was the first person who adapted to an electro-magnet placed in a long galvanic circuit, suitable machinery for recording the establishment and duration of a galvanic current through such a long galvanic current.

7. He was the first person who devised a process or mode of establishing and continuing at determinate intervals of time a galvanic current through a circuit of conductors, and of recording the establishment of such current in dots and lines.

8. He was the first person who devised a system of signs formed of the combination of dots and lines, and so applicable to the above process of recording, as to render it available for representing at a distance, letters, words, and sentences.

9. He was the first person who employed electro-magnetism, when developed in the manner and by the means specified, to produce distinguishable signs for telegraphing.

10. He was the first person who adapted to an electro-magnet a lever with an adjustable reacting spring, and adjustable stops for limiting the play of such armature, and thus formed a receiving electro-magnet, susceptible of nice regulation so as to operate equally with the varying force of the galvanic currents in a long or main circuit.

11. He was the first person who combined such an electro-magnet in a long circuit with a short recording circuit, to be opened and closed by such electro-magnet.

12. He was the first person who devised and constructed an apparatus or machine for telegraphing, consisting of the several following parts, sustaining to each other the several following relations, and performing the several following functions respectively:

1. A main circuit	which consists of	a long conductor extending through several stations,	the function of which is	to transmit the galvanic current through its whole length whenever it is closed.
2. A main battery series	"	a number of cups arranged along the main conductor,	"	to supply the main conductor with a current sufficient to work the electro-magnets in its course.
3. Operating keys	each of which consists of	a small metalic lever,	"	to break and close the main circuit.
4. A series of receiving magnets	"	an electro-magnet, with lever, and reacting spring,	"	to close the office circuit when a current passes through the main circuit.
5. Adjusting screws	"	movable screws to regulate force of reacting spring and play of lever,	"	to render receiving magnets sensitive to varying force of main current.

6. Office circuits	each of which consists of	a circuit of conductors limited to each office,	the function of which is	to transmit the power to mark the paper.
7. Office battery series	"	a certain number of Grove cups at each station,	"	to generate and supply the office circuit with a current of greater force than the main circuit current.
8. Marking apparatus	which consists of	a fine pointed piece of iron, pen lever, and grooved roller,	"	to indent dots and lines upon paper.
9. Registers	"	a series of clock-work moved by a weight regulated by a fly,	"	to move the paper uniformly under the point of the pen.
10. Office magnets	"	an electro-magnet,	"	1. To develop the power by which the pen marks in the groove of a roller. 2. To produce audible distinguishable sounds.
11. Certain process	"	in establishing, continuing and interrupting a galvanic current through the main circuit at determinate intervals,	"	to record dots and lines at one or many distant stations at the will of a distant operator.
12. A system of signs	"	dots and lines to represent the letters of the alphabet and numerals,	"	1. When applied to the record, to render such record intelligible. 2. When applied to the sounds of the office magnet, to render those sounds intelligible.

13. The art of recording dots and lines at a distance for telegraphing.

(The counsel then examined the question of infringement of each patent, separately, and concluded with the following:)

The Appellants infringe the Patents of 1840 *and* 1846, *jointly considered.*

It is proper to consider the claims of the patents together, and in connection with the specifications as well as separately, in order to secure the real invention to the patentee.

The joint effect of the several claims of the first patent, apart from the specific things claimed in each, makes it a patent also for Morse's new art, process, and system of telegraphing, by recording the variable duration of the galvanic current, in dots and lines.

The second patent is for an improvement in the means by which that art was carried into effect.

The two together constitute the art, process, system, and

means of telegraphing as improved, or, in other words, *the Telegraph*.

This whole system or telegraph so jointly considered, as used by the appellants, in all its main features, is copied from that of the appellees. That it is so, will appear from the following table, showing the several parts of the apparatus used by each, and their several relations and functions.

The appellants and appellees agree in employing an apparatus for telegraphing, consisting of the following parts, sustaining to each other the several following relations, and performing the several following functions, respectively:—

1. A main circuit,	which consists of	a long conductor extending through several stations,	the function of which is	to transmit the galvanic current through its whole length, whenever it is closed.
2. A main battery series,	"	a number of cups arranged along the main conductor,	"	to supply the main conductor with a current sufficient to work the electro-magnets in its course.
3. Operating keys,	each of which consists of	a small metallic lever,	"	to break and close the main circuit.
4. A series of receiving magnets,	"	an electro-magnet, with lever, and reacting spring,	"	to close the office circuit when a current passes through main circuit.
5. Adjusting screws,	"	movable screws to regulate force of reacting spring and play of lever,	"	to render receiving magnet sensitive to varying force of main currents.
6. Office circuits,	"	circuit of conductors limited to each office,	"	to transmit the power to mark the paper.
7. Office battery series,	"	a certain number of Grove cups at each station,	"	to generate and supply the office circuit with a current of greater force than the main circuit current.
8. A pen point, pen lever, and grooved lever,	"	a fine pointed piece of iron, lever and grooved roller,	"	to indent dots and lines upon paper.
9. Registers,	"	a series of clock-work, moved by a weight regulated by a fly,	"	to move the paper uniformly under the point of the pen.
10. Office magnets,	"	an electro-magnet,	"	1. To develop the power by which the pen marks in the groove of a roller. 2. To produce audible distinguishable sounds.

11. A certain process,	which consists	in establishing, continuing and interrupting a galvanic current through main circuit at determinate intervals,	the function of which is	to record dots and lines at one or many distant stations, at the will of a distant operator.
12. A system of signs,	"	of dots and lines to represent the letters of the alphabet and numerals.	"	1. When applied to the record to render such record intelligible. 2. When applied to the sounds of the office magnet, to render those sounds intelligible.

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

In proceeding to pronounce judgment in this case, the court is sensible, not only of its importance, but of the difficulties in some of the questions which it presents for decision. The case was argued at the last term, and continued over by the court for the purpose of giving it a more deliberate examination. And since the continuance, we have received from the counsel on both sides printed arguments, in which all of the questions raised on the trial have been fully and elaborately discussed.

The appellants take three grounds of defence. In the first place they deny that Professor Morse, was the first and original inventor of the Electro-Magnetic Telegraphs described in his two reissued patents of 1848. Secondly, they insist that if he was the original inventor, the patents under which he claims have not been issued conformably to the acts of Congress, and do not confer on him the right to the exclusive use. And thirdly, if these two propositions are decided against them, they insist that the Telegraph of O'Reilly is substantially different from that of Professor Morse, and the use of it, therefore, no infringement of his rights.

In determining these questions we shall, in the first instance, confine our attention to the patent which Professor Morse obtained in 1840, and which was reissued in 1848. The main dispute between the parties is upon the validity of this patent; and the decision upon it will dispose of the chief points in controversy in the other.

In relation to the first point, (the originality of the invention,) many witnesses have been examined on both sides.

It is obvious that, for some years before Professor Morse made his invention, scientific men in different parts of Europe were earnestly engaged in the same pursuit. Electro-magnetism itself was a recent discovery, and opened to them a new and unexplored field for their labors, and minds of a high order were engaged in developing its power and the purposes to which it might be applied.

Professor Henry, of the Smithsonian Institute, states in his testimony that, prior to the winter of 1819–20, an electro-magnetic telegraph — that is to say, a telegraph operating by the combined influence of electricity and magnetism — was not possible; that the scientific principles on which it is founded were until then unknown; and that the first fact of electro-magnetism was discovered by Oersted, of Copenhagen, in that winter, and was widely published, and the account everywhere received with interest.

He also gives an account of the various discoveries, subsequently made from time to time, by different persons in different places, developing its properties and powers, and among them his own. He commenced his researches in 1828, and pursued them with ardor and success, from that time until the telegraph of Professor Morse was established and in actual operation. And it is due to him to say that no one has contributed more to enlarge the knowledge of electro-magnetism, and to lay the foundations of the great invention of which we are speaking, than the professor himself.

It is unnecessary, however, to give in detail the discoveries enumerated by him — either his own or those of others. But it appears from his testimony that very soon after the discovery made by Oersted, it was believed by men of science that this newly-discovered power might be used to communicate intelligence to distant places. And before the year 1823, Ampere of Paris, one of the most successful cultivators of physical science, proposed to the French Academy a plan for that purpose. But his project was never reduced to practice. And the discovery made by Barlow, of the Royal Military Academy of Woolwich, England, in 1825, that the galvanic current greatly diminished in power as the distance increased, put at rest, for a time, all attempts to construct an electro-magnetic telegraph. Subsequent discoveries, however, revived the hope; and in the year 1832, when Professor Morse appears to have devoted himself to the subject, the conviction was general among men of science everywhere that the object could, and sooner or later would be, accomplished.

The great difficulty in their way was the fact that the galvanic current, however strong in the beginning, became gradually weaker as it advanced on the wire; and was not strong enough to produce a mechanical effect, after a certain distance had been traversed. But, encouraged by the discoveries which were made from time to time, and strong in the belief that an electro-magnetic telegraph was practicable, many eminent and scientific men in Europe, as well as in this country, became deeply engaged in endeavoring to surmount what appeared to be the chief obstacle to its success. And in this state of

HARVARD LAW SCHOOL LIBRARY

things it ought not to be a matter of surprise that four different magnetic telegraphs, purporting to have overcome the difficulty, should be invented and made public so nearly at the same time that each has claimed a priority; and that a close and careful scrutiny of the facts in each case is necessary to decide between them. The inventions were so nearly simultaneous, that neither inventor can be justly accused of having derived any aid from the discoveries of the other.

One of these inventors, Doctor Steinhiel, of Munich, in Germany, communicated his discovery to the Academy of Science in Paris, on the 19th of July, 1838, and states, in his communication, that it had been in operation more than a year.

Another of the European inventors, Professor Wheatstone, of London, in the month of April, 1837, explained to Professors Henry and Bache, who were then in London, his plan of an electro-magnetic telegraph, and exhibited to them his method of bringing into action a second galvanic circuit, in order to provide a remedy for the diminution of force in a long circuit; but it appears, by the testimony of Professor Gale, that the patent to Wheatstone and Cooke was not sealed until January 21, 1840, and their specification was not filed until the 21st of July in the same year; and there is no evidence that any description of it was published before 1839.

The remaining European patent is that of Edward Davy. His patent, it appears, was sealed on the 4th of July, 1838, but his specification was not filed until January 4, 1839; and when these two English patents are brought into competition with that of Morse, they must take date from the time of filing their respective specifications. For it must be borne in mind that, as the law then stood in England, the inventor was allowed six months to file the description of his invention after his patent was sealed; while, in this country, the filing of the specification is simultaneous with the application for patents.

The defendants contend that all, or at least some one of these European telegraphs, were invented and made public before the discovery claimed by Morse; and that the process and method by which he conveys intelligence to a distance is substantially the same, with the exception only of its capacity for impressing upon paper the marks or signs described in the alphabet he invented.

Waiving, for the present, any remarks upon the identity or similitude of these inventions, the court is of opinion that the first branch of the objection cannot be maintained, and that Morse was the first and original inventor of the telegraph described in his specification, and preceded the three European inventions relied on by the defendants.

The evidence is full and clear that, when he was returning from a visit to Europe, in 1832, he was deeply engaged upon this subject during the voyage; and that the process and means were so far developed and arranged in his own mind, that he was confident of ultimate success. It is in proof that he pursued these investigations with unremitting ardor and industry, interrupted occasionally by pecuniary embarrassments; and we think that it is established, by the testimony of Professor Gale and others that, early in the spring of 1837, Morse had invented his plan for combining two or more electric or galvanic circuits, with independent batteries for the purpose of overcoming the diminished force of electro-magnetism in long circuits, although it was not disclosed to the witness until afterwards; and that there is reasonable ground for believing that he had so far completed his invention, that the whole process, combination, powers, and machinery, were arranged in his mind, and that the delay in bringing it out arose from his want of means. For it required the highest order of mechanical skill to execute and adjust the nice and delicate work necessary to put the telegraph into operation, and the slightest error or defect would have been fatal to its success. He had not the means at that time to procure the services of workmen of that character; and without their aid no model could be prepared which would do justice to his invention. And it moreover required a large sum of money to procure proper materials for the work. He, however, filed his caveat on the 6th of October, 1837, and, on the 7th of April, 1838, applied for his patent, accompanying his application with a specification of his invention, and describing the process and means used to produce the effect. It is true that O'Reilly, in his answer, alleges that the plan by which he now combines two or more galvanic or electric currents, with independent batteries, was not contained in that specification, but discovered and interpolated afterwards; but there is no evidence whatever to support this charge. And we are satisfied, from the testimony, that the plan, as it now appears in his specification, had then been invented, and was actually intended to be described.

With this evidence before us, we think it is evident that the invention of Morse was prior to that of Steinheil, Wheatstone, or Davy. The discovery of Steinheil, taking the time which he himself gave to the French Academy of Science, cannot be understood as carrying it back beyond the months of May or June, 1837. And that of Wheatstone, as exhibited to Professors Henry and Bache, goes back only to April in that year. And there is nothing in the evidence to carry back the invention of Davy beyond the 4th of January, 1839, when his specifica-

tion was filed, except a publication said to have been made in the London Mechanics' Magazine, January 20, 1838; and the invention of Morse is justly entitled to take date from early in the spring of 1837. And in the description of Davy's invention, as given in the publication of January 20, 1838, there is nothing specified which Morse could have borrowed; and we have no evidence to show that his invention ever was or could be carried into successful operation.

In relation to Wheatstone, there would seem to be some discrepancy in the testimony. According to Professor Gale's testimony, as before mentioned, the specification of Wheatstone and Cook was not filed until July 21, 1840, and his information is derived from the London Journal of Arts and Sciences. But it appears, by the testimony of Edward F. Barnes, that this telegraph was in actual operation in 1839. And, in the case of the Electric Telegraph Company *v.* Brett & Little, 10 Common Pleas Reports, by Scott, his specification is said to have been filed December 12, 1837. But if the last-mentioned date is taken as the true one, it would not make his invention prior to that of Morse. And even if it would, yet this case must be decided by the testimony in the record, and we cannot go out of it, and take into consideration a fact stated in a book of reports. Moreover, we have noticed this case merely because it has been pressed into the argument. The appellants do not mention it in their answer, nor put their defence on it. And if the evidence of its priority was conclusive, it would not avail them in this suit. For they cannot be allowed to surprise the patentee by evidence of a prior invention, of which they gave him no notice.

But if the priority of Morse's invention was more doubtful, and it was conceded that in fact some one of the European inventors had preceded him a few months or a few weeks, it would not invalidate his patent. The act of Congress provides that, when the patentee believes himself to be the first inventor, a previous discovery in a foreign country shall not render his patent void, unless such discovery, or some substantial part of it, had been before patented, or described in a printed publication.

Now, we suppose no one will doubt that Morse believed himself to be the original inventor, when he applied for his patent in April, 1838. Steinheil's discovery does not appear to have been ever patented, nor to have been described in any printed publication until July of that year. And neither of the English inventions are shown by the testimony to have been patented until after Morse's application for a patent, nor to have been so described in any previous publication as to em-

brace any substantial part of his invention. And if his application for a patent was made under such circumstances, the patent is good, even if in point of fact he was not the first inventor.

In this view of the subject, it is unnecessary to compare the telegraph of Morse with these European inventions, to ascertain whether they are substantially the same or not. If they were the same in every particular, it would not impair his rights. But it is impossible to examine them, and look at the process and the machinery and results of each, so far as the facts are before us, without perceiving at once the substantial and essential difference between them and the decided superiority of the one invented by Professor Morse.

Neither can the inquiries he made, or the information or advice he received, from men of science in the course of his researches, impair his right to the character of an inventor. No invention can possibly be made, consisting of a combination of different elements of power, without a thorough knowledge of the properties of each of them, and the mode in which they operate on each other. And it can make no difference, in this respect, whether he derives his information from books, or from conversation with men skilled in the science. If it were otherwise, no patent, in which a combination of different elements is used, could ever be obtained. For no man ever made such an invention without having first obtained this information, unless it was discovered by some fortunate accident. And it is evident that such an invention as the Electro-Magnetic Telegraph could never have been brought into action without it. For a very high degree of scientific knowledge and the nicest skill in the mechanic arts are combined in it, and were both necessary to bring it into successful operation. And the fact that Morse sought and obtained the necessary information and counsel from the best sources, and acted upon it, neither impairs his rights as an inventor, nor detracts from his merits.

Regarding Professor Morse as the first and original inventor of the Telegraph, we come to the objections which have been made to the validity of his patent.

We do not think it necessary to dwell upon the objections taken to the proceedings upon which the first patent was issued, or to the additional specifications of the reissued patent of 1848. In relation to the first, if there was any alteration at the suggestion of the commissioner, it appears to have been a matter of form, rather than of substance; and, as regards the second, there is nothing in the proof or on the face of the reissued patent to show that the invention therein described is not the same with the one intended to be secured by the original

patent. It was reissued by the proper lawful authority; and it was the duty of the commissioner of patents to see that it did not cover more than the original invention. It must be presumed, therefore, that it does not, until the contrary appears. Variations from the description given in the former specification do not necessarily imply that it is for a different discovery. The right to surrender the old patent, and receive another in its place, was given for the purpose of enabling the patentee to give a more perfect description of his invention, when any mistake or oversight was committed in his first. It necessarily, therefore, varies from it. And we see nothing in the reissued patent that may not, without proof to the contrary, be regarded as a more careful description than the former one, explaining more fully the nice and delicate manner in which the different elements of power are arranged and combined together and act upon one another, in order to produce the effect described in the specification. Nor is it void because it does not bear the same date with his French patent. It is not necessary to inquire whether the application of Professor Morse to the Patent Office, in 1838, before he went to France, does or does not exempt his patent from the operation of the act of Congress upon this subject. For, if it should be decided that it does not exempt it, the only effect of that decision would be to limit the monopoly to fourteen years from the date of the foreign patent. And, in either case, the patent was in full force at the time the injunction was granted by the Circuit Court, and when the present appeal stood regularly for hearing in this court.

And this brings us to the exceptions taken to the specification and claims of the patentee in the reissued patent of 1848.

We perceive no well-founded objection to the description which is given of the whole invention and its separate parts, nor to his right to a patent for the first seven inventions set forth in the specification of his claims. The difficulty arises on the eighth.

It is in the following words:

"Eighth. I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer."

It is impossible to misunderstand the extent of this claim. He claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs, or letters at a distance.

If this claim can be maintained, it matters not by what process or machinery the result is accomplished. For aught that we now know some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff's specification. His invention may be less complicated — less liable to get out of order — less expensive in construction, and in its operation. But yet if it is covered by this patent the inventor could not use it, nor the public have the benefit of it without the permission of this patentee.

Nor is this all, while he shuts the door against inventions of other persons, the patentee would be able to avail himself of new discoveries in the properties and powers of electro-magnetism which scientific men might bring to light. For he says he does not confine his claim to the machinery or parts of machinery, which he specifies; but claims for himself a monopoly in its use, however developed, for the purpose of printing at a distance. New discoveries in physical science may enable him to combine it with new agents and new elements, and by that means attain the object in a manner superior to the present process and altogether different from it. And if he can secure the exclusive use by his present patent he may vary it with every new discovery and development of the science, and need place no description of the new manner, process, or machinery, upon the records of the patent office. And when his patent expires, the public must apply to him to learn what it is. In fine he claims an exclusive right to use a manner and process which he has not described and indeed had not invented, and therefore could not describe when he obtained his patent. The court is of opinion that the claim is too broad, and not warranted by law.

No one, we suppose will maintain that Fulton could have taken out a patent for his invention of propelling vessels by steam, describing the process and machinery he used, and claimed under it the exclusive right to use the motive power of steam, however developed, for the purpose of propelling vessels. It can hardly be supposed that under such a patent he could have prevented the use of the improved machinery which science has since introduced; although the motive power is steam, and the result is the propulsion of vessels. Neither could the man who first discovered that steam might, by a proper arrangement of machinery, be used as a motive power to grind corn or spin cotton, claim the right to the exclusive use of steam as a motive power for the purpose of producing such effects.

Again, the use of steam as a motive power in printing-presses is comparatively a modern discovery. Was the first inventor

of a machine or process of this kind entitled to a patent, giving him the exclusive right to use steam as a motive power, however developed, for the purpose of marking or printing intelligible characters? Could he have prevented the use of any other press subsequently invented where steam was used? Yet so far as patentable rights are concerned both improvements must stand on the same principles. Both use a known motive power to print intelligible marks or letters; and it can make no difference in their legal rights under the patent laws, whether the printing is done near at hand or at a distance. Both depend for success not merely upon the motive power, but upon the machinery with which it is combined. And it has never, we believe, been supposed by any one, that the first inventor of a steam printing-press, was entitled to the exclusive use of steam, as a motive power, however developed, for marking or printing intelligible characters.

Indeed, the acts of the patentee himself are inconsistent with the claim made in his behalf. For in 1846 he took out a patent for his new improvement of local circuits, by means of which intelligence could be printed at intermediate places along the main line of the telegraph; and he obtained a reissued patent for this invention in 1848. Yet in this new invention the electric or galvanic current was the motive power, and writing at a distance the effect. The power was undoubtedly developed, by new machinery and new combinations. But if his eighth claim could be sustained, this improvement would be embraced by his first patent. And if it was so embraced, his patent for the local circuits would be illegal and void. For he could not take out a subsequent patent for a portion of his first invention, and thereby extend his monopoly beyond the period limited by law.

Many cases have been referred to in the argument, which have been decided upon this subject, in the English and American courts. We shall speak of those only which seem to be considered as leading ones. And those most relied on, and pressed upon the court, in behalf of the patentee, are the cases which arose in England upon Neilson's patent for the introduction of heated air between the blowing apparatus and the furnace in the manufacture of iron.

The leading case upon this patent, is that of Neilson and others *v.* Harford and others in the English Court of Exchequer. It was elaborately argued and appears to have been carefully considered by the court. The case was this:

Neilson, in his specification, described his invention as one for the improved application of air to produce heat in fires, forges, and furnaces, where a blowing apparatus is required. And it was to be applied as follows: The blast or current of air pro-

duced by the blowing apparatus was to be passed from it into an air-vessel or receptacle made sufficiently strong to endure the blast; and through or from that vessel or receptacle by means of a tube, pipe, or aperture into the fire, the receptacle be kept artificially heated to a considerable temperature by heat externally applied. He then described in rather general terms the manner in which the receptacle might be constructed and heated, and the air conducted through it to the fire: stating that the form of the receptacle was not material, nor the manner of applying heat to it. In the action above-mentioned for the infringement of this patent, the defendant among other defences insisted — that the machinery for heating the air and throwing it hot into the furnace was not sufficiently described in the specification, and the patent void on that account — and also, that a patent for throwing hot air into the furnace, instead of cold, and thereby increasing the intensity of the heat, was a patent for a principle, and that a principle was not patentable.

Upon the first of these defences, the jury found that a man of ordinary skill and knowledge of the subject, looking at the specification alone, could construct such an apparatus as would be productive of a beneficial result, sufficient to make it worth while to adapt it to the machinery in all cases of forges, cupolas, and furnaces, where the blast is used.

And upon the second ground of defence, Baron Parke, who delivered the opinion of the court, said:

"It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of the court much difficulty; but after full consideration we think that the plaintiff does not merely claim a principle, but a machine, embodying a principle, and a very valuable one. We think the case must be considered as if the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces, and his invention then consists in this: by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before cold air, in a heated state to the furnace."

We see nothing in this opinion differing in any degree from the familiar principles of law applicable to patent cases. Neilson claimed no particular mode of constructing the receptacle, or of heating it. He pointed out the manner in which it might be done; but admitted that it might also be done in a variety of ways; and at a higher or lower temperature; and that all of them would produce the effect in a greater or less

degree, provided the air was heated by passing through a heated receptacle. And hence it seems that the court at first doubted, whether it was a patent for any thing more than the discovery that hot air would promote the ignition of fuel better than cold. And if this had been the construction, the court, it appears, would have held his patent to be void; because the discovery of a principle in natural philosophy or physical science, is not patentable.

But after much consideration, it was finally decided that this principle must be regarded as well known, and that the plaintiff had invented a mechanical mode of applying it to furnaces; and that his invention consisted in interposing a heated receptacle, between the blower and the furnace, and by this means heating the air after it left the blower, and before it was thrown into the fire. Whoever, therefore, used this method of throwing hot air into the furnace, used the process he had invented, and thereby infringed his patent, although the form of the receptacle or the mechanical arrangements for heating it, might be different from those described by the patentee. For whatever form was adopted for the receptacle, or whatever mechanical arrangements were made for heating it, the effect would be produced in a greater or less degree, if the heated receptacle was placed between the blower and the furnace, and the current of air passed through it.

Undoubtedly, the principle that hot air will promote the ignition of fuel better than cold, was embodied in this machine. But the patent was not supported because this principle was embodied in it. He would have been equally entitled to a patent, if he had invented an improvement in the mechanical arrangements of the blowing apparatus, or in the furnace, while a cold current of air was still used. But his patent was supported, because he had invented a mechanical apparatus, by which a current of hot air, instead of cold, could be thrown in. And this new method was protected by his patent. The interposition of a heated receptacle, in any form, was the novelty he invented.

We do not perceive how the claim in the case before us, can derive any countenance from this decision. If the Court of Exchequer had said that Neilson's patent was for the discovery, that hot air would promote ignition better than cold, and that he had an exclusive right to use it for that purpose, there might, perhaps, have been some reason to rely upon it. But the court emphatically denied his right to such a patent. And his claim, as the patent was construed and supported by the court, is altogether unlike that of the patentee before us.

For Neilson discovered, that by interposing a heated recepta-

cle between the blower and the furnace, and conducting the current of air through it, the heat in the furnace was increased. And this effect was always produced, whatever might be the form of the receptacle, or the mechanical contrivances for heating it, or for passing the current of air through it, and into the furnace.

But Professor Morse has not discovered, that the electric or galvanic current will always print at a distance, no matter what may be the form of the machinery or mechanical contrivances through which it passes. You may use electro-magnetism as a motive power, and yet not produce the described effect, that is, print at a distance intelligible marks or signs. To produce that effect, it must be combined with, and passed through, and operate upon, certain complicated and delicate machinery, adjusted and arranged upon philosophical principles, and prepared by the highest mechanical skill. And it is the high praise of Professor Morse, that he has been able, by a new combination of known powers, of which electro-magnetism is one, to discover a method by which intelligible marks or signs may be printed at a distance. And for the method or process thus discovered, he is entitled to a patent. But he has not discovered that the electro-magnetic current, used as motive power, in any other method, and with any other combination, will do as well.

We have commented on the case in the Court of Exchequer more fully, because it has attracted much attention in the courts of this country, as well as in the English courts, and has been differently understood. And perhaps a mistaken construction of that decision has led to the broad claim in the patent now under consideration.

We do not deem it necessary to remark upon the other decisions, in relation to Nielson's patent, nor upon the other cases referred to, which stand upon similar principles. The observations we have made on the case in the Court of Exchequer, will equally apply to all of them.

We proceed to the American decisions. And the principles herein stated, were fully recognized by this court in the case of Leroy et al. v. Tatham and others, decided at the last term, 14 Howard, 156.

It appeared that, in that case, the patentee had discovered that lead, recently set, would, under heat and pressure in a close vessel, reunite perfectly, after a separation of its parts, so as to make wrought, instead of cast pipe. And the court held that he was not entitled to a patent for this newly-discovered principle or quality in lead; and that such a discovery was not patentable. But that he was entitled to a patent for the new process or method in the art of making lead pipe, which this

discovery enabled him to invent and employ; and was bound to describe such process or method, fully, in his specification.

Many cases have also been referred to, which were decided in the circuit courts. It will be found, we think, upon careful examination, that all of them, previous to the decision on Nielson's patent, maintain the principles on which this decision is made. Since that case was reported, it is admitted, that decisions have been made, which would seem to extend patentable rights beyond the limits here marked out. As we have already said we see nothing in that opinion, which would sanction the introduction of any new principle in the law of patents. But if it were otherwise, it would not justify this court in departing from what we consider as established principles in the American courts. And to show what was heretofore the doctrine upon this subject, we refer to the annexed cases. We do not stop to comment on them, because such an examination would extend this opinion beyond all reasonable bounds. Wyeth *v.* Stone, 1 Story, R. 270, 285; Blanchard *v.* Sprague, 3 Sumn. 540. The first mentioned case is directly in point.

Indeed, independently of judicial authority, we do not think that the language used in the act of Congress, can justly be expounded otherwise.

The 5th section of the act of 1836, declares that a patent shall convey to the inventor for a term not exceeding fourteen years, the exclusive right of making, using, and vending to others to be used, his invention or discovery; referring to the specification for the particulars thereof.

The 6th section directs who shall be entitled to a patent, and the terms and conditions on which it may be obtained. It provides that any person shall be entitled to a patent who has discovered or invented a new and useful art, machine, manufacture, or composition of matter; or a new and useful improvement on any previous discovery in either of them. But before he receives a patent, he shall deliver a written description of his invention or discovery, "and of the manner and process of making, constructing, using, and compounding the same," in such exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same.

This court has decided, that the specification required by this law is a part of the patent; and that the patent issues for the invention described in the specification.

Now whether the Telegraph is regarded as an art or machine, the manner and process of making or using it must be set forth in exact terms. The act of Congress makes no difference in this respect between an art and a machine. An improvement

in the art of making bar iron or spinning cotton must be so described; and so must the art of printing by the motive power of steam. And in all of these cases it has always been held, that the patent embraces nothing more than the improvement described and claimed as new, and that any one who afterwards discovered a method of accomplishing the same object, substantially and essentially differing from the one described, had a right to use it. Can there be any good reason why the art of printing at a distance, by means of the motive power of the electric or galvanic current, should stand on different principles? Is there any reason why the inventor's patent should cover broader ground? It would be difficult to discover any thing in the act of Congress which would justify this distinction. The specification of this patentee describes his invention or discovery, and the manner and process of constructing and using it; and his patent, like inventions in the other arts above mentioned, covers nothing more.

The provisions of the acts of Congress in relation to patents may be summed up in a few words.

Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact, that any one skilled in the science to which it appertains, can, by using the means he specifies, without any addition to, or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes, the patent is void. And if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination; or by the application of discoveries or principles in natural philosophy known or unknown before his invention; or by machinery acting altogether upon mechanical principles. In either case he must describe the manner and process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from those described.

Indeed, if the eighth claim of the patentee can be maintained, there was no necessity for any specification, further than to say that he had discovered that, by using the motive power of electro-magnetism, he could print intelligible characters at any distance. We presume it will be admitted on all hands, that no patent could have issued on such a specification. Yet this claim can derive no aid from the specification filed. It is out-

side of it, and the patentee claims beyond it. And if it stands, it must stand simply on the ground that the broad terms abovementioned were a sufficient description, and entitled him to a patent in terms equally broad. In our judgment the act of Congress cannot be so construed.

The patent then being illegal and void, so far as respects the eighth claim, the question arises whether the whole patent is void, unless this portion of it is disclaimed in a reasonable time, after the patent issued.

It has been urged, on the part of the complainants, that there is no necessity for a disclaimer in a case of this kind. That it is required in those cases only in which the party commits an error in fact, in claiming something which was known before, and of which he was not the first discoverer; that in this case he was the first to discover that the motive power of electromagnetism might be used to write at a distance; and that his error, if any, was a mistake in law, in supposing his invention, as described in his specification, authorized this broad claim of exclusive privilege; and that the claim therefore may be regarded as a nullity, and allowed to stand in the patent without a disclaimer, and without affecting the validity of the patent.

This distinction can hardly be maintained. The act of Congress above recited, requires that the invention shall be so described, that a person skilled in the science to which it appertains, or with which it is most nearly connected, shall be able to construct the improvement from the description given by the inventor.

Now, in this case, there is no description but one, of a process by which signs or letters may be printed at a distance. And yet he claims the exclusive right to any other mode and any other process, although not described by him, by which the end can be accomplished, if electro-magnetism is used as the motive power. That is to say — he claims a patent, for an effect produced by the use of electro-magnetism distinct from the process or machinery necessary to produce it. The words of the acts of Congress above quoted show that no patent can lawfully issue upon such a claim. For he claims what he has not described in the manner required by law. And a patent for such a claim is as strongly forbidden by the act of Congress, as if some other person had invented it before him.

Why, therefore, should he be required and permitted to disclaim in the one case and not in the other? The evil is the same if he claims more than he has invented, although no other person has invented it before him. He prevents others from attempting to improve upon the manner and process which he has described in his specification — and may deter the public

from using it, even if discovered. He can lawfully claim only what he has invented and described, and if he claims more his patent is void. And the judgment in this case must be against the patentee, unless he is within the act of Congress which gives the right to disclaim.

The law which requires and permits him to disclaim, is not penal but remedial. It is intended for the protection of the patentee as well as the public, and ought not, therefore, to receive a construction that would restrict its operation within narrower limits than its words fairly import. It provides "that when any patentee shall have in his specification claimed to be the first and original inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just claim to the same," — he must disclaim in order to protect so much of the claim as is legally patented.

Whether, therefore, the patent is illegal in part because he claims more than he has sufficiently described, or more than he invented, he must in either case disclaim, in order to save the portion to which he is entitled; and he is allowed to do so when the error was committed by mistake.

A different construction would be unjust to the public, as well as to the patentee, and defeat the manifest object of the law, and produce the very evil against which it intended to guard.

It appears that no disclaimer has yet been entered at the patent office. But the delay in entering it is not unreasonable. For the objectionable claim was sanctioned by the head of the office; it has been held to be valid by a circuit court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment. The omission to disclaim, therefore, does not render the patent altogether void; and he is entitled to proceed in this suit, for an infringement of that part of his invention which is legally claimed and described. But as no disclaimer was entered in the patent office before this suit was instituted, he cannot, under the act of Congress, be allowed costs against the wrongdoer, although the infringement should be proved. And we think it is proved by the testimony. But as the question of infringement embraces both of the reissued patents, it is proper, before we proceed to that part of the case, to notice the objections made to the second patent for the local circuits, which was originally obtained in 1846 and reissued in 1848.

It is certainly no objection to this patent, that the improvement is embraced by the eighth claim in the former one. We

have already said that this claim is void, and that the former patent covers nothing but the first seven inventions specifically mentioned.

Nor can its validity be impeached upon the ground that it is an improvement upon a former invention, for which the patentee had himself already obtained a patent. It is true that under the act of 1836, s. 13, it was in the power of Professor Morse, if he desired it, to annex this improvement to his former specification, so as to make it from that time a part of the original patent. But there is nothing in the act that forbids him to take out a new patent for the improvement, if he prefers it. Any other inventor might do so: and there can be no reason in justice or in policy, for refusing the like privilege to the original inventor. And when there is no positive law to the contrary, he must stand on the same footing with any other inventor of an improvement upon a previous discovery. Nor is he bound in his new patent to refer specially to his former one. All that the law requires of him is that he shall not claim as new, what is covered by a former invention, whether made by himself or any other person.

It is said, however, that this alleged improvement is not new, and is embraced in his former specification; and that if some portion of it is new, it is not so described as to distinguish the new from the old.

It is difficult, perhaps impossible, to discuss this part of the case, so as to be understood by any one who has not a model before him, or perfectly familiar with the machinery and operations of the Telegraph. We shall not, therefore, attempt to describe minutely the machinery or its mode of operation. So far as this can be done intelligibly, without the aid of a model to point to, it has been fully and well done in the opinion delivered by the learned judge who decided this case in the Circuit Court. All that we think is useful or necessary to say is, that, after a careful examination of the patents, we think the objection on this ground is not tenable. The force of the objection is mainly directed upon the receiving magnet, which it is said is a part of the machinery of the first patent, and performs the same office. But the receiving magnet is not of itself claimed as a new invention. It is claimed as a part of a new combination or arrangement to produce a new result. And this combination does produce a new and useful result. For, by this new combination, and the arrangement and position of the receiving magnet, the local and independent circuit is opened by the electric or galvanic current, as it passes on the main line, without interrupting it in its course; and the intelligence it conveys is recorded almost at the same moment at the

end of the line of the Telegraph, and at the different local offices on its way. And it hardly needs a model or a minute examination of the machinery to be satisfied that a telegraph which prints the intelligence it conveys at different places, by means of the current, as it passes along on the main line, must necessarily require a different combination and arrangement of powers from the one that prints only at the end. The elements which compose it may all have been used in the former invention; but it is evident that their arrangement and combination must be different to produce this new effect. The new patent for the local circuits was therefore properly granted; and we perceive no well-founded objection to the specification or claim contained in the reissued patent of 1848.

The two reissued patents of 1848, being both valid, with the exception of the eighth claim in the first, the only remaining question is, whether they or either of them have been infringed by the defendants.

The same difficulty arises in this part of the case which we have already stated, in speaking of the specification and claims in the patent for the local circuits. It is difficult to convey a clear idea of the similitude or differences in the two Telegraphs to any one not familiarly acquainted with the machinery of both. The court must content itself, therefore, with general terms, referring to the patents themselves for a more special description of the matters in controversy.

It is a well-settled principle of law, that the mere change in the form of the machinery (unless a particular form is specified as the means by which the effect described is produced) or an alteration in some of its unessential parts; or in the use of known equivalent powers, not varying essentially the machine, or its mode of operation or organization, will not make the new machine a new invention. It may be an improvement upon the former; but that will not justify its use without the consent of the first patentee.

The Columbian (O'Reilly's) Telegraph does not profess to accomplish a new purpose, or produce a new result. Its object and effect is to communicate intelligence at a distance, at the end of the main line, and at the local circuits on its way. And this is done by means of signs or letters impressed on paper or other material. The object and purpose of the Telegraph is the same with that of Professor Morse.

Does he use the same means? Substantially, we think he does, both upon the main line and in the local circuits. He uses upon the main line the combination of two or more galvanic or electric circuits, with independent batteries for the purpose of obviating the diminished force of the galvanic current,

and in a manner varying very little in form from the invention of Professor Morse. And, indeed, the same may be said of the entire combination set forth in the patentee's third claim. For O'Reilly's can hardly be said to differ substantially and essentially from it. He uses the combination which composes the register with no material change in the arrangement, or in the elements of which it consists; and with the aid of these means he conveys intelligence by impressing marks or signs upon paper — these marks or signs being capable of being read and understood by means of an alphabet or signs adapted to the purpose. And as regards the second patent of Professor Morse for the local circuits, the mutator of the defendant does not vary from it in any essential particular. All of the efficient elements of the combination are retained, or their places supplied by well-known equivalents. Its organization is essentially the same.

Neither is the substitution of marks and signs, differing from those invented by Professor Morse, any defence to this action. His patent is not for the invention of a new alphabet; but for a combination of powers composed of tangible and intangible elements, described in his specification, by means of which marks or signs may be impressed upon paper at a distance, which can there be read and understood. And if any marks or signs or letters are impressed in that manner by means of a process substantially the same with his invention, or with any particular part of it covered by his patent, and those marks or signs can be read, and thus communicate intelligence, it is an infringement of his patent. The variation in the character of the marks would not protect it, if the marks could be read and understood.

We deem it unnecessary to pursue further the comparison between the machinery of the patents. The invasion of the plaintiff's rights, already stated, authorized the injunction granted by the Circuit Court, and so much of its decree must be affirmed. But, for the reasons hereinbefore assigned, the complainants are not entitled to costs, and that portion of the decree must be reversed, and a decree passed by this court, directing each party to pay his own costs, in this and in the Circuit Court.

Mr. Justice WAYNE, Mr. Justice NELSON, and Mr. Justice GRIER, dissent from the judgment of the court on the question of costs.

Mr. Justice GRIER.

I entirely concur with the majority of the court, that the ap-

pellee and complainant below, Samuel F. B. Morse, is the true and first inventor of the Recording Telegraph, and the first who has successfully applied the agent or element of nature, called electro-magnetism, to printing and recording intelligible characters at a distance; and that his patent of 1840, finally reissued in 1848, and his patent for his improvements as reissued in the same year, are good and valid; and that the appellants have infringed the rights secured to the patentee by both his patents. But, as I do not concur in the views of the majority of the court, in regard to two great points of the case, I shall proceed to express my own.

I. Does the complainant's first patent come within the proviso of the 6th section of the act of 1839? and should the term of fourteen years granted by it commence from the date of his patent here, or from the date of his French patent in 1838?

If the complainant's patent is within the provisions of this section, I cannot see how we can escape from declaring it void. The proviso declares that, "in all cases, every such patent (issued under the provisions of that section) shall be limited to the term of fourteen years from the date or publication of such foreign letters-patent." It is true it does not say that the patent shall be void if not limited to such term on its face; but it gives no power to the officer to issue a patent for a greater term. If the patent does not show the true commencement of the term granted by it, the patentee has it in his power to deceive the public, by claiming a term of fourteen years, while in reality it may be not more than one.

But I am of opinion that the patent in question does not come within this proviso.

The facts of the case, as connected with this point, are these: On the 6th of October, 1837, Morse filed in the office of the commissioner of patents, a *caveat* accompanied by a specification, setting forth his invention, and praying that it may be protected, till he could finish some experiments necessary to perfect its details. On the 9th of April, 1838, he filed a formal application for a patent, accompanied by a specification and drawings. On the first of May, 1838, the commissioner informs him, that his application has been granted. Morse answers on the 15th of May, that he is just about to sail to Europe, and asks the commissioner to delay the issue of his patent for the present, fearing its effect upon his plans abroad.

On the 30th of October, 1838, he obtained his useless French patent. On his return to this country in 1840, he requests his patent to be perfected and issued. In this application, filed on the 9th of April, 1838, there was an oversight in filling up the day and month. This clerical omission was wholly imma-

terial, but *ex majori cautela* a second affidavit was filed, and the patent issued on the 20th of June, 1840, for the term of fourteen years from its date.

The application of 1838 had a set of drawings annexed to the specification. The second set of drawings, required by the 6th section of the act of 1837, being for the purpose of annexation to the patent, they were entirely unnecessary till the patent issued, and are not required by law to accompany the application when first made, and the want of them cannot affect the validity of the application.

In many instances, owing to various causes, the patent is not issued till many months, and sometimes a year or more after the application. The commissioner requires time to examine the specification; he may suggest difficulties and amendments; and disputes often arise, which delay the issuing of the patent. But the application does not require to be renewed, and is never considered abandoned in consequence of such delay. It still remains as of the date of its filing for every purpose beneficial to the applicant. The law does not require that the specification and its accompaniments should be in the precise form which they afterwards assume in the patent. It requires only that the application be "in writing," and that the applicant should "make oath that he is the original inventor," &c. The other requirements of the act must precede the issuing of the patent, but make no part of the application, and are not conditions precedent to its validity.

In the present case, we have, therefore, a regular application in due form, accompanied by a specification and drawings, filed on the 9th of April, 1838. It has not been withdrawn, discontinued, or abandoned. There is nothing in the act of Congress which requires that the patent should be issued within any given time after the application is filed, or which forbids the postponement of it for a time, at the suggestion either of the applicant or the officer. Nor is there any thing in the general policy of the patent laws which forbids it. On the contrary, it has always been the practice, when a foreign patent is desired, to delay the issuing of the patent here, after application filed, for fear of injuring such foreign application. It forms no part of the policy of any of our patent acts to prevent our citizens from obtaining patents abroad.

By the Patent Act of 1793, the applicant must swear "that his invention, was not known or used before the application." The filing of the application was the time fixed for determining the applicant's right to a patent. If a patent had issued abroad, or the invention had been in use or described in some public work, before that time, it was a good defence to it. The time

of filing the application was, therefore, made by law the criterion of his right to claim as first inventor. A foreign patent subsequent to the date of his application, could not be set up as a defence against the domestic patentee. The American inventor who had filed his application and specification at home, was thus enabled to obtain his patent abroad, without endangering his patent at home. This was a valuable privilege to American citizens, and one of which he has never been deprived by subsequent legislation. And thus the law stood till the act of 4th July, 1836.

Before this time the right to obtain a patent was confined to American citizens, or those who had filed their intentions to become such. The policy of this act was to encourage foreign inventors to introduce their inventions to this country, but in doing so it evinces no intention of limiting our own citizens by taking away from them rights which they had hitherto enjoyed.

Accordingly it gave an inventor, who had obtained a patent abroad, and who was generally a foreigner, a right to have one here, provided he made his application here within six months after the date of his foreign patent. Neither the letter nor the spirit of this act interferes with the right of an inventor who has filed his application here, from obtaining a patent abroad, or his right to a term of fourteen years, from the date of his patent.

In 1838, therefore, when complainant filed his application, he was entitled to such a patent. But in March, 1839, an act was passed, by the 6th section of which it is alleged the complainant's rights have been affected. That section is as follows:

"That no person shall be debarred from receiving a patent for any invention, &c., as provided in the act of 4th July, 1836, to which this is additional, by reason of the same having been patented in a foreign country, more than six months prior to his application. Provided, that the same shall not have been introduced into public and common use in the United States prior to the application for such patent. And provided, also, that in all cases, every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters-patent."

Now the act of 1836, as we have shown, had given a privilege to foreign patentees to have a patent within six months after date of such foreign patent. It had not affected, in any manner, the right previously enjoyed by American citizens, to take out a foreign patent after filing their applications here. This section gives additional rights to those who had first taken out patents abroad, and holding out an additional encouragement to foreign inventors to introduce their inventions here, subject to certain

conditions contained in the proviso. Neither the letter, spirit, nor policy of this act, have any reference to, or bearing upon, the case of persons who had just made their applications here. To construe a proviso, as applicable to a class of cases not within its enacting clause, would violate all settled rules of construction. The office of a proviso, is either to except something from the enacting clause, or to exclude some possible ground of misinterpretation, or to state a condition to which the privilege granted by the section shall be subjected.

Here the proviso is inserted, to restrain the general words of the section and impose a condition on those who accept the privileges granted by the section. It enlarged the privileges of foreign patentees, which had before been confined to six months, on two conditions. 1st. Provided the invention patented abroad had not been introduced into public use here; and 2d, on condition that every such patent should be limited in its terms. The general words, "in all cases," especially when restrained to every such patent, cannot extend the conditions of the proviso beyond such cases as are the subject-matter of legislation in the section. The policy and spirit of the act are to grant privileges to a certain class of persons which they did not enjoy before; to encourage the introduction of foreign inventions and discoveries, and not to deprive our own citizens of a right heretofore enjoyed, or to affect an entirely different class of cases, when the applications had been filed here before a patent obtained abroad.

It is supposed, that certain evils might arise by allowing an applicant for a patent here to delay its issue till he can obtain a foreign patent. To which, it is a sufficient answer to say, that if such evil consequences should be found to exist, it is for Congress to remedy them by legislation.

It is no part of the duty of this court, by a forced construction of existing statutes, to attempt the remedy of possible evils by anticipation.

I am, therefore, of opinion that the complainant's patent, as renewed, contained a valid grant of the full term of fourteen years from its original date.

II. The other point, in which I cannot concur with the opinion of the majority, arises in the construction of the eighth claim of complainant's first patent, as finally amended. The first claim, as explanatory of all that follow, should be read in connection with the eighth. They are as follows:

"1st. Having thus fully described my invention, I wish it to be understood, that I do not claim the use of the galvanic current or currents of electricity, for the purpose of telegraphic communications generally; but what I specially claim as my

invention and improvement, is making use of the motive power of magnetism, when developed by the action of such current or currents substantially as set forth in the foregoing description of the first principal part of my invention, as means of operating or giving motion to machinery which may be used to imprint signals upon paper or other suitable material, or to produce sounds in any desired manner for the purpose of telegraphic communication at any distances. The only ways in which the galvanic current had been proposed to be used prior to my invention and improvement, were by bubbles resulting from decomposition, and the action or exercise of electrical power upon a magnetized bar or needle; and the bubbles and the deflections of the needles thus produced, were the subjects of inspection, and had no power or were not applied to record the communication. I therefore characterize my invention as the first recording or printing telegraph by means of electro-magnetism.

"There are various known modes of producing motions by electro-magnetism, but none of these had been applied prior to my invention and improvement to actuate or give motion to printing or recording machinery, which is the chief point of my invention and improvement."

"8th. I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims, the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer."

The objection to this claim is, that it is too broad, because the inventor does not confine himself to specific machinery or parts of machinery, as described in his patent, but claims that the essence of his invention consists in the application of electro-magnetism as a motive power, however developed, for printing characters at a distance. This being a new application of that element or power, of which the patentee claims to be the first inventor or discoverer.

In order to test the value of this objection, as applied to the present case, and escape any confusion of ideas too often arising from the use of ill-defined terms and propositions, let us examine, 1st. What may be patented; or what forms a proper subject of protection, under the Constitution and acts of Congress, relative to this subject.

2d. What is the nature of the invention now under consideration? Is it a mere machine, and subject to the rules which affect a combination of mechanical devices to effect a particular purpose.

3d. Is the claim true, in fact? And if true, how can it be too broad, in any legal sense of the term, as heretofore used, either in the acts of Congress, or in judicial decisions?

4th. Assuming the hypothesis that it is too broad, how should that affect the judgment for costs in this case?

1st. The Constitution of the United States declares that "Congress shall have the power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

The act of Congress of 1836, confers this exclusive right for a limited time, on "any person who has discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements on any art, machine, manufacture, or composition of matter, not known or used by others, before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use," &c.

A new and useful art or a new and useful improvement on any known art is as much entitled to the protection of the law as a machine or manufacture. The English patent acts are confined to "manufactures" in terms; but the courts have construed them to cover and protect arts as well as machines; yet without using the term art. Here we are not required to make any latitudinous construction of our statute for the sake of equity or policy; and surely we have no right, even if we had the disposition, to curtail or narrow its liberal policy by astute or fanciful construction.

It is not easy to give a precise definition of what is meant by the term "art," as used in the acts of Congress — some, if not all, the traits which distinguish an art from the other legitimate subjects of a patent, are stated with clearness and accuracy by Mr. Curtis, in his Treatise on Patents. "The term art, applies," says he, "to all those cases where the application of a principle is the most important part of the invention, and where the machinery, apparatus, or other means, by which the principle is applied, are incidental only and not of the essence of his invention. It applies also to all those cases where the result, effect, or manufactured article is old, but the invention consists in a new process or method of producing such result, effect, or manufacture." Curt. on Pat. 80.

A machine, though it may be composed of many parts, instruments, or devices combined together, still conveys the idea of unity. It may be said to be invented, but the term "discovery" could not well be predicated of it. An art may employ many different machines, devices, processes, and manipulations, to

produce some useful result. In a previously known art a man may discover some new process, or new application of a known principle, element, or power of nature, to the advancement of the art, and will be entitled to a patent for the same, as "an improvement in the art," or he may invent a machine to perform a given function, and then he will be entitled to a patent only for his machine.

That improvements in the arts, which consist in the new application of some known element, power, or physical law, and not in any particular machine or combination of machinery, have been frequently the subject of patents both in England and in this country, the cases in our books most amply demonstrate. I have not time to examine them at length; but would refer to James Watt's patent for a method of saving fuel in steam-engines by condensing the steam in separate vessels, and applying non-conducting substances to his steam-pipes; Clegg's patent for measuring gas in water; Juhr v. Pratt, Webster's Pat. Cas. 103; and the celebrated case of Neilson's patent for the application of hot blast, being an important improvement in the art of smelting iron.

In England, where their statute does not protect an art in direct terms, they have made no clear distinction between an art or an improvement in an art, and a process, machine, or manufacture. They were hampered and confined by the narrowness of the phraseology of their patent acts. In this country, the statute is as broad as language can make it. And yet, if we look at the titles of patents, as given at the patent office, and the language of our courts, we might suppose that our statute was confined entirely to machines. Notwithstanding, in Kneiss v. The Bank, (4 Washington C. C. Rep. 19,) Mr. Justice Washington supported a patent which consisted in nothing else but a new application of copperplates to both sides of a bank-bill as a security against counterfeiting. The new application was held to be an art, and, therefore, patentable. So the patent in McClurg v. Kingsland (1 Howard, 204) was in fact for an improvement in the art of casting chilled rollers by conveying the metal to the mould in a direction approaching to the tangent of the cylinder; yet the patentee was protected in the principle of his discovery, (which was but the application of a known law of nature to a new purpose,) against all forms of machinery embodying the same principle.

The great art of printing, which has changed the face of human society and civilization, consisted in nothing but a new application of principles known to the world for thousands of years. No one could say it consisted in the type or the press, or in any other machine or device used in performing some par-

ticular function, more than in the hands which picked the types or worked the press. Yet if the inventor of printing had, under this narrow construction of our patent law, claimed his art as something distinct from his machinery, the doctrine now advanced, would have declared it unpatentable to its full extent as an art, and that the inventor could be protected in nothing but his first rough types and ill-contrived press.

I do not intend to review the English cases which adopt the principle for which I now contend, notwithstanding their narrow statute; but would refer to the opinion of my brother Nelson, in 14 Howard, 177; and will add, that Mr. Justice McLean, in delivering the opinion of the court in that case, quotes with approbation the language of Lord Justice Clerke, in the Neilson case, which is precisely applicable to the question before us. He says: "The specification does not claim any thing as to form, nature, shape, materials, numbers, or mathematical character of the vessel or vessels in which the air is to be heated, or as to the mode of heating such vessels." Yet this patent was sustained as for a new application of a known element; or, to use correct language, as an improvement in the art of smelting iron, without any regard to the machinery or parts of machinery used in the application. Such I believe to be the established doctrine of the English courts.

He who first discovers that an element or law of nature can be made operative for the production of some valuable result, some new art, or the improvement of some known art; who has devised the machinery or process to make it operative, and introduced it in a practical form to the knowledge of mankind, is a discoverer and inventor of the highest class. The discovery of a new application of a known element or agent may require more labor, expense, persevering industry, and ingenuity than the inventor of any machine. Sometimes, it is true, it may be the result of a happy thought or conception, without the labor of an experiment, as in the case of the improvement in the art of casting chilled rollers, already alluded to. In many cases, it is the result of numerous experiments; not the consequence of any reasoning *a priori*, but wholly empirical; as the discovery that a certain degree of heat, when applied to the usual processes for curing India rubber, produced a substance with new and valuable qualities.

The mere discovery of a new element, or law, or principle of nature, without any valuable application of it to the arts, is not the subject of a patent. But he who takes this new element or power, as yet useless, from the laboratory of the philosopher, and makes it the servant of man; who applies it to the perfecting of a new and useful art, or to the improvement of one already

known, is the benefactor to whom the patent law tenders its protection. The devices and machines used in the exercise of it may or may not be new; yet, by the doctrine against which I contend, he cannot patent them, because they were known and used before. Or, if he can, it is only in their new application and combination in perfecting the new art. In other words, he may patent the new application of the mechanical devices, but not the new application of the operative element which is the essential agent in the invention. He may patent his combination of the machinery, but not his art.

When a new and hitherto unknown product or result, beneficial to mankind, is effected by a new application of any element of nature, and by means of machines and devices, whether new or old, it cannot be denied that such invention or discovery is entitled to the denomination of a "new and useful art." The statute gives the inventor of an art a monopoly in the exercise of it as fully as it does to the inventor of a mere machine. And any person who exercises such new art without the license of the inventor is an infringer of his patent, and of the franchise granted to him by the law as a reward for his labor and ingenuity in perfecting it. A construction of the law which protects such an inventor, in nothing but the new invented machines or parts of machinery used in the exercise of his art, and refuses it to the exercise of the art itself, annuls the patent law. If the law gives a franchise or monopoly to the inventor of an art as fully as to the inventor of a machine, why shall its protection not be coextensive with the invention in one case as well as in the other? To look at an art as nothing but a combination of machinery, and give it protection only as such, against the use of the same or similar devices or mechanical equivalents, is to refuse it protection as an art. It ignores the distinction between an art and a machine; it overlooks the clear letter and spirit of the statute; and leads to inextricable difficulties. It is viewing a statue or a monument through a microscope.

The reason given for thus confining the franchise of the inventor of an art to his machines and parts of machinery is, that it would retard the progress of improvement, if those who can devise better machines or devices, differing in mechanical principle from those of the first inventor of the art, or, in other words, who can devise an improvement in it, should not be allowed to pirate it.

To say that a patentee, who claims the art of writing at a distance by means of electro-magnetism, necessarily claims all future improvements in the art, is to misconstrue it, or draws a consequence from it not fairly to be inferred from its language. An improvement in a known art is as much the subject of a

patent as the art itself; so, also, is an improvement on a known machine. Yet, if the original machine be patented, the patentee of an improvement will not have a right to use the original. This doctrine has not been found to retard the progress of invention in the case of machines; and I can see no reason why a contrary one should be applied to an art.

The claim of the patentee is, that he may be protected in the exercise of his art as against persons who may improve or change some of the processes or machines necessary in its exercise. The court, by deciding that this claim is too broad, virtually decides that such an inventor of an improvement may pirate the art he improves, because it is contrary to public policy to restrain the progress of invention. Or, in other words, it may be said that it is the policy of the courts to refuse that protection to an art which it affords to a machine, which it is the policy of the Constitution and the laws to grant.

2d. Let us now consider what is the nature of the invention now under consideration.

It is not a composition of matter, or a manufacture, or a machine. It is the application of a known element or power of nature, to a new and useful purpose by means of various processes, instruments and devices, and if patentable at all, it must come within the category of "a new and useful art." It is as much entitled to this denomination as the original art of printing itself. The name given to it in the patent is generally the act of the commissioner, and in this, as in many other cases, a wrong one. The true nature of the invention must be sought in the specification.

The word telegraph is derived from the Greek, and signifies "to write afar off or at a distance." It has heretofore been applied to various contrivances or devices, to communicate intelligence by means of signals or semaphores, which speak to the eye for a moment. But in its primary and literal signification of writing, printing, or recording at a distance, it never was invented, perfected, or put into practical operation till it was done by Morse. He preceded Steinheil, Cook, Wheatstone, and Davy in the successful application of this mysterious power or element of electro-magnetism to this purpose; and his invention has entirely superseded their inefficient contrivances. It is not only "a new and useful art," if that term means any thing, but a most wonderful and astonishing invention, requiring tenfold more ingenuity and patient experiment to perfect it, than the art of printing with types and press, as originally invented.

3d. Is it not true, as set forth in this eighth claim of the specification, that the patentee was the first inventor or discoverer of the use or application of electro-magnetism to print and record

intelligible characters or letters? It is the very ground on which the court agree in confirming his patent. Now the patent law requires an inventor, as a condition precedent to obtaining a patent, to deliver a written description of his invention or discovery, and to particularly specify what he claims to be his own invention or discovery. If he has truly stated the principle, nature and extent of his art or invention, how can the court say it is too broad, and impugn the validity of his patent for doing what the law requires as a condition for obtaining it? And if it is only in case of a machine that the law requires the inventor to specify what he claims as his own invention and discovery, and to distinguish what is new from what is old, then this eighth claim is superfluous and cannot affect the validity of his patent, provided his art is new and useful, and the machines and devices claimed separately, are of his own invention. If it be in the use of the words "however developed" that the claim is to be adjudged too broad, then it follows that a person using any other process for the purpose of developing the agent or element of electro-magnetism, than the common one now in use, and described in the patent, may pirate the whole art patented.

But if it be adjudged that the claim is too broad, because the inventor claims the application of this element to his new art, then his patent is to be invalidated for claiming his whole invention, and nothing more. If the result of this application be a new and useful art, and if the essence of his invention consists in compelling this hitherto useless element to record letters and words, at any distance and in many places at the same moment, how can it be said that the claim is for a principle or an abstraction? What is meant by a claim being to broad? The patent law and judicial decisions may be searched in vain for a provision or decision that a patent may be impugned for claiming no more than the patentee invented or discovered. It is only when he claims something before known and used, something as new which is not new, either by mistake or intentionally, that his patent is affected.

The act of Congress requires the applicant for a patent to swear that "he is the original and first inventor of the art, machine, &c." It requires the commissioner to make an examination of the alleged invention, "and if it shall appear that the same has not been invented prior to the alleged invention, he shall grant a patent, &c. But if it shall appear that the applicant is not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new, had before been invented," then the applicant to have leave to withdraw his application.

The 13th section treats of defective specifications and their remedy where the applicant, through mistake or inadvertency, had claimed "more than he had a right to claim as new."

The 15th section, in enumerating the defences which a defendant may be allowed to make to a patent, states that *inter alia* he may show, "that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new." And the proviso to the same section allows the court to refuse costs, "when the plaintiff shall fail to sustain his action on the ground that, in his specification or claim, is embraced more than that of which he was the first inventor."

The 7th section of the act of March 3, 1837, specially defines the meaning of the phrase "too broad," to be "when the patent claims more than that of which the patentee was the original and first inventor." And the 9th section of the same act, again providing for cases, where by accident or mistake, the patentee claims more than he is justly entitled to, describes it to be "where the patentee shall have in his specification claimed to be the original inventor or discoverer of any material or substantial part, of which he is not the first and original inventor, and shall have no legal and just right to the same."

Thus we see that it is only where, through inadvertence or mistake, the patentee has claimed something of which he was not the first inventor, that the court are directed to refuse costs.

The books of reports may be searched in vain for a case where a patent has been declared void, for being too broad, in any other sense.

Assuming it to be true, then, for the purpose of the argument, that the new application of the power of electro-magnetism to the art of telegraphing or printing characters at a distance, is not the subject of a patent, because it is patenting a principle; yet as it is also true, that Morse was the first who made this application successfully, as set forth in this eighth claim, I am unable to comprehend how, in the words of the statute, we can adjudge "that he has failed to sustain his action, on the ground that his specification or claim embraces more than that of which he was the first inventor." It is for this alone that the statute authorizes us to refuse costs.

4th. Assuming this eighth claim to be too broad, it may well be said, that the patentee has not unreasonably delayed a disclaimer, when we consider that it is not till this moment he had reason to believe it was too broad. But the bill claims, and it is sustained by proof, that the defendant has infringed the complainant's second patent for his improvement.

The court sustains the validity of this patent. Why, then,

is the complainant not entitled to his costs? At law, a recovery on one good count is sufficient to entitle the plaintiff to recover costs; and I can see no particular equity which the defendants can claim, who are adjudged to have pirated two inventions at once.

I am of opinion, therefore, that the decree of the Circuit Court should be affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel. On consideration, whereof, it is now here ordered, adjudged, and decreed, by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed, except so much thereof as decrees that the complainants shall recover their costs, in the prosecution of this suit, of and from the defendants, and that that part of the said decree giving costs to the complainants, be, and the same is hereby, reversed, and annulled.

And it is further ordered, and decreed, by this court, that the parties, respectively, pay their own costs in this court, and in the said Circuit Court.

FRANCIS O. J. SMITH, PLAINTIFF, v. HEMAN B. ELY, HENRY O'REILLY, ROBERT W. McCOY, THOMAS MOODIE, MICHAEL B. BATEHAM, LINCOLN GOODALE, WRAY THOMAS, ALBERT B. BUTTLES AND ROBERT NEIL.

The preceding case of O'Reilly and Morse having settled the principles involved in the controversy between them, this court declines to hear an argument upon technical points of pleading in a branch of the case coming from another State.
The case is remanded to the Circuit Court.

THIS cause came up from the Circuit Court of the United States for the District of Ohio, upon a certificate of division in opinion between the judges thereof.

An action was brought by Smith, as the assignee of Morse and Vail, against Ely, O'Reilly, and others, for an infringement of Morse's patent rights to the telegraph, which are particularly set forth in the report of the preceding case.

The first count of the declaration was upon the patent of 1840, surrendered and reissued in 1846.

The second count was upon the patent for improvements in transmitting and recording intelligence, by the use of the motive power of electricity. Both of these patents were surrendered, and reissued in 1848.

The defendants filed eighteen pleas. On the 2d, 3d, 4th, 5th, and 10th, the plaintiff took issue. He demurred to the remaining pleas, and upon some of these demurrers the court were divided.

All that need to be stated in explanation of the case, will be to state the difference of opinion, and refer to the pleas.

And afterwards, to wit, on the twenty-third day of October, being in the year and at the time of said court last mentioned, "this cause came on to be heard at the present term upon the demurrers filed by the plaintiff to the sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth special pleas of the defendants. And thereupon, the arguments of counsel being heard, and due deliberation being had, the opinion of the judges of said court were divided as to the following questions, to wit:

I. Upon the demurrer to the sixth and seventh pleas, respectively, whether the said letters-patent to the said Morse are void, for the reason that the same do not on their face respectively express that they are to run for fourteen years from the date of the patent issued to said Morse in the kingdom of France.

II. Whether, upon the demurrer to the eighth, ninth, and eighteenth pleas, said letters-patent to said Morse assume, as to the matter alleged in said eighteenth plea, to patent a principle, or a thing which is not an art, machine, manufacture, or composition of matter, or any improvement on any art, machine, manufacture, or composition of matter; and if so, whether, and to what extent, said letters-patent, or any part thereof, are void in consequence thereof; and also whether said pleas are bad, respectively, for the reason that they assume to answer certain material and substantial parts of the plaintiff's claim, without averring that there are no other material and substantial parts embraced in his claim, which can be distinguished from the other parts averred to be so claimed without right, and on which he would be entitled to recover.

III. Whether, upon the demurrers to the fourteenth and fifteenth pleas, said patent, issued April 11th, 1846, and reissued June 13, 1848, is void; and if so, to what extent; for the reason that it embraces as a material and substantial part thereof, a material and substantial part of a former patent issued to said Morse.

IV. Whether, upon the demurrers to the eighth, ninth, fourteenth, and fifteenth pleas, said letters-patent issued to said

Morse are void, for the reason, as averred in said pleas, that he was not the original and first inventor of the several matters in said pleas respectively set forth; but the same had been, prior to said invention by said Morse, known and used in a foreign country.

The substance of these pleas was as follows:

6th. This plea alleges, that on the 18th of August, 1838, Morse took out a patent in France for the same invention patented to him in his letters of June 20, 1840; but that the latter were made to run fourteen years from date, instead of fourteen years from the date of the French letters.

7th. This plea states the same as the sixth, and that Morse's French patent was issued more than six months next before he filed his specification and drawings, annexed to the letters-patent of June 20, 1840.

Upon the demurrers to these two pleas the court were divided, as mentioned in the first question of division.

8th. This plea sets out with the patents of 1840, as reissued, and then alleges that "the use of the motive power of the electric or galvanic current, however developed, for marking or printing intelligible characters, signs, or letters, at any distances," is a substantial and material part of the thing patented; and it states that Morse was not the original and first inventor or discoverer of the thing patented, but that the same was known before to one Dr. Steinheil, of Munich, and used on a line from Munich to Bogenhausen.

The principles claimed and patented in the letters of 1840, referred to in the 8th and 9th pleas, are as follows, to wit:

"What I specially claim as my invention and improvement is, making use of the motive power of magnetism, when developed by the action of such current or currents substantially as set forth in the foregoing description of the first principal part of my invention, as means of operating, or giving motion to, machinery which may be used to imprint signals upon paper, or other suitable materials, or to produce sounds in any desired manner for the purpose of telegraphic communication of any distances."

Eighth. "I do not propose to limit myself to the specific machinery, or parts of machinery, described in the foregoing specification and claims, the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs, or letters, at any distances — being a new application of that power, of which I claim to be the first inventor or discoverer."

9th. In this plea the defendants allege that the mode and

process of propelling and connecting currents of electricity, or galvanism, through two or more metallic conductors, is a substantial and material part of the thing patented in the letters of 1840; and they aver that Morse was not the original and first inventor or discoverer thereof, but the same was known to one Edward Davy, in England."

18th. In this plea the defendants allege that "the use of motive power of the electro-galvanic current, however developed, for marking and printing intelligible characters, signs, or letters, at any distances," is a substantial and material part of the thing patented, and is distinctly claimed by the patentee in the specification; and he avers that the thing, so patented and claimed, is not any art, machine, manufacture, or composition of matter, or any improvement on them.

The demurrers to these three pleas raise the questions secondly certified to this court.

14th. In this plea the defendant sets out the patent of 1846, as reissued to, and states that "the combination of a pen-lever, pen-point or points, and roller," mentioned in the patent, is a substantial and material part of the thing patented; and they aver that it was before known, and formed a part of an electro-magnetic telegraph for which Morse had taken out letters-patent in 1840.

15th. In this plea the defendants allege that, "the mode of combining two or more circuits of electricity or galvanism, mentioned and described in the specification annexed to the said letters-patent as an improvement, is a substantial and material part of the thing patented;" and they aver that in electro-magnetic telegraphs, before known, modes of combining, on the same principle described in the specification, two or more circuits of electricity or galvanism, existed, and formed a part thereof, to wit, in one patented to Morse, June 20, 1840; to Edward Davy, of London, July 4, 1838, by the Queen of Great Britain. This plea also states that Morse, in patent of 1846, does not specify and point out the improvement in the said mode of combining two or more circuits made by him, so as to distinguish the same from the said modes before known and patented by him and by Davy.

The third question certified to this court is raised by demurrers to these two pleas.

The fourth question is raised by demurrers to pleas 8, 9, 14, 15, above set forth.

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

The plaintiff in error is the assignee, within a certain tract of country, of the two patents granted to Morse for his Electro-

Magnetic Telegraph, one in 1840, and the other in 1846, and both reissued in 1848. And this action was brought in the Circuit Court for the District of Ohio, for infringements of both of these patents, within the limits assigned to the plaintiff.

The defendants did not proceed in their defence in the manner authorized by the act of Congress, but pleaded the general issue, and seventeen special pleas. Upon some of these pleas issue was joined, and others were demurred to; and, upon the argument of the demurrers, the judges of the court were divided in opinion on the following questions, which they have certified for decision to this court.

"I. Upon the demurrer to the sixth and seventh pleas respectively whether the said letters-patent to the said Morse are void, for the reason that the same do not on their face respectively express that they are to run for fourteen years from the date of the patent issued to said Morse in the kingdom of France.

II. Whether, upon the demurrer to the eighth, ninth, and eighteenth pleas, said letters-patent to said Morse assume, as to the matter alleged in said eighteenth plea, to patent a principle, or a thing which is not an art, machine, manufacture, or composition of matter, or any improvement on any art, machine, manufacture, or composition of matter; and if so, whether, and to what extent, said letters-patent, or any part thereof, are void in consequence thereof, and also whether said pleas are bad, respectively, for the reason that they assume to answer certain material and substantial parts of the plaintiff's claim, without averring that there are no other material and substantial parts embraced in his claim, which can be distinguished from the other parts averred to be so claimed without right, and on which he would be entitled to recover.

III. Whether, upon the demurrers to the fourteenth and fifteenth pleas, said patent, issued April 11th, 1846, and reissued June 13th, 1848, is void; and if so, to what extent; for the reason that it embraces as a material and substantial part thereof, a material and substantial part of a former patent issued to said Morse.

IV. Whether, upon the demurrers to the eighth, ninth, fourteenth, and fifteenth pleas, said letters-patent issued to said Morse are void, for the reason, as averred in said pleas, that he was not the original and first inventor of the several matters in said pleas respectively set forth; but the same had been, prior to said invention by said Morse, known and used in a foreign country."

The questions certified, so far as they affect the merits of the case, have all been substantially decided in the case of Morse and others *v.* O'Reilly and others, at the present term. But

several questions are presented by the certificate upon the construction of the pleas and the extent of the admissions made by the demurrers, and the legal effect of such admissions upon the plaintiff's right of action.

In relation to the questions which go to the merits, as they have been already fully heard and decided in the case above-mentioned, they are not open for argument in this case; and it would be a useless and fruitless consumption of time to hear an argument upon the technical questions alone. For, however the points of special pleading might be ruled by this court, they could have no material influence on the ultimate decision of the case: because, if it is found that errors in pleading have been committed by either party, injurious to his rights, an opportunity ought and would certainly be afforded him to correct them in some subsequent proceeding, so as to bring the real points in controversy fairly before the court.

For these reasons, the motion of the counsel for the defendants for leave to argue the points certified, is overruled, and the case, remanded to the Circuit Court.

Under such circumstances, we deem it proper to remand the case, without argument, to the Circuit Court for the District of Ohio, where either party may amend his pleadings, and where the defendants, if they can distinguish their case from that above mentioned, will have an opportunity of being heard.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the acts of Congress in such case made and provided, and it appearing to this court that the said questions, so far as they affect the merits of the case, have been substantially decided by this court at this term, in the case of O'Reilly et al. *v.* Morse et al., it is thereupon now here ordered and adjudged by this court, that this cause, without argument, be, and the same is hereby, remanded to the said Circuit Court, with directions to permit either party to amend his pleadings, and also to allow the defendants an opportunity to distinguish their case, if they can, from that above referred to.

JAMES E. BROOME, ADMINISTRATOR DE BONIS NON OF ARTHUR MACON, DECEASED, PLAINTIFF IN ERROR, v. THE UNITED STATES.

The act of Congress, passed on 2d March, 1799, (1 Stat. at Large, 705,) requires the bond given by a collector of the customs to be approved by the Comptroller of the Treasury.

But the date of such approval is not conclusive evidence of the commencement of the period when the bond began to run. On the contrary, it begins to be effective from the moment when the collector and his sureties part with it in the course of transmission.

Hence, where the surety upon the bond of a collector in Florida, died upon the 24th of July, and the approval of the comptroller was not written upon the bond until the 31st of July, it was properly left to the jury to ascertain the time when the collector and his sureties parted with the bond to be sent to Washington; and they were instructed that before they could find a verdict for the surety, they must be satisfied from the evidence that the bond remained in the hands of the collector, or the sureties, until after the 24th of July.

Collectors are often disbursing officers; and they and their sureties are responsible for the money which a collector receives from his predecessor in office; and also for money transmitted to him by another collector, upon his representation and requisition that it was necessary to defray the current expenses of his office, and advanced for that purpose.

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

The facts are stated in the opinion of the Court.

It was submitted on a printed brief, by *Mr. Charlton*, for the plaintiff in error, and argued for the United States by *Mr. Cushing*, (Attorney-General.)

Mr. Charlton, for the plaintiff in error.

1. The first point we make is, that this bond never had a legal existence, so far as Macon was concerned. That he died before it was approved by the Comptroller of the Treasury; and having died before the time had arrived, when vitality was given to it by such approval, he was not a party to the contract; and his administrator is in no manner responsible for any default of Crane, in the discharge of his duties.

This writing obligatory belongs to that class of sealed instruments which, though not strictly escrows, yet are delivered, subject to a condition prescribed either by the parties, or the law.

By the act of Congress of 2d March, 1799, (1st vol. Little & Brown's edition, 705,) the bond of a collector of customs must be approved by the comptroller. If not so approved, it never becomes an official bond; the day of the date, we all know, is immaterial; and the manual delivery, even in such a case, coupled with the condition which the law itself annexes, does not give legal existence or vitality to the instrument. It is the approval by the Comptroller of the Treasury which breathes

into it its legal life. It is that which shows the *aggregatio mentium;* it is that which makes it a contract. Commonwealth *v.* Kendry, 2 Barr's Rep. 448. Suppose that the comptroller had refused to approve this instrument, would it then have had any efficiency? Would it have held the persons signing as sureties, liable for any default of Crane? Certainly not; for, as to them, there had been no contract with the government; they had offered to contract, but the offer had been declined. Does not this show, conclusively, that the approval of the comptroller is the act which, for the first time, gives any life to this paper? But when that life was given to it, Macon was dead; the offer he had made to become a surety for Crane, had never been accepted in his lifetime; his death withdrew the offer, and his administrator is not bound. Chitty on Contracts, 6th Amer. Ed. p. 9, and note 2, p. 12, citing Pothier; that it may be retracted at any time before acceptance, p. 13; and that death retracts it, p. 14, citing Pothier. See, also, p. 15; Macher *v.* Frith, 5 Wendell, 112, 113. If a contract was made at all, it was with Macon, not with his administrator. But can a dead man make a contract? The authorities cited, refer, it is true, to unsealed instruments, but there is the same principle here. If the paper was actually delivered, it was upon the condition that it should be approved by the obligee; that it was a condition that the law attached to it, and there was no *aggregatio mentium* until such approval; and, in the mean time, death had retracted the offer.

We think, therefore, that his honor, in the court below, committed error in ruling that the approval of the comptroller was not the act that gave this instrument its legal vitality.

And we think, that even if we are not correct in that view, still, that he was in error in refusing the instruction asked for by the counsel for the defendant below; that it was the duty of the plaintiff below to prove that the said bond was delivered before the death of Macon.

I will not stop to argue that if this paper was signed by Macon in the presence of witnesses, but not actually delivered by him, that it never bound him. I think we will all agree that if he signed it in the presence of a thousand witnesses, who attested it as sealed and delivered, yet, that if he purposely kept possession of it himself, it did not bind him. It was, therefore, the duty of the plaintiff below to prove a delivery in the lifetime of Macon. If the fact existed, he could and ought to have proved it, as he held the affirmative of the issue. But he did not offer even *primâ facie* evidence. The possession of it by the comptroller would be evidence of its delivery; but when? Would it show a delivery in the lifetime of Macon? Would it

not rather show that the comptroller did not receive it until the 31st July, 1837, the day on which he approved it; the presumptions of law being that an officer of the government discharges his duty with promptitude. 7 Howard, 132.

Though there may be evidence, then, that this instrument was delivered to bind Crane and Swain, there is none, not even *primâ facie*, that it was ever delivered to bind Macon. Its date does not afford that proof, for the date of a deed is not any vital part of it at all. It is equally good without a date, or with an impossible date, and this shows that a date is no legal part of it. If we were to hold otherwise, we would fall into the absurdity of being bound by the assertion of a sealed instrument that it had been made on the 30th of February. Whilst the law forbids you to contradict, add to, or vary any part of a sealed instrument by parol evidence, it allows you and requires you every day to prove the time of delivery, even though a date be stated, and even though the date of such delivery should directly contradict the alleged date of the instrument, thus clearly showing that it does not consider the date inserted as any part of the instrument.

There is not a tittle of proof that any officer of the government ever had the possession of this paper until the 31st July, and then, for the first time, arises the presumption of its delivery; there is no proof that any of these parties ever parted with the possession of this paper before the 31st July, 1837, when it reached the comptroller, possibly from the hands of an agent of Macon, whose power to deliver would end with the death of his principal; and it is worthy of remark that, even according to the very vague and unsatisfactory testimony offered by the United States in the court below, as to the time it would take to transmit by mail, or messenger, from Tallahassee to Washington, that this paper could have been forwarded after the death of Macon, and reached Washington by the 31st. The language of the witness being *about* eight or ten days for transmission by mail, and by individuals, seven or eight days. A bond may be delivered by the surety to his principal as an escrow. 4 Cranch, 221.

His honor, below, refused to give the instructions, as asked for, and ruled that the jury must be satisfied that the bond remained in the hands of Crane or the surety until after the death of Macon, thus virtually throwing the burden of proof upon us who held the negative, instead of requiring the plaintiff below to prove the act *in pais*, viz. the delivery necessary to give vitality to the instrument. 4 Wheaton's Rep. 77.

2. But if this bond ever was legally delivered in the lifetime of Macon, the question remains, did his principal, Crane, ever

make such default in the discharge of the duties of his office, as would bind his sureties?

The condition of the bond is, that Crane "shall continue truly and faithfully to execute and discharge all the duties of the said office according to law."

What were the duties of his office according to law? The statute of Congress of 2d March, 1799, prescribes them. 1st vol. Little & Brown's edition, p. 642. See, also, 2d act of same date, 708, top part of page.

Is there here any authority on the part of government to authorize Crane to become their financial agent, and to authorize him to collect moneys for the government outside of his official duties; and if not, could his sureties be bound by such acts?

Where, then, was the authority to authorize him to draw upon, or receive money from Breedlove, the collector at New Orleans?

Be that as it may, by what authority or law can the United States make the sureties responsible for the money collected by Crane from Willis? Is it part of the official duty of a collector of customs to collect from his predecessor the amount due by him to government? If there be such law, let it be shown. His honor, in the court below, virtually concedes this point, but then he destroys the effect of such concession, by instructing the jury that, although the money might have been received outside of his official duty, yet, as the government adopted the act and charged the amount to him, it was of course conclusive upon him, and that his sureties could not, with any propriety, complain, because it appeared from his accounts that, at the time Crane received the $1,279.92 from Willis, the United States were indebted to him (Crane) in a much larger amount, and that for some time thereafter, and after debiting his accounts with that sum, the balance was still against the United States, and in favor of Crane, and that the defalcation of Crane, for which his sureties were sought to be held liable, accrued long after that period, and that it was therefore immaterial to the sureties, &c.

We respectfully say that there is a mingling up, in this legal caldron, of very discordant materials, and that the reasoning is neither logical nor conclusive.

We are not going to deny that if a man, without any authority, collects the money belonging to another, that other may, if he pleases, confirm the act and sue the party who has assumed to act as his agent, for the amount he has thus collected. And we do not, therefore, dispute the reasoning of his honor in the court below, when he held, that after the government

adopted the act of the collection from Willis, and charged it to Crane, that it was, of course, conclusive upon Crane. What we object to is, the application of this principle, and the subsequent reasoning as to the sureties.

The government may, by an artificial and artistical way, make out the accounts between these parties, so as to obscure the true issue, but that cannot preclude us. It may make what rests it pleases in such accounts for such purposes, and it may, by inserting in the quarter ending the 30th September, an amount which their own evidence (that is, if there was any evidence at all of that receipt of money) shows was received on the 1st October. But the only true way of ascertaining whether the sureties are liable in this case, is to make out a general account of all sums received by Crane in his official capacity, and which it was his duty so to receive, and then to credit him with all payments which he properly made; and if the debits exceed the credits of such legitimate transactions, to that extent the sureties are responsible. When the judge below tells us, then, that although Crane had no right to receive this $1,279.92 from Willis, in his capacity as collector, (in other words, though it was not an act for which his sureties were responsible,) yet, that as the government owed him at that time, (a fact which, by the way, is inconsistent with their proof,) and for some time after, and as all his defalcations actually occurred afterwards, that, therefore, his sureties had no right to complain of this charge being made in the account, and that it was immaterial to them whether he had or had not received the sum in his official capacity, is, we repeat, not logical reasoning. If the sureties are charged in the general account with $1,279.92, which ought not to be charged to them, are they not so much the losers? Does it not deduct from the credits to which they are entitled, in the general account, running through all the time for which they were so responsible, just so much, and produce a corresponding effect upon the balance at the foot of the account? If this sum had not been charged against them, would there not have been exactly so much more due by the government to Crane as collector, for the payments legitimately made by him, as collector, and to the benefit of which indebtedness the sureties would be entitled?

It seems difficult to answer these questions negatively. What possible difference can it make, then, (even if it be so,) that Crane, after receiving this money, was still the creditor of the government? It is to the general result, at the close of his term of office, that we must look, and that general result, after deducting this illegal debit, must show, so far as the sureties are concerned, exactly so much more due by the government to

Crane, as collector, than now appears. How, then, was it immaterial to the sureties? And besides this error of law, the judge also erred in withdrawing the questions of fact from the jury, whether this money had ever been received by Crane, by virtually telling them that it was an immaterial fact in the case, and that the surety (the only person sued) was not sought to be charged by it, thus taking away the fact itself from their scrutiny.

He was asked, by the counsel of defendant below, to charge that the receipt for $1,279.92, given in the 4th quarter of 1837, is not a sufficient voucher to support the item of same amount in the account of third quarter, 1837 of Willis's transaction. This the judge refused to charge.

We respectfully insist that the government officers had no right to charge this receipt at all, either in the fourth or third quarter, against Crane, as collector. It was a fact that did not officially come within their knowledge; to which knowledge the law confines them, in making out their transcripts for evidence. Crane had never charged himself with it, as collector, but the government officer undertook to discharge the sureties of Willis for money for which, as far as we know, they were responsible, and to charge the sureties of Crane, without their assent, and this upon no other proof than the exhibition of a receipt purporting to be Crane's, but not proved to be so. We think that this does not come within the purview of the statute of 3d March, 1797, and that the transcript was not a sufficient voucher to support the item, the original receipt being the best evidence (if evidence at all) of the fact of payment. United States *v.* Buford, 3 Peters, 29; Cox and Dick *v.* United States, 6 Peters, 202. Nor is the case in 8 Peters, 375, hostile, for there Orr was entitled to draw on the treasury for money, and the officers knew that they had paid it. But in our case Crane had no right to receive the money at all, nor did he authorize the charge; and the United States had no right to relieve Willis by charging to Crane and his sureties. See 3 Peters, 29. Hoyt *v.* United States, 10 Howard, 132, 133.

Mr. Cushing, for the United States.

First point omitted.

II. The official bond of the collector and inspector, Crane, and his sureties, Swain and Macon, bears date 2d June, 1837.

Indorsed July 4th, 1837, by the District Attorney of the United States, that the sureties are good and sufficient.

"July 31st, 1837: approved on the above certificate. George Wolf, comptroller."

Arthur Macon died 24th July, 1837, after the approval of the

sureties by the district attorney, but before the indorsement by the comptroller.

The administrator of A. Macon contended, that the surety died before delivery of the bond, and therefore that, as to him, it was not obligatory. To this end various instructions were moved by the administrator. The rulings of them by the court are to be seen, p. 48 of the record.

The several instructions on this subject, moved on behalf of the administrator, need not be here repeated. The charges of the court were correct; they left to the jury the question of fact of delivery, under all the circumstances, without any improper instruction as to the matters of law.

"A deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent."

"And so, also, a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him; or it may be delivered to any stranger, for and in the behalf, and to the use of him to whom it is made without authority." Touchstone, chap. 4, p. 57.

If a man makes an obligation to F, and delivers it to B, if F gets the obligation he shall have action upon it, for it shall be intended that B took the deed for F, as his servant." 13 Viner, Faits, (K) plea 7, page 23.

"If a man delivers a writing as an escrow, to be his deed, on certain conditions to be performed, and afterwards the obligor or obligee dies, and afterwards the condition is performed, the deed is good, for there was *traditio inchoata* in the life of the parties; *sed postea consummata existens*, by the performance of the condition, takes its effect by force of the first delivery, without any new delivery." Perryman's Case, 5 Coke, 84-6. S. P. Graham v. Graham, 1 Vesey, Jr. 272, 274; Froset v. Walch, Bridgm. 51 from Year Book 27 Hen. VI. 7.

"If I deliver an obligation or other writing to a man as my deed, to deliver unto him to whom it is made when he shall come to York, it is my deed presently; and if he deliver it to him before he comes to York, yet I shall not avoid it; and if I die before he comes to York, and afterwards he cometh to York, and he delivereth the deed unto him, it is clearly good, and my deed, and that it cannot be if it were not my deed before my death." 13 Viner, Faits, (M) plea 7, p. 24; and cites Perkins, sect. 143.

"And where the deeds have a kind of double delivery, there they shall take effect from and have relation to the time of the first delivery or not, *ut res valeat;* for if relation may hurt, and for some cause make void the deed, (as in some cases it may,)

there it shall not relate. But if relation may help it, as in case where a *feme sole* delivers escrow, and before the second delivery she has married, or dieth, in this case, if there were not a relation the deed would be void, and therefore in this case it shall relate." Touchstone, chap. 4, page 72, Relation; Butler & Baker's case, 3 Coke, 35 *b*, Resolve 1 and 2; Cook's Adm'r *v.* Hendricks, 4 B. Monroe, 502-3.

A, being indebted to his bankers, executed a deed, purporting to be a mortgage to them, for securing the debt. After executing it, he delivered it to his attorney, who retained it in his possession till A's bankruptcy, which occurred about a month afterwards. The attorney then delivered it to the mortgagee. Held, that this was a good delivery by A to the mortgagee. Grugeon *v.* Gerrard, 4 Younge & C. 119.

If a deed is delivered by the grantor to any person in his lifetime to be delivered to the grantee after his decease, it was a good delivery upon the happening of the contingency, and related back so as to divest the title of the grantor, by relation from the just delivery. Foster *v.* Mansfield, 3 Metcalf, 412; O'Kelly and others *v.* O'Kelly, 8 Metcalf, 436, 439. See Exton *v.* Scott, 6 Sim. 31.

A delivers a deed, as an escrow, to J S to deliver over on condition performed, before which A becomes *non compos mentis;* the condition is then performed, and the deed delivered over; it is good, for it shall be A's deed from the first delivery. Brook's Reading on St. of Lim. p. 150.

The present is not the case of an escrow; and if it were it would not avail the obligors in the bond; the relation of which is clearly stated by Chief Justice Parsons, in the case of Wheelwright *v.* Wheelwright, 2 Mass. Rep. 447, and repeated by Mr. J. Sewall, in Hatch *v.* Hatch, 9 Mass. Rep. 307, 309, as follows:

"The delivery is an essential requisite to a deed, and the effect of it is to be from the time when it is delivered as a deed. But it is not essential to the valid delivery of a deed, that the grantee be present, and that it be made to or accepted by him personally at the time. A writing delivered to a stranger, for the use and the benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, seems almost entirely nominal, when we consider the rules of decision, which have been resorted to, for the purpose of effectuating the intentions of the grantor or obligor, in some cases of necessity. If delivered as an escrow, and not in name as a deed, it will, nevertheless, be regarded and construed as a deed from the first delivery, as soon as the event happens, or the condition is performed, upon which the effect had been suspended,

if this construction should be then necessary in furtherance of the lawful intentions of the parties. See also 3 Coke on Littleton by Day, 36 *a* note 223. Perkins, sec. 137, 138, 142. Bushel *v.* Passmore, 6 Mod. 217; Maynard *v.* Maynard, 10 Mass. Rep. 486; Bodwell *v.* Webster, 13 Pickering, 411, 416; 4 Cruise, by Greenleaf, p. 28, note; Elsey *v.* Metcalf, 1 Denio, 323; Brown *v.* Brown, 1 Woodbury & Minot, 325; Doe dem. Gurnons *v.* Knight, 8 Dowl. & R. 348; Doe dem. Lloyd *v.* Bennett, 8 Car. & P. 124.

"The delivery of a deed may be inferred from circumstances," per Mr. Justice Story, Gardiner *v.* Collins, 3 Mason, 401.

The possession of the deed by the lessor or plaintiff, who offers it in proof, is *primâ facie* evidence of its delivery. Under ordinary circumstances, no other evidence of the delivery of a deed than the possession of it by the person claiming under it, is required." Games *v.* Stiles, 14 Peters, 327; S. P. Hare *v.* Horton, 2 Nev. & M. 428; 5 Barnwell & Ad. 715.

"If the original deed remained in existence, proof of the handwriting, added to its being in possession of the grantee, would, it is presumed, be *primâ facie* evidence that it was sealed and delivered. No reason is perceived why such evidence should not be as satisfactory in the case of a deed as in the case of a bond." Lessee of Sicard *v.* Davis, 6 Peters, 137. In that case the original deed was lost, but the execution and the delivery thereof were inferred from circumstances.

"All deeds do take effect from, and therefore have relation to, the time, not of their date, but of their delivery. And this is always presumed to be the time of their date, unless the contrary do appear." Touchstone, chap. 4, sect. 8, p. 72.

These principles seem to me to be sufficient to warrant the rulings and charges by the court, on the subject of the delivery of the bond.

If a bond, with surety required by law of an officer, be signed and sealed by the parties who are named as obligors to the United States, and sent by mail, or by private conveyance, to the proper department, and be sued upon by the United States, such circumstances must be *primâ facie* evidence of delivery; which delivery must be presumed to be the time of the date, until the contrary be made to appear; otherwise the great affairs of this government, spreading over such vast territories, requiring bond and security from officers intrusted with the collections or disbursements of public moneys, could not be administered safely, unless all the various officers, who are by law required to give bond with security, to be filed in the proper department, should be required to come with their sureties to the seat of government, and execute and deliver in person, in the proper office,

their respective obligations. Such a rule would be highly inconvenient, excessively dilatory, if not impracticable. Such a rule could be endured only in a village, town, or city, or in a district of country of small extent.

That A. Macon signed the bond is admitted. After he signed and sealed he did not keep it in his possession; it was not found after his death among his papers; he delivered it to some person; the purpose for which he signed and sealed the bond was, that it should be delivered into the proper department of the government; it expresses that purpose on its face, and to that intent it expresses to have been "sealed and delivered in the presence of witnesses,—Robert Lord, George G. Holt," who, as witnesses, have signed their names. It came to the possession of the proper department of the Government of the United States, and was given in evidence by the department.

From all these circumstances the inference is irresistible that, after A. Macon signed and sealed the bond, and caused it to be attested by the witnesses, he delivered it to some person to be sent to the proper department of the Government of the United States, the obligee named in the bond. The jury have found in favor of the United States, without any improper instruction from the court, and the verdict is conclusive.

III. The question raised for the defendant in the District Court, now plaintiff in error, as to the sum of $1,279.92 appearing in the account against Mr. Crane, as collector of the customs for the district of St. Mark's, and inspector of the revenue for the port of Magnolia, is so properly and clearly treated of by the judge in his charge to the jury, as not to require of me any thing in addition to what he has said.

As to the sums of $3,000 and $6,500, it appears in evidence that they were paid to Crane, upon his representation and requisition, to defray the current expenses of his office; and on this account the judge ruled that they were legitimate charges as against his sureties.

This view is supported by the provisions of law which require the collector to pay the expenses of his office out of its revenue, or to disburse the money received by him from the government to supply any deficiencies in such revenue. See Act of 1799, (1 Stat. at Large, 707); Act of 1823, (3 Id. 723.)

The government advanced money to Crane, under the statute cited, to defray the expenses of his office.

The conditions of the collector's bond were to execute and discharge all the duties of his office faithfully. This condition was broken if the collector made false statements to the Comptroller of the Treasury of the sums necessary to the current expenses of the district whereof he was collector, and false requi-

sitions upon the Treasury Department, for moneys to pay those current expenses, it was a *malfeasance* in office, a breach of the condition of the collector's bond, for which the surety was chargeable.

The collector was, by law, the officer to pay the current expenses of the district whereof he was appointed collector, and he and his surety were properly chargeable with all moneys put into the hands of the collector for such purposes.

Mr. Justice WAYNE delivered the opinion of the court.

Ambrose Crane was appointed collector of customs for St. Mark's, in Florida, and signed, with his sureties, Swain and Macon, what was meant by them to be an official bond. The form of the bond is given in the statute. This conforms to it in every particular. 1 Stat. at Large, 705. Crane, the collector, became a defaulter. This suit was brought to recover the amount of the defalcation from the administrator of Macon, one of the sureties of Crane. The bond is dated on the 2d June, 1837. Two indorsements are upon it. One of them was made by the District Attorney of the United States for Florida.

Office of the United States Attorney, Middle District of Florida, July 4th, 1837. I hereby certify, that Peter H. Swain and Arthur Macon, Esqrs., who appear to have executed the within bond as securities, are generally esteemed to be, and in my opinion undoubtedly are, good for the amount of this bond. They reside in Leon county, and I would take either of them, without hesitation, as security for a private debt of that amount. The signatures appear to be genuine.

CHARLES S. SIBLEY, *District Attorney.*

The other indorsement is as follows:

Comptroller's Office, July 31, 1837. Approved in the above certificate. GEORGE WOLFE, *Comptroller.*

Macon died on the 24th July, seven days before the date of the comptroller's approval, and twenty-four days after the date of the district attorney's indorsement. The evidence in the case shows that, in the year 1837, the mail time between Tallahassee and Washington was from eight to ten days. The distance might have been travelled by an individual in less time, but not in less than seven or eight days. This testimony was introduced by the plaintiff to prove that the bond, if it had not been delivered before the 24th of July, the day of Macon's death, that it must have been in the course of transmission from the obligors before that day, as the comptroller's approval is

dated the 31st of the month. The act directing bond to be taken from collectors, with sureties, to be approved by the Comptroller of the Treasury of the United States, will be found in 1 Stat. at Large, 705. It is, that every collector, naval officer, and surveyor, employed in the collection of the duties upon imports and tonnage shall, within three months after he enters upon the duties of his office, give bond, with one or more sureties, to be approved by the Comptroller of the Treasury of the United States, and payable to the United States, with condition for the true and faithful performance of the duties of his office, according to law. The condition of the bond is, that whereas the President of the United States hath, pursuant to law, appointed the said to the office of , in the State of . Now, therefore, if the said has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of said office, according to law, then the above obligation is to be void and of none effect, otherwise it shall abide, and remain in full force and virtue.

In this state of the case, a recovery upon this bond is resisted by an objection that it never had a legal existence as to Macon, the intestate of the appellant, because he died before it was approved by the comptroller. It is not denied — or, if it be, the evidence makes it altogether probable — that the bond had been delivered before Macon died. We cannot admit that the date of the approval can be taken absolutely as the time when the bond was accepted, without any relation to the time when it was delivered. A bond may not be a complete contract until it has been accepted by the obligee; but if it be delivered to him to be accepted if he should choose to do so, that is not a conditional delivery, which will postpone the obligor's undertaking to the time of its acceptance, but an admission that the bond is then binding upon him, and will be so from that time, if it shall be accepted. When accepted, it is not only binding from that time forward, but it becomes so upon both from the time of the delivery. That is the offer which the obligor makes, when he hands the bond to the obligee, and in that sense the obligee received it. Such is just the case before us. The act requires the collector to give a bond, "with sureties to be approved by the comptroller;" it must be done in three months after he has entered upon the duties of his office; it must be retrospective to that time, and be for the future also. The comptroller may accept the sureties or reject them. He may call at any future time for other sureties, if circumstances shall occur, or information shall be received, which make it necessary that the United States should have a more responsible security.

Or he may call, under the direction of the Secretary of the Treasury, for a new bond. He may decide upon the sufficiency of the sureties before they have made themselves so, or after they have signed the collector's bond. The first course is not the usual practice. The bond is commonly sent to the collector with such sureties as he can get. The comptroller receives it under the law, to be afterwards approved, upon such information as he has or may procure, concerning the responsibility of the sureties. The time is not limited for the use of his discretion for that purpose. He knows, and the collector knows, that the bond ought to be given in three months after the collector has begun to discharge the duties of his office. It is his duty to give the bond. It is the comptroller's to see that it is done. It is not necessary that it should be handed to the comptroller. It may be handed to an agent appointed by the comptroller to receive it, or it may be put into the possession of any person to deliver it, or it may be transmitted by mail. If done in any one of these ways, it is a delivery from the moment that the collector and his sureties part with it. It is from that moment in the course of transmission, with the intention that the law may act upon it through the comptroller's agency, and his subsequent approval is an acceptance with relation to the time beginning the transmission. The statute does not require the approval to be in writing. It may be so, and may be done verbally; or it may not be done in either way. Receiving the bond, and retaining it for a considerable time without objection, will be sufficient evidence of acceptance to complete the delivery, especially when the exception is taken by the party who had done all he could to complete it. Postmaster-General *v.* Norvell, 1 Gilpin Rep. 106–121. And we add, that the retention of such a bond by the comptroller without objection, for a longer time than the statute requires it to be given, would be presumptive evidence of its approval and acceptance. This presumption of acceptance has been ruled by this court, in the case of the United States Bank *v.* Dandridge and others, 12 Wheat. 64. In that case, an objection was taken in the Circuit Court to the admissibility of evidence to show a presumptive acceptance of a cashier's bond, because the charter of the bank required a bond to be given satisfactory to the directors. The Circuit Court sustained the objection, and ruled that the approval must be in writing to bind the cashier's sureties. This court ruled otherwise. Presumptive evidence, then, being admissible to prove the acceptance of a bond — such as its being in the possession of the obligee — having been retained without objection, and the obligor continuing to act under it, without having called for a more formal acceptance, it follows that a written

acceptance, dated after a delivery, as was done in this case, is not to be taken as the time from which the completeness of the contract is to be computed; but that such an acceptance has a relation to the time of delivery, making that time the beginning of its obligation upon the parties to the bond. We remark, also, that there is no rule which can be applied to determine what constitutes the approval of official bonds. Every case must depend upon the laws directing such an approval. The purpose for which such a bond is required must be looked to. The character of the office and its duties must be examined. The time within which such a bond must be given and approved, and whether it is to be retrospective or for the future only, must be considered before it can be determined how and when the approval must be made. The differences suggested may be seen by comparing the terms of the statute of 1825, requiring bonds to be given by postmasters directly to the Postmaster-General, and not to the United States, with the phraseology of the section of the act directing bonds to be taken from the collectors to the United States.

The case of Bruce and others v. The State of Maryland, for the use of Love, in 11 Gill & Johnson, 382, which was supposed to have a bearing upon the case, will illustrate fully, the differences of which we have spoken.

The 42d article of the Constitution of Maryland, requires bonds from the sheriff of that State, with sureties, before they can be sworn in to act as such. The act of Maryland, carrying that article into operation, (2d vol. Laws of Maryland, November, 1794,) fixes the time within which sheriffs shall give bonds, and the manner of taking them is prescribed. It must be done in a county court, or before the Chief Justice, or two associate Justices, &c., but by whomsoever approved, the act directs that the official doing so, shall immediately transmit it to the County Court to be recorded. The case came before the Court of Appeals, from a county court, which had decided that the bond of the sheriff operated from its date, that bond having been given without the approval in the manner prescribed. The Court of Appeals overruled the court below, saying that the bond had been irregularly taken, and that a sheriff's bond was only obligatory from the time of its approval. Under that statute, the question, when a sheriff's bond became operative, could not properly occur, it having made the delivery and approval of the bond simultaneous, that there might be a compliance with the constitution, which declared that no sheriff should act until he had given bond. The act which we have been considering, does not require the comptroller's approval to be in writing. A collector may be permitted to dis-

charge the duties of his office, for three months, before he gives a bond, if the Secretary of the Treasury shall think it safe to be done. But if otherwise, he may require a bond before the collector enters upon the duties of the office. The statute means that the three months allowed for a bond to be given, is an indulgence to the collector, and not a rule binding upon the government, when its proper functionary shall determine that a bond shall be given earlier. We think, too, that the approval by the comptroller is directory, and not a condition precedent to give validity to the bond. The doctrine that deeds and bonds take effect by relation to the time they are delivered, is well understood. The cases cited by the Attorney-General, in support of it, are sufficient for the occasion. We need not add to them. It applies to this case. Macon was bound as the surety of Crane, by the delivery of the bond before his death. The evidence in support of such a delivery, was fairly put to the jury.

We have compared the charge of the judge, with the instructions which were asked by the counsel of the defendant, upon the point we have been considering, and we think that it covers all of them correctly.

Another objection against a recovery upon this bond remains to be disposed of.

It is said that Crane, the collector, received money belonging to the United States, out of the line of his duty, which has been improperly charged to make up the amount of the defalcation, which his sureties are now called upon to pay.

The duties of collectors have been much multiplied by other acts, since the act of 1799 was passed. Scarcely an act, and no general act has been passed since, concerning the collection of duties upon imports and tonnage, without some addition having been made to the collector's duties. They are suggested from experience. The collector, too, has always been a disbursing officer for the payment of the expenses of his office, and may pay them out of any money in hand, whether received from duties or from remittances to him for that purpose, where the expenses are not unofficial, have been sanctioned by law, and have been incurred by the direction of the Secretary of the Treasury. For such payments, he may credit himself in his general account against the sums which may have been received for duties. He may retain his own salary, or fees and commissions; pay the salaries of inspectors and other officers attached to the office; make disbursements for the revenue boats, light-house buoys, &c., and apply money collected for duties, to all expenses lawfully incurred by himself or by his predecessors. For such as may have been incurred by his predecessor, he may

receive from him any money in his hands, when he is going out of office, belonging to the United States, and which have been retained by him for the payment of such expenses.

When so turned over to a successor, he receives it officially, to be applied by him to the purposes for which it had been retained. Himself and his sureties are as much responsible for the faithful application of it as they are for his fidelity to his trust, for duties received by himself, or for other sums which may have been remitted to him by the order of the government. It has often been the case, and must be so again, as it now is, that the convenience of the government and the interest of its citizens, require collection districts to be established, which do not, and are not expected at first to pay expenses. Remittances then must be made for such purposes. They are made to the collector, because it is under his personal supervision that the work is done, or the goods are furnished for the government, at the point of his office where the law requires him to reside. What we have said, covers all of the remittances which were made to Crane, by Breedlove, the collector of Mississippi; and also the payment of $1,279.92 received by him from Willis, his predecessor, when he was going out of office, and when Crane was coming in. It appears, from the accounts, that he received it as collector. It cannot be denied that there was then a debt due by the government, on account of the expenses of the office, to which that sum ought to have been applied. Had it been so, he would have been credited with the sum in his next quarterly settlement. And if it was not so applied, it cannot be said that there was fidelity to his official trust in withholding it and applying other money of the government subsequently collected or received, to the payment of its antecedent debt. In this instance, there is less reason for not exempting the securities of Crane from responsibility for the sum received by the collector from his predecessor, because the evidence in the case shows it was afterwards sanctioned by the government, and that it might have been applied by the collector to the liquidation of an official debt, as far as it would go, due by this government to himself. What has been said, covers every instruction which the court below was asked to give upon this point. We do not think that the judge erred in his general charge upon them to the jury, or that in making the charge which he did, that there is any error of which the defendant can complain.

We affirm the judgment below, and direct a mandate to issue accordingly.

Mr. Justice CAMPBELL.

I dissent from the judgment of the court in this case.

The certificate of the Comptroller of the Treasury, of his approval of a bond which it is made his duty to accept on behalf of the government, is the best evidence of the time of its delivery, as a valid and operative obligation. If another date is asserted by the government, the burden of sustaining it by clear proof, devolves upon it.

The instruction to the jury by the District Judge, "that the time of the approval of the bond, at the Treasury Department, is not to be taken as the time of delivery," was, in my opinion, too general, and is erroneous.

The District Judge further instructed the jury, that although the bond "may not have come to the hands of the officers of the government" till after the death of one of the obligors, yet "if they had parted with it for the purpose of sending it, or having it sent to Washington city, before that time," that would charge the legal representative of the person who had died.

The delivery of a bond is only complete when it has been accepted by the obligee, or a third person, "for, and in his behalf, and to his use."

The terms I have quoted from the Touchstone, imply a cession of the title to the paper in the act of delivery.

The third person, who thus represents the obligee, is not subject to the mandate of the obligor, nor amenable to his control.

The instructions of the District Judge would be satisfied by any surrender of the custody of the paper, if for the purpose of having it sent to Washington city; whether it be to the agent or servant of the obligors, who would be subject to their orders, or by its inclosure in a letter, the delivery of which might be countermanded; in other words, by acts which did not amount to a surrender of the property or legal right to control the paper. This, in my opinion, was erroneous. With respect for the opinion of this court, I enter, therefore, my dissent to the judgment which affirms these instructions.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the Northern District of Florida, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed, with interest, until paid, at the same rate, per annum, that similar judgments bear in the courts of the State of Florida.

Elijah Phelps, Plaintiff in Error, v. Jacob Mayer.

In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them, excepted to them while the jury were at the bar.

The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge who authenticates it, to have been so taken.

Hence, when the verdict was rendered on the 13th December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs.

Mr. Justice Curtis did not sit in this cause, having been of counsel for the patentee.

This case was brought up by writ of error from the Circuit Court of the United States for the District of Indiana.

It is not necessary to state either the facts or arguments of the case, inasmuch as it went off upon a point of practice.

It was argued by *Mr. Ewing*, for the plaintiff in error, and *Mr. Jernegan*, for the defendant in error.

Mr. Jernegan thus noticed the point upon which the case went off.

A preliminary objection arises. It appears from the record that the verdict was rendered on the 13th of December, and the bill of exceptions filed on the 14th. No exceptions were taken on the trial. It is therefore too late now to object to the instructions of the court, or its refusal to give the instructions required. 11 Peters's Rep. 185; 6 Blackford's Rep. 417; Cully v. Doe, 11 Adolph. & Ellis, 1008, note.

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

This action was brought by the plaintiff in error against the defendant in the Circuit Court of the United States for the District of Indiana, for the infringement of the plaintiff's rights under a patent granted to him for a new and useful improvement in the application of hydraulic power. The case was submitted to a jury under certain directions from the court, and the verdict and judgment were for the defendant.

This writ of error is brought for the purpose of revising this judgment—and the case has been fully argued upon the charge given by the Circuit Court, and also upon its refusal to give sundry directions to the jury which were requested by the plaintiff.

But, although it appears by the certificate of the judge, sent up as part of the record, that these instructions were given and refused at the trial, yet it also appears that no exception was taken to them while the jury remained at the bar. The verdict was rendered on the 13th of December, and the next day the plaintiff came into court and filed his exception. There is nothing in the certificate from which it can be inferred that this exception was reserved pending the trial and before the jury retired.

The defendant in error now objects that this exception was too late, and is not therefore before this court, upon the writ of error. We think this objection cannot be overcome.

It has been repeatedly decided, by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The Statute of Westminster 2d, which provides for the proceeding by exception requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken.

Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it, by further testimony, if apprised of it in time.

This subject was fully considered in the case of Sheppard v. Wilson, 6 How. 275, where the cases previously decided in this court, affirming the rule above stated, are referred to.

There being, therefore, no exception before the court, and no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs.

Order.

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

Charles Bispham, Appellant, *v.* Eli K. Price, Executor of Joseph Archer, deceased.

In the settlement of complicated partnership accounts by means of an arbitrator, Bispham was charged with one half of certain custom-house bonds, which Archer, the other partner, was liable to pay, and which obligations had been incurred on partnership account.

There was a reservation in the settlement as to certain liabilities, but this one was not included.

Archer's estate was afterwards exonerated from the payment of these bonds by a decision of this court, reported in 9 Howard, 83.

A bill cannot be brought by Bispham against Archer's executor to refund one half of the amount of the bonds, upon the ground that Archer had never paid it.

The reference to an arbitrator was lawful, and his award included many items which were the subject of estimates. It was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of Archer.

No fraud or mistake is charged in the bill, and if an error of judgment occurred, by which the chance was overrated that the custom-house bonds would be enforced against Archer, this does not constitute a ground for the interference of a court of equity.

The statute of limitations also is a bar to the claim.

This was an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, sitting as a court of equity.

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

It was argued by Mr. *Gerhard* for the appellant and by Mr. *Meredith* for the appellee.

The counsel for the appellant made the following points.

First Point. The express terms and proper construction of the statement of the accounts between the parties by William Foster, entitle the appellant to a recovery.

The "settlement" or "statement" of the accounts by Mr. Foster, giving rise to this suit, is careful to provide for any such contingency as that which has occurred. The amount to be paid by Mr. Archer to Mr. Bispham, is declared to be "in liquidation and full settlement between them, of all matters, claims, and demands, relating to or growing out of the transactions of their late firm, so far as they are now known, ascertained, or believed to exist."

This seems to include every future contingency, and to reserve to each party the benefit of it. To prevent any possible future misunderstanding, however, the paper goes on to provide,

First. "But as liabilities may hereafter be established or ascertained,"

Second. "Or claims received, not now known to exist, growing out of transactions during the partnership for partner-

ship account, it is understood that the same are not embraced in the foregoing settlement and determination by me as the agent and umpire of the parties, and especially any matter of such character contingent on the result of pending suits, is excepted from this adjustment of the affairs of said firm."

It will be observed, that there were no pending suits unless a reference was intended, as was doubtless the case, to the suits by the United States against Mr. Archer on the custom-house duty bonds in question—no others existed. There was one and one only, in New York, besides those, which are the foundation of this suit. And it is submitted that the court below erred in refusing to recognize, as pending suits, those in which judgments had been recovered, but the judgments themselves were unsatisfied—and that, too, when the phrase is used by mercantile men in an informal paper writing.

If a reference is only made to the second reservation above quoted, it is submitted that the appellant's case is made out. What difference is there between the actual facts, and the hypothetical case of a payment by Mr. Archer, and a repayment by Mifflin? Could there, in such an event, have been a doubt as to Mr. Bispham's right to participate in that recovery? The facts then would have been literally within the provision.

Second Point. If it is necessary to sustain the case for the appellant, the court as a court of equity, would reform the agreement and statement made in pursuance of it, to give relief to the appellant in the present case. It is a case within the principles of both mistake and accident. It is clearly settled, that where, either in a settlement, award, or even a solemn adjudication by the judgment of a competent court, there has been a technical mistake, such as has occurred in the present case, courts of equity will relieve against such a mistake. Courts of equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. Story's Equity, § 162.

Equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument, and the circumstances of the case. The general rule, "*Quoties in verbis nulla est ambiguitas, ibi,*" &c., shall not prevail to defeat the manifest intent and object of the parties, where it is clearly discernible, on the face of the instrument, and the ignorance, or blunder, or mistake of the parties has prevented them from expressing it in the appropriate language. Id. § 168.

"The same principle applies where a legacy is revoked, or is given upon a manifest mistake of facts." Id. § 182. 8 Hare's R. 222; Osgood *v.* Jones, 10 Shep. 312; Williamson *v.* Johnson, 3 Halsted, Ch. 537.

So also in the case of settlements, so called.

A settlement of accounts, where one of the parties had but little knowledge of the matters settled, will be considered as *primâ facie* evidence, subject to be rebutted by satisfactory proof, under proper allegations, in the pleadings charging fraud or mistake as to particular items. Lee's Administrators *v.* Reed, 4 Dana, 109.

The court will open settlements made by mistake, although receipts in full have passed, and the note on which payments were made, has been taken up. M'Crae *v.* Hollis, 4 Desaus. 122. See also Shipp *v.* Swann, 2 Bibb, 82. Waggoner *v.* Minter, 7 J. J. Marsh. 173.

Where a bond was in form only a joint bond, but it was suggested to have been the intention of the parties to have made it joint and several, the court referred it to the master to inquire whether this was the intention of the parties. Where such intention appears on the face of the bond, the court will treat it as a joint and several bond, although it is only a joint bond in form. Ex parte Symonds, 1 Cox, 200. See also Rawstone *v.* Parr, 3 Russ. 539.

And so anxious is a court of equity to correct a mistake, that even parol evidence is admitted to prove one made by a solicitor in the draft of a settlement. Rogers *v.* Earl, Dick. 294. See also Shipp *v.* Swann, 2 Bibb, 82.

An account stated, may be set up by way of plea, as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a court of equity. But if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and reëxamined.

Sometimes the account is simply opened to contestation, as to one or more items, which are specially set forth in the bill of the plaintiff. Story's Equity, § 523.

An award may be good for part and bad for part; and the part which is good will be sustained, if it be not so connected with the part which is bad, that injustice will thereby be done. Banks *v.* Adams, 10 Shep. 259.

To some extent the courts of equity and of common law exercise a concurrent jurisdiction on this point. Wilkins *v.* Woodfin, Administrator of Pearce, 5 Munf. 183.

Assumpsit lies for one against his copartner, for money paid him on a dissolution, and adjustment of the concerns of the copartnership, more than was actually due. Bond *v.* Hays, 12 Mass. R. 34. Or for one who has paid over by mistake more than his partner was entitled to receive. Id. 36.

It is very plain that the error which occurs in the case before the court was not a mistake of law, but of fact, or a technical mistake, for the reason that, at the time when that settlement was made, there was an actual existing liability for which the appellant was obliged to account.

Where a party has been subjected by a decree to a contingent and probable liability, he may be compelled to account, with a view to that liability, when the state of things shall happen upon which it may depend. Bank of the State *v.* Rose, 2 Strobhart, Eq. 90.

If, therefore, the occurrence in question comes within the definition of a mistake, it was clearly one of fact; a mistake of fact in this, that the account was struck upon the basis, that the contingency would never happen by which those payments were discharged. This view of the subject, however, necessarily points out another light in which it may be viewed as within the scope of equitable relief, viz. "accident."

The definition of "accident," as given by Mr. Jeremy, embraces this very case; he defines it to be "an occurrence in relation to a contract which was not anticipated by the parties, when the same was entered into, and which gives an undue advantage to one of them over the other in a court of "law."

And the exception, taken to this definition by Mr. Justice Story, is that the term "contracts" is not sufficiently general. Story's Eq. § 78, note 3. By the term accident, is here intended not merely inevitable casualty, &c., but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party. Story's Eq. § 78. It may be stated, generally, that where an inequitable loss or injury will otherwise fall upon a party, from circumstances beyond his own control, or from his own acts done in entire good faith, and in the performance of a supposed duty without negligence, courts of equity will interfere to grant him relief. Id. § 89. Under this definition the unforeseen death of Mr. Archer fairly brings the appellant's case within that ground for equitable relief. See also Hachett *v.* Pattle, 6 Mad. 5.

Third Point. There has been an entire failure of the consideration upon which the money sought to be recovered in this action was paid by the appellant to the appellee's testator. Parish *v.* Stone, 14 Pick. 198, 210. Fink *v.* Cox, 18 Johns. 145; 8 Mass. 46; 15 Johns. 503; 5 Pick. 391; 2 Penn. State Rep. (Barr) 200.

This is the appellant's case, to which various defences have been made. It is said that Mr. Bispham released Mr. Archer. There is no release, (technical,) express or by implication. Agnew *v.* Dorr, 5 Whart. 131; Tyson *v.* Dorr, 6 Ib. 256. Nor

if it were a release would it be binding in a court of equity, where there was ground for relief on account of mistake or accident. Story's Eq. § 523; M'Crae v. Hollis, 4 Desaus. 122; Shipp v. Swann, 2 Bibb, 82. When construing the whole transaction together, with an effort and the right to arrive at the actual meaning of the parties, there can be no question that no such release, as is asserted in the answer, was designed or intended. Even construing exhibit E as a strict technical release, the defendant cannot at all sustain his construction of it. Mr. Bispham exonerates Mr. Archer from any further claims, "further" than such as can be made under Mr. Foster's settlement, is the grammatical construction. And the plaintiff really asks for nothing beyond this.

Again, it is said by the appellee that the agreement to state the accounts was a submission to an arbitrament, and that Mr. Foster's statement was an award, and is conclusive on Mr. Bispham. The appellant denies that this was an award; but even if it was, the case has been shown to be carefully excluded from the effect of Mr. Foster's statement. It is submitted that an award, not made a rule of court, cannot be binding where, if it were a rule of court, it would be set aside, and it is a familiar principle of the law of awards that courts will set aside an award made upon a mistake appearing, as here, on the face of the award itself. Watson on Arbitraments and Awards, 280. In all awards, not made under a rule of court, it is the settled law that a court of equity will relieve against them on the ground of mistake in any such case as the present.

Another suggestion of the appellee is that the account stated between the parties bars the appellant. The law is otherwise where, as here, there was a mistake, accident, or any similar event. The court will open settlements made by mistake, although receipts in full have passed, and the note on which payments were made has been taken up.

Again, it is said by the court below, that Mr. Bispham confirmed the settlement of the accounts twenty-one months after he had had the opportunity of examining it. This would be very well if Mr. Bispham's absence from Philadelphia put him into legal default. But it appears, from the evidence and record, that, from the date of the settlement of November 18th, 1835, to the confirmation of the account by Mr. Bispham on the 18th of August, 1837, he was absent from Philadelphia, and had not seen Mr. Archer who was in England and Canton. He had not, therefore, at the date of the confirmation, been informed that no money had in fact been paid on this account by Mr. Archer, but he was justified in supposing, from his (Archer's) letter of the 16th of November, 1835, above referred to, that

the judgments had been actually satisfied by him. If upon this supposition (a clear mistake in point of fact) Mr. Bispham confirmed the settlement by Mr. Foster, he would, upon every principle, be entirely justified in asking a court of equity to correct this mistake, particularly as he had been led into it by the assertions of Mr. Archer himself, that the liability on his part was complete, and that funds were provided by him for its immediate payment, which would be made as soon as they should be realized by his father. Twenty-one months after this letter Mr. Bispham certainly had a right to suppose them to have been actually so applied, and that the charge was therefore a proper one.

But even if Mr. Bispham did abandon or waive his right, under a mistake, it will not conclude him. A party who abandons his rights under a contract, from a mistake as to their character, is not concluded by such abandonment. Williams *v.* Champion and Goodrich, 6 Ham. 169.

The counsel for the appellant then argued that the Statute of Limitations did not apply.

Mr. Meredith, for the appellee, made the following points.

On behalf of the appellee it is contended that there is no equity whatever in the bill, for on this very subject-matter there were —

1. A submission and award.
2. Freely ratified and confirmed by the parties after full consideration, and with full knowledge of all material facts.
3. Payment of the amount awarded, in satisfaction, and
4. Mutual releases. (See Mr. Archer's letter, Record, p. 22,) and Mr. Bispham's letter, (Record, p. 24.)

It is also conceived, that —

1. If the plaintiff has any claim, he has a complete remedy at law.
2. That he is barred by the Statute of Limitations.
3. That he is affected by such laches as would bar him in equity, independently of the Statute of Limitations.

1. There was a submission and award on the very subject-matter in question. The submission is on the record, by which, after appointing Mr. Foster the joint agent of the parties in the settlement of all accounts between them, it is expressly agreed that his "decision shall be final and binding on all the parties concerned." By the award, dated 18th November, 1835, Mr. Foster did "award and determine" that Mr. Archer was indebted and should pay, &c. These bonds were part of the subject-matter of that award.

We contend that this case shows both an award and a settlement.

2. This award was freely ratified and confirmed by the parties after full consideration, and with full knowledge of all material facts. It was ratified as a whole, and by Mr. Archer, on the express condition that the whole should stand or none. See his letter of 16th November, 1835, and the paper signed by him of 19th November, 1835, (Record, pp. 22–23.) That paper, which the bill alleges was delivered by Archer to the comptroller on the 19th November, 1835, (Record, p. 3,) expressly provides that if Mr. Bispham objects to the settlement, Mr. Archer binds himself to abrogate the same, and open it for a new and final adjustment. On the 18th August, 1837, Mr. Bispham says, "the settlement..... is perfectly satisfactory to me, and I do hereby confirm the same." He had taken, therefore, abundant time for the fullest consideration; and that he was acquainted with all the facts, not only appears from the evidence in the case, but has not been denied by Mr. Bispham.

3 and 4. The acknowledgment of payment, and the mutual exoneration are to be found in the letters above referred to. Mr. Bispham, in his letter of August 18th, 1837, (Record, p. 24,) after acknowledging the receipt of the amount due under the award and settlement, and reciting what he understood to be the exception, adds, "and intending this letter as entirely exonerating you from any further claims from myself, heirs, or executors, I am," &c. The appellant (Brief, p. 16) contends that this was not a technical release; but being founded on a sufficient consideration, it cannot be denied that it is, for all the purposes of this case, just as much a release as if the most formal instrument had been executed. The word "further" in the release, evidently means further than any unsettled claims which might be made on the firm. To be sure Mr. Bispham understood the meaning of the award to be the same, as will hereafter be more fully shown, and therefore, in that sense, he may be considered to have meant further than could be made under Mr. Foster's settlement.

The appellant's counsel, in the brief, presents three points, on each of which a few words will be said.

They are substantially as follow, viz.

1. That on a true construction of the award, which he calls a statement of account, the appellant is entitled to recover.

2. That the papers are, if necessary, to be reformed on the ground of mistake or accident, or both.

3. That there has been an entire failure of the consideration on which the money sought to be recovered in this action was paid.

(The remarks of *Mr. Meredith* upon the first and third of these propositions, are necessarily omitted for want of room.)

2. The second point advanced in the brief of appellant's counsel, is that, if necessary, the papers are to be reformed on the ground of mistake, or accident, or both.

It is to be observed on this, and the succeeding point, that the appellant's bill sets up no case in which they can arise; it does not allege any mistake, or accident, or failure of consideration, nor does it pray that the papers may be reformed, or his release cancelled, or that he may be relieved from his contract; on the contrary, it appears to claim that on the true construction of all the papers, agreements, &c., themselves, he is entitled to recover the money which he claims. Now a party cannot set up in argument, a case different from or inconsistent with his bill, and, therefore, there is no necessity for answering either the 2d or 3d point of appellant's brief. Nevertheless, a brief notice will be given to both.

And first on the question of mistake, the appellant's brief has been in vain carefully examined on this head of his argument, to discover what mistake it is that he alleges. The bill does not allege any mistake, and it is conceived that the brief particularizes none. On page 12, of the brief, it is said "where there has been a technical mistake, such as has occurred in the present case, courts of equity will relieve." Again, on page 15, "It is very plain that the error which occurs in the case before the court, was not a mistake of law, but of fact, or a technical mistake," &c. And again, on the same page: "If, therefore, the occurrence in question comes within the definition of a mistake, it was clearly one of fact; a mistake of fact in this, that the account was struck upon the basis that the contingency would never happen by which these payments were discharged." From these extracts, the following positions may be gathered, pursuing the order in which they are found, viz. That the mistake complained of, was, 1. A technical mistake. 2. Not a mistake of law. 3. A mistake of fact, or a technical mistake. 4. Clearly a mistake of fact, if the occurrence in question were a mistake at all.

What the "occurrence" was, that is here referred to, is not very clearly explained. It may be surmised, (from what follows in the same sentence,) to have been "the contingency by which these payments were discharged." If this be so, then the allegation is that Mr. Archer's dying six years after the settlement, was a mistake, but if so, it was not a wilful mistake, and surely not such a mistake as would induce a court of equity to set aside all the contracts he had made in his lifetime.

If the ground really be, that Mr. Bispham was ignorant of

the rule of law which discharges the estate of a deceased surety, against whom a judgment has been obtained jointly with his principal, the answer is twofold.

1. That there is no evidence whatever that Mr. Bispham was, in fact, ignorant of that rule of law. He nowhere asserts himself to have been so ignorant; and this court have assumed, that this rule of law is known and established, and formed a part of the written conditions of the bonds in question.

2. If such ignorance were averred or proved, then it is abundantly clear, that it would be wholly immaterial. See for this familiar principle, 1 Story's Equity, c. 5, § 111 to 115, inclusive, and the cases there cited. In the well known case of Hunt *v.* Rousmaniere, (8 Wheat. 174; 1 Pet. 1, 13, 14,) upon a loan of money, for which security was to be given, the lender took a letter of attorney, with power to sell the property, (ships,) in case of non-payment of the money, instead of a mortgage on the property itself, upon the mistake of law, that the security by the former instrument would bind the property as strongly as a mortgage, in case of death or other accident. The debtor died insolvent, and on a bill against his administrators to reform the instrument, or to give it a priority by way of lien on the property, the court denied relief.

On the head of accident, the case seems quite clear against the appellant. In matters of positive contract and obligation created by the party, (such as this was,) it is no ground for the interference of equity that the party has been prevented from fulfilling them by accident; or, that he has been in no default; or that he has been prevented by accident from deriving the full benefit of the contract on his own side. 1 Story's Equity, c. 4, § 101, et seq., and the cases there cited.

Thus, if an estate be sold by A, to B, for a certain sum of money, and an annuity, and the agreement be fair, equity will not grant relief, although the party dies before the payment of any annuity. Mortimer *v.* Capper, 1 Bro. Ch. R. 156; Jackson *v.* Lever, 3 Bro. Ch. R. 605; and see 9 Ves. 246.

There is a sort of suggestion on pages 17 and 18, of the brief, that Mr. Bispham, at the date of the confirmation of the settlement, supposed that Mr. Archer had actually paid the bonds, and that he had been led into this mistake by the assertions of Mr. Archer himself. Of Mr. Bispham, it ought to be observed that he has not in his bill, or elsewhere, so far as is known, averred or insinuated that he supposed the bonds were paid. The settlement was made expressly on the footing that the bonds were not paid, and it was confirmed on the same footing. As Mr. Bispham does not appear to have made such a suggestion during Mr. Archer's lifetime, or hitherto since his death, it is not probable that he will ever sanction it.

It is stated, in the appellant's brief, that the partners never met after the expiration of the copartnership. There is no evidence in the case on that point, but the appellee's counsel is instructed to say that they did meet, and that Mr. Archer, after a lingering illness, actually died in Mr. Bispham's house, at Mount Holly, N. J., where he had been staying for several weeks as a guest.

Now, still looking at the settlement as relating to the bonds alone, it will be observed that the position of the parties was this. Mr. Archer was absolutely liable to the United States for the whole amount of the judgments, long before obtained against him. Mr. Bispham was liable to him for one half of what he should be obliged to pay, unless Mr. Foster's proportion could be recovered, and the recovery of that was quite desperate. Notwithstanding the award, Mr. Archer left Mr. Bispham at perfect liberty to accept or reject its terms. Mr. Bispham might either have determined to wait till Mr. Archer had actually paid the judgments, and then contributed his proportion, in which case he would, in all human probability, have been obliged (failing Mr. Foster) to pay the full half of the whole amount; or he might accept the terms proposed in the award, and by paying at once less than half the amount, be entirely exonerated. He deliberately chose the alternative.

This case seems to differ in substance from Hunt v. Rousmaniere, and other cases cited above, only in this remarkable circumstance, that whereas, in those cases, the party complaining was worse off, by reason of the unforeseen death, and lost his money thereby, in the present case, it is evident that Mr. Bispham is no worse off by Mr. Archer's death, and has lost no money thereby. If Mr. Archer had lived, it is not pretended that Mr. Bispham would have been entitled to recover the money back, and his death merely leaves him in the same position.

Mr. Justice CAMPBELL 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 Pennsylvania.

Joseph Archer (the testator of the appellee) and the plaintiff (Charles Bispham) in June, 1828, provided for the extension of a partnership, which was existing between them, for a term of five years. The plaintiff was to form a connection with another house, and to remain at Valparaiso, on the Pacific coast, for the term; while Archer was to manage the affairs of the firm in the United States. During the latter years of this partnership, Archer formed a partnership connection with another firm, and went to Canton, in China. The partners agreed to be equally

concerned in the profit or loss of all their business, whether transacted on the coast of the Pacific, the United States, or elsewhere. At the termination of this partnership, one of the partners was at Valparaiso and the other at Canton. In April, 1834, Archer, then at Canton, signed a paper which declares, that from "the long and repeated absence" of the partners from the United States "it is believed their accounts are in a state of confusion," and "in case of the death of either," "some difficulty might be experienced in the settlement." William Foster was therefore constituted "the joint agent" of the partners, "in the settlement of all accounts between them," and "that his decision shall be final and binding." This paper was countersigned in the November following by Bispham, and the authority of Foster confirmed. Twelve months after, (November, 1835,) Foster executed this authority, by a statement of the accounts between the parties ascertaining a large balance to be due to Bispham, and awarded and determined that it should be paid to him "in liquidation and full settlement between them, of all matters, claims, and demands relating to, or growing out of the transactions of the firm so far as they are now known, ascertained, or believed to exist;" and provided, that "as liabilities might hereafter be established or ascertained, or claims recovered (received) not then known to exist, the determination was not to embrace them, and especially any matter of such a character, contingent on the result of pending suits, was excepted from this adjustment of the affairs of the firm."

Before the execution of this power, Archer had returned to the United States, and the settlement was evidently undertaken by Foster at his urgent solicitations. For, contemporaneously with the settlement, he gave to Foster a stipulation, reciting that Foster, having agreed to and ratified the final settlement of all accounts between the partners in relation to their business, that if it should happen that Bispham should, in his own name, object to this settlement, Foster is to be exempt from all blame, and he binds himself "to abrogate said settlement, and open it for a new and final adjustment."

At the same time, he wrote a letter to Bispham, stating that he had hoped to have met him in the United States, but that as he was about to embark for China, there seemed little chance of "their meeting for a number of years." He had resolved, in conformity with the letter of Bispham, of the 13th May, (this letter is not a part of the record,) to make a settlement of Archer and Bispham's affair with William Foster, as per statement, which he will forward, and he expresses the conviction that the settlement was made on liberal principles to Bispham. In this letter, after discussing various items of the account indicative of liber-

ality, and justifying others, he says, "if there is any thing in this settlement which does not meet with your approbation, I wish you to state it candidly to William Foster, with your reasons, and let him, as your agent, appoint an arbitrator, and my father, as mine, will name another, and let them say what is just and right under all circumstances, embracing the gain allowed you, on the shipment of raw silk in settlement, and open the account anew for adjustment. If the settlement meets your approbation confirm it, under your own hand, and send it to me at Canton." He promises, in this letter, to remit the balance against him from Canton.

A month later, he addresses a letter to Bispham, from England, in which he states, that "I wrote to our friend, William Foster, yesterday, about our settlement, and have stated to him, that if you were not satisfied with it, I was perfectly willing to leave it to an arbitration. He will show you the letter, if you desire it. I want the business closed, for should you or I make a finish of our career in this world, it never could be settled with any degree of certainty."

What communications were made during the year 1836, or the first half of 1837, between the partners or their agent, do not appear. The 18th of August, 1837, twenty-one months from the date of Foster's statement, Bispham, at Valparaiso, addressed Archer a letter at Canton, in which he acknowledges the receipt of a bill on London for the ascertained balance, dated June, 1836, declares that the settlement, made by William Foster, is "perfectly satisfactory," admits his responsibility for any unsettled claims which might be made, and concludes that "intending this letter as entirely exonerating you from any further claims from myself, heirs, or executors. I am, yours, &c."

It appears, from a particular averment in the bill of the plaintiff in this case, "that no liabilities have been established or ascertained growing out of transactions during the said partnership of Archer & Bispham for partnership accounts, or any payments on account of the same, other than those known to exist at the time of the settlement of the account of said Archer & Bispham by William Foster, and that no claims had been received by Bispham, growing out of the transactions of the firm." The record shows no other dealings between these partners during the life of Archer, who died in 1841. After his death, Bispham qualified as executor of his will, and acted for sixteen months, and was discharged upon his own petition.

The present controversy originates in the execution by Archer, in his individual name, of eight bonds to the United States for the payment of duties, as surety for James L. Mifflin, upon four of which William Foster was a co-surety. These bonds by

arrangement, were debts of the firm. Mifflin having become insolvent, the bonds were not paid, and, in 1829, judgments were rendered against the obligors jointly, in favor of the United States, by the Circuit Court of the United States at Philadelphia. In 1831, Foster petitioned for his discharge as an insolvent, which was granted in 1834. These liabilities are included in the settlement of 1835, under the title of "statement of J. L. Mifflin's bonds, for which Archer & Bispham are liable." In the statement of the account, the bonds are enumerated, their dates, and the amount of principal and interest due upon them described. The share of William Foster, notwithstanding his continued insolvency and the fact of his release, is deducted, and the balance divided between the partners.

From the balance found to be due on the accounting to Bispham from Archer, his share of this liability is deducted. In the letter of November, 1835, to which we have referred, Archer says,—"During our absence, my father endeavored to effect a compromise with the government for Mifflin's bonds, and, since my return, I have also made an effort to do the same, but without effect, as the officers intrusted with such matters can make no abatement in the whole amount due with interest, unless the applicant produce all their books and papers, and affirm their inability to pay the whole amount. With these conditions I could not comply; and as there seems likely to be no benefit to us by longer delay, I have concluded to pay the amount. My father has funds enough of mine in his hands to pay the amount, which will be appropriated to that purpose as soon as he can realize them.

"You will observe, by the statement, that your proportion of the bonds has been deducted from the sum due you. I therefore absolve you from all claim for these bonds, your proportion having been paid to me in settlement." No other explanation of the transaction is found in the record. These judgments were not paid to the United States during the lives either of Foster or Archer; nor since by Mifflin, who is the survivor of both.

Upon the death of Archer we learn, from the bill and answer, that the executor of Archer "at all times" claimed, and now claims, the exemption of the assets in his hands from the judgments, for the reason that the remedy at law was extinct, and that equity would afford none. This court sustained that claim, for reasons reported, 9 Howard, 83.

This bill, in 1850, was a consequence of that decision. It charges that, in the settlement, it was assumed that the liability of Archer upon the bonds could be enforced by the United States, and, on that assumption, the share of Bispham in the

liability was paid to Archer; and that the estate having been discharged without a payment, he is entitled to a return of his money. The bill does not claim that there was any want of information, or any mistake in reference to the state of the liability at the date of the settlement. The inference to be deduced from the age of the judgments, Foster's connection with a portion of them, and his discharge by the United States, the item for counsel fees in the accounts, the intimate relations of the plaintiff with Archer and with the estate of Archer, and the absence of all averment in the bill, either of error, ignorance, mistake or fraud,—is, that accurate information of the judgments was possessed by all the persons connected with the settlement. The bill does not aver that these judgments were designed to be included in the reservation contained in the latter part of Foster's report; but the extract we have made from the bill evinces that this is a claim whose situation was known, and the relations of the partners to it at that time ascertained and adjusted. The evidence is satisfactory that this reservation did not include this liability, or any contingency in which it was involved. The statement of the liability in the accounts is particular and exact. The portion of each partner is determined with precision. Archer acknowledges to have received Bispham's share, and "absolves" him from further claim; while Bispham expresses his satisfaction with the whole result, and exonerates Archer from future responsibility. Whether we consider the averments in the pleadings, or the evidence, we must take the settlement as a sedate and deliberate adjustment of the affairs of the partnership, so far as they were ascertained and could be made the subject of an arrangement.

The design of the settlement was to extricate the affairs of the partners from the complication, uncertainty, and confusion in which they were involved. They had been engaged in distinct partnerships, carrying on business in different continents, apparently disconnected, and having but little opportunity even of correspondence. They had the prospect before them of a longer separation, and of diminished intercourse. Their partnership had ended. The ordinary mode of liquidating, after a dissolution, could not be followed. These partners, under these circumstances, and to attain their ends, consequently agreed to a reference of their accounts to a mutual friend, and clothed him with authority to make a final and binding decision. Was this lawful?

In Knight *v.* Marjoribanks, 11 Beav. 322, affirmed on appeal 2 Mc. & Gord. 10, the Master of the Rolls, after stating the usual course on a dissolution, said, "it is lawful for partners to deal with each other in quite a different way, if they think proper.

They may lawfully rely on the stock-takings, valuations, and accounts which appear in the books, and the accounts kept in the manner known to, or acquiesced in, by the partners. The stock-takings and valuations will be more or less accurate, according to the nature of the business and the property employed or engaged in the concern. It would, in many cases, be absurd to expect perfect accuracy, or to conclude that a transaction between partners, founded on statements appearing on the valuations and accounts stated in the books, could be set aside on the ground of some subsequent discovery of unintentional inaccuracy. When a question arises, you must in each case look to the circumstances."

In that case, the seat of the partnership was Van Diemen's Land. The partners resided in London, having no personal knowledge of the business, and dependent upon the reports of agents, coming at distant intervals, and received several months after their date. A sale of the share of one partner to another was impeached for inadequacy of price, error, and fraud. The Master of the Rolls said, "these parties, situated as they were, might fairly and honestly deal with each other, with respect to the share of any one, notwithstanding the ignorance in which they were as to the exact value. After all inquiry which can be made with respect to matters of this kind, the question of value becomes comparatively immaterial, if there was no deception, no misrepresentation or fraud, no unfairness."

In the case before us, entire accuracy is not to be looked for. Bispham is credited with proportions of profit arising from "unfinished business," and is charged with proportions of "estimated gains." There are items, which Archer pointed to as debatable, which he had conceded, and there are allowances to him, which might be considered as narrow. He regarded the settlement as a liberal one to Bispham. He asked its acceptance as a whole, "to close the business," and provided for an arbitration if this was refused. There was not haste in the acceptance, but ample time employed for inquiry. After this, it was accepted as "perfectly satisfactory," and acquiesced in as as such, until long after the death of Archer.

We cannot infer mistake or error under these circumstances. We adopt the language of Chancellor Walworth, (4 Paige, 481,) "that the practice of opening accounts, which the parties who could best understand them have themselves adjusted, is not to be encouraged," and "the whole labor of proof lies upon the party objecting to the account, and errors, which he does not plainly establish, cannot be supposed to exist."

In the absence of mistake, or fraud, does there arise an equity in favor of the plaintiff, by the averment that it was assumed in

the settlement, that there was a liability against Archer, which the United States might, at all times, and under all circumstances, enforce; and on this alone the money was paid to him, or allowed to him in settlement?

In the able argument submitted to us for the plaintiff, this assumption is treated as the motive to the contract, that which constitutes its obligation, in one word, its consideration. If this assumption had been so comprehensive, and had entered so thoroughly into the inducements to the contract, the consequence might follow; but the argument is not supported by the evidence. The parties certainly assumed there existed an imminent liability over the firm which the United States could enforce against Archer, and for which it was prudent to provide.

Bispham, entertaining this opinion, by making a payment to the United States on the judgments to the extent of his share, would have been absolved from the claim either of the United States or of Archer. The United States having made no contract, except with Archer, and Bispham being liable only through him, might liberate himself by a payment to Archer, instead of the United States. This he accomplished.

It may be that neither party reckoned upon the neglect of the government officers about the collection of the debt, nor weighed the consequences of the death of Archer upon the binding efficacy of the judgments, but these were within the provisions of both of the parties to the contract, and its terms might have been moulded to secure the rights of each, according to such circumstances. This court has no competency to supply a providence which the parties to the contract withheld. The *corpus* of this portion of the contract, a debt obliging Archer, and through him affecting the partnership, the collection of which could have been enforced, and which both parties had the right to assume would be enforced, had an unquestionable existence. If there was an error, it was in overlooking the fact that there were some contingencies in which the debt might be extinguished as to Archer without the payment of money, and in making no provision for these.

An error of this nature, if it were plainly proven to exist, could not be regarded as a ground for equitable relief.

The case of Okill *v.* Whitaker, 1 De Gex & Smale, 83, 2 Phil. 338, was one in which premises had been sold, and enjoyed for several years, upon a contract for the sale of the residue of a term, both parties expressly contracting and settling the price on the belief that eight years only remained unexpired. Upon the discovery that there were twenty years, a bill was filed for relief. The Vice-Chancellor complained of the delay of the suit until after the death of the purchaser, where-

fore "those who had to administer justice between the parties were deprived of all the assistance and information he could give if he were living." He said that the only reasonable ground upon which the bill could be treated was as a bill to rescind the entire contract, upon the alleged mistake, and adds, "that for the present purpose it is not too much to say, that it was their duty to know what was the state, what was the condition of the property they had to sell."

The Lord Chancellor said that the only equity presented was "that the thing turns out more valuable than either party supposed."

The nature of this settlement and the motives presented in the correspondence concerning it, would render it impossible for the court to modify one portion, and to leave the rest in force. It was presented to Bispham as a settlement made on liberal principles, with the option to accept it as it was, or to reject it altogether.

Without the benefit of the information and assistance that Archer and Foster might give, after so long an acquiescence, the case must be brought clearly within the limits in which courts of equity are accustomed to interfere, to justify such a decree. This has not been done. But if we could doubt upon the intrinsic equities of the parties, the statute of limitations affords a conclusive answer to the bill. The bill and the answer agree that this item of the account was ascertained and stated, and that all the liabilities of the firm were practically adjusted by this settlement. The amount of the liability of Bispham was credited to him, and he received the "absolution" of Archer, from all further claim. The exception in the Pennsylvania statute in favor of merchants' accounts, according to numerous authorities of the State courts, does not apply to the accounts of partners *inter sese*, though this is not universally admitted. 1 Robin. Va. 79; 10 Pick. 112; 6 Monroe, 10. 4 Sand. Sup. C. R. 311, (contra.) But however the law may be as to open accounts, the settled doctrine of the court is, that the exception in the statute does not apply to stated accounts. Spring *v.* Grey, 6 Peters, 151; Toland *v.* Sprague, 12 Peters, 300.

If we regard this money as a deposit in the hands of Archer, to be applied to a specific object, or to abide the action of the government against him, in either case the statute would afford a bar. The assumpsit in the one would be to pay the money in a reasonable time, and a cause of action would accrue upon a neglect of this duty. Foley *v.* Hill, 1 Phill. 399; Brookbank *v.* Smith, 2 Y. & Co. Ex. R. 58; 13 Barb. 632; 11 Ala. R. 679; 4 Sand. S. C. R. 590.

In the other case, the liability of Archer was determined at

his death, and the right of the United States then extinguished. The facts were all known at that time, and the executor of Archer appreciated accurately the legal value of the facts, for the bill avers and the answer admits that he uniformly repelled the claim of the United States, and denied its validity. It is clear, therefore, if Bispham had placed this money to abide the issue of these obligations, the right to reclaim it arose at the death of Archer. Calvin *v.* Buckle, 8 M. & W. 680; Maury *v.* Mason, 8 Port. 211.

Our views upon this statute correspond with those expressed by the Supreme Court of Pennsylvania. Hamilton *v.* Hamilton, 18 Penn. State R. 20; Porter *v.* School Directors, Ibid. 144.

Upon the whole case, we conclude there is no error in the record, and that the decree should be affirmed.

Order.

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

William C. Bevins and Oliver P. Earle, surviving Partners of the firm of Bevins, Earle & Co., Assignees, &c., who sue for the use of Oliver P. Earle, Plaintiffs in Error *v.* William B. A. Ramsey, Robert Craighead, James P. N. Craighead, Thomas W. Humes, and James McMillan, Administrator of Andrew McMillan, deceased.

Where a clerk of a court was sued upon his official bond, and the breach alleged was, that he had surrendered certain goods without taking a bond with good and sufficient securities, and the plea was, that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond, — this plea was sufficient, and a demurrer to it was properly overruled.

This case was brought up, by writ of error, from the Circuit Court of the United States for the District of East Tennessee.

Ramsey was clerk of the Chancery Court, held at Knoxville, Tennessee. Bevins and Earle were citizens, the former of Arkansas, and the latter of South Carolina.

The action was one of debt, upon the official bond of Ramsey, and his securities.

The declaration states that Ramsey was appointed clerk and master of the Chancery Court, in the declaration mentioned; and, on the 11th April, 1836, delivered to Newton Cannon, Governor of Tennessee, his bond, with the other defendants, his sureties, in the penalty of $10,000, conditioned to discharge the duties of the office of clerk and master, according to law.

That Ramsey failed to discharge the duties of that office:

1. That upon the dissolution of an injunction, awarded on a bill attaching certain property brought by the plaintiffs against Chase & Bowen, which property had been put in the hands of Ramsey, clerk and master, as receiver, he was ordered to surrender the property attached on Chase & Bowen, giving bond and security to abide the decree; that it was the duty of Ramsey, as clerk and master, to take that bond; that he did not take their bond with sufficient securities, but, on the contrary, took the bond of Chase, with Thornburg and others, as sureties, who were then wholly insufficient for the performance of the judgment and decree; that plaintiffs finally got a decree for $6,303.64, which is still unpaid.

2. That in the suit of Bevins, Earle, and Brown v. Chase & Bowen, the property attached in, which had been placed in the hands of Ramsey, clerk and master of the court, as receiver, he was ordered to surrender the property attached to Chase & Bowen, on their giving bond and security to abide by and perform the decree; and under that order it was the duty of Ramsey, as clerk and master, before surrendering the goods, to take a bond from Chase & Bowen, with sufficient security conditioned according to the order. But Ramsey did not take such bond with sufficient security, but wholly neglected and failed so to do, and gave up the property without so doing. And plaintiffs afterwards obtained a decree against Chase & Bowen, for $6,303.64, which is still unpaid by said Chase & Bowen.

3. That in the suit, and under the order above prescribed, it was the duty of Ramsey, as clerk and master, to take such bond as the order directed to be taken before surrendering the property; yet Ramsey did not take bond and security from Chase & Bowen to abide and perform the decree, but surrendered the property without taking bond and security; and a decree was afterwards rendered for $6,303.64 in favor of the plaintiffs.

4. That in the suit, and under the order aforesaid, it was the duty of Ramsey, as clerk and master, to take from Chase & Bowen, bond and sufficient security to abide and perform the decree; yet he wholly failed and neglected to take bond and sufficient security, but surrendered the property held by him as

receiver, without taking bond and security as required by the order; and afterwards a decree for $6,303.64 was in that suit rendered in favor of plaintiffs, which Chase & Bowen have failed to perform, and which yet remains due.

By reason of the premises, the bond of Ramsey, as clerk and master, became forfeited, and was assigned by the successor of the obligee, Governor of Tennessee, by his written assignment, on a copy of the bond, to plaintiffs, on the 22d July, 1847.

The defendants appeared and pleaded:

1st. That they had performed the condition of the bond.

2d. That it was no part of the right or duty of Ramsey, as clerk and master, to take the bond of Chase & Bowen with good and sufficient security or otherwise, but it was the duty of the receiver.

On these pleas there is an issue of fact.

3d. That the filing the bill of the plaintiffs against Chase & Bowen, the attachment awarded, and the appointing the receiver, the order requiring the bond and the final decree, were null and void for want of jurisdiction in the court of chancery, the remedy being properly at law.

4th. That after the order on the declaration mentioned, and before the surrender of the property, Ramsey did take a bond conditioned as required by the order, which bond was, on application of Bevins, Earle & Co., by the court, ordered to be surrendered, and was accepted; and under it they have recovered $2,000.

5th. That the defendants do not owe the debt.

7th. That at the date of the bond, the obligors and obligees were citizens of Tennessee, and the obligors and the obligee and his successors, have all continued to be citizens of Tennessee.

8th. That at the time of the cause of action the plaintiffs and defendants were citizens of Tennessee.

To these pleas the plaintiffs demurred.

To the 6th plea: that before surrendering the property, Ramsey took bond conditioned as required by the order; and in so doing, and judging of the sufficiency of the sureties, he acted *bonâ fide* in the exercise of his best judgment.

The plaintiffs replied, that Ramsey did not take bond from Chase & Bowen with sufficient surety, as was his duty.

To this replication the defendants demurred.

The court overruled the demurrers of the plaintiffs, and sustained the demurrer of the defendants to the replication to the sixth plea and to the declaration, and gave judgment for the defendant on the whole record.

In this state of things, the record was brought up to this court.

It was argued by *Mr. Davis*, for the plaintiffs in error, and *Mr. Lee*, for the defendants, with whom was *Mr. Cullom.*

Mr. Davis, for the plaintiffs in error, contended that, under the declaration, they could recover on one of the two following propositions:

1. That the goods attached are alleged to be in the hands of the defendant Ramsey, in his character of clerk and master, according to the legal effect of the declaration; and that, therefore it was his duty to take good bond and surety before surrendering the goods. Caruthers and Nicholson, St. Tenn. 224, 162, 155; (Acts 1797, c. 22, § 3; 1794, c. 1; 1833, c. 47); Waters *v.* Carroll, 9 Yerger, 102, 108, 110; McNutt *v.* Livingston, 7 Smedes & Marsh. 641.

2. That if the legal effect of the declaration be to charge that the goods were in the hands of Ramsey as receiver, and not as clerk and master, then that it was his duty, as clerk and master, to approve the bond on which the goods were ordered to be surrendered by him as receiver; and that, having approved a bad bond, in his capacity of clerk and master, he is liable in that character for the consequences of such approval — the loss following from the surrender of the goods by him as receiver, on the faith of the bond improperly approved by him as clerk and master.

This may be maintained on the following grounds:

(*a.*) The declaration distinctly avers that, in point of fact, it was the duty of Ramsey, as clerk and master, under such an order as that for the surrender of the goods, on bond to be given, to take the bond; and this allegation has been traversed, and an issue of fact is now pending on it; and under this it will be competent for the plaintiff to show such to have been his duty: 1st, by adducing the rules of court; or, 2d, showing the practice and course of the court in like cases. United States *v.* McDaniel, 7 Pet. 1; United States *v.* Fillebrown, 7 Id. 28; Duncan's Heirs *v.* United States, 7 Id. 435; United States *v.* Arredondo, 6 Id. 714; Minor *v.* Mechanics Bank, Alex. 1 Id. 46; Williams *v.* United States, 1 How. 290.

(*b.*) It is clearly a part of the duty of the master to approve such bonds. The bond is an official one, to be filed in court, not kept by the receiver. The receiver is to act only on such a bond as the proper officer of the court shall have approved. It is the duty of the receiver not to surrender the property till such a bond, properly approved, be filed. The order does not give

the receiver the right, nor throw on them the duty of approving the bond. He is ordered to surrender the goods when such a bond is given, but is silent as to the person by whom it is to be taken and approved. That person is, plainly, from the nature of his office, the clerk and master. See books above cited, and 1 Smith, Ch. Pr. 9.

If it be supposed that the declaration contemplates only one of those grounds of liability; then,

3. The question, whether Ramsey be charged in his capacity of clerk and master, or as receiver, cannot, as is admitted by the brief of the defendants in error, be now the subject of inquiry on these demurrers; since "this supposed error in pleading is brought to an issue of fact, which is still undisposed of."

We are, therefore, entitled to charge Ramsey, on this declaration and at this stage, with the duty of taking or approving the bond as clerk and master.

4. We submit, that the bond of the clerk and master is assignable, under the Tennessee statutes. Caruthers and Nicholson, 162, 155; Acts 1794, c. 1; and 1797, c. 22, § 3.

5. That the assignment here is not a copy of the bond, but the bond itself; the assignment happening to be indorsed or written on a copy of the bond.

6. The demurrer to the 3d plea must be sustained. The plea attempts to inquire collaterally into the regularity of the proceedings in the injunction suit. It does not raise the question of the jurisdiction of the tribunal; but whether the relief sought were properly to be had at law or in equity. To call that a question of jurisdiction, in order to open the case to collateral inquiry, is to misuse legal language.

7. The plea of *nil debet* is clearly bad in reply to breaches assigned on a bond with collateral condition. Sneed *v.* Wister, 8 Wheat. 690.

10. The fourth plea contains no answer to the declaration in substance; and what it does contain is badly pleaded.

The gravamen of the action is the neglect to take any bond, or if any were taken, the taking of insufficient surety.

This plea avers the taking of a bond which it sets forth, and so far it is good. But it does not aver the sureties to have been good or sufficient; and, therefore, it does not in that meet the declaration.

That the plaintiffs sued on the bond, does not show it to have been sufficient, but is, perhaps, the best way of proving its insufficiency. If it were good for part, and not all of the decree, the plaintiffs were entitled to have it, and get what they could, and perhaps bound so to do; but then they were at liberty to sue the officer, likewise, for his neglect in approving bad sure-

ties, or surrendering the property without taking good sureties. It was no case of election, where the suing on the bond concluded the plaintiffs' right to indemnity for its insufficiency.

11. If the replication to the sixth plea be perhaps not very formal, it is as good as the plea; and the plea itself is clearly bad on general demurrer.

The plea avers, 1st, that, taking of bond with sureties, according to the order; and, 2d, that in taking bond, Ramsey acted *bonâ fide*, and in the exercise of his best judgment. But,

1st. To meet the declaration, the defendant was obliged to aver the taking of bond as a performance of one of the duties provided for in the bond on which the suit was brought; but the bond should have been so stated or pleaded as to enable the court to judge of its conformity to the order of law. The plea does not state to whom it was payable, to whom it was delivered, what were its terms; its date, its condition, who were the sureties, nor who were parties to it.

2d. Nor does the plea aver that the sureties were sufficient at the date of the bond; nor that they were believed to be sufficient by Ramsey; nor that he made them swear as to their sufficiency. It merely avers, that he acted *bonâ fide*, and to the best of his judgment; but does not say what he did, nor on what he judged, nor that he took any means to inform his judgment. On that plea, the court must take his ideas of *bona fides* and his judgment as conclusive. Minor *v.* Mechanics Bank, Alexandria, 1 Pet. 46, 49, 71, 66; 4 Taunt. R. 34; Wise *v.* Wise, 2 Levinz, 152; Steph. Pl. 406; 1 Chitty, Pl. 567, 573; 1 B. & P. 638; Co. Lit. 303, *b.*; Finley *v.* Bochin, 3 G. & J. 42, 51; Hughes *v.* Sellers, 5 H. & J. 432; Townsend *v.* Jemison, 7 How. 706, 722; 4 G. & J. 395, 401; McNutt *v.* Livingston, 7 Smedes & Marsh. 641; McAlister *v.* Scrice, 7 Yerger, 277, 278.

But the replication to the sixth plea may well be considered as a traverse of one of the two material allegations of the plea; for the plea alleged taking bond, without stating the parties; and the replication denies the taking bond with the proper parties, as well as the taking of sufficient surety.

The counsel for the defendant in error contended, that there is no rule of pleading better settled than that a demurrer reaches the first error in pleading; and, if it were universal in its operation, it might be contended for successfully, that this declaration shows on its face that the defendant Ramsey acted as receiver in the chancery case set forth in the declaration, and as such was not liable, in his official character of clerk, but in his individual capacity, as commissioner of the court. See 9

Yerger, 102. There are, however, some exceptions to this rule; and amongst others is embraced the case where a supposed error in the pleading is brought to an issue of fact, which is still undetermined; we are therefore precluded, perhaps, from the argument of the point just suggested in this stage of the proceedings. There are two objections to the declaration, which are brought up by the demurrers, either of which are fatal. 1st. The bond of a chancery court clerk is not made assignable by the statutes of Tennessee; and, 2dly. If it is, the assignment must be made of the original bond, and not of a certified copy. It will be seen, by reference to the act of 1794, (see Nich. & Car. pages 155, 147,) that the bonds of the Circuit and County Court clerks are both made payable to the governor, and assignable in cases of default; but the act of 1797, (see Nich. & Car. 162,) which requires a bond from the Chancery Court clerk, does not make it assignable, and it remains as at common law. In confirmation of this view of the case, the court is referred to the case in 9 Yerg. p. 102, where the suit was instituted in the name of the governor. Certainly, there is no statute in Tennessee authorizing the assignment of a copy of a bond, as set forth in this declaration. It is true that profert may, by the statutes, be made of a copy, as the original remains in the office, but the assignment must be of the original bond.

The fourth plea of the defendants was a good and sufficient answer to the declaration, for several reasons. The law of Tennessee does not impose upon clerks and masters in chancery, in express terms, the duty of requiring bonds in cases of the dissolution of injunctions or judging of the sufficiency of the sureties thereto; the obligation arises simply from the order or interlocutory decree delegating him to this power by the court. It is exactly on a footing with any other requisition made upon him by the chancellor in any cause, such as selling property, taking testimony, &c.; he is bound to perform the duty and make report thereof, and if no exceptions are filed by the parties, they are absolutely concluded, unless in cases of fraud. It would be hard indeed, if, after two years from the execution of an interlocutory decree, a clerk could be rendered liable for its faulty performance, when, perhaps, both the means of rectifying his error or disproving it would have passed away forever. The power is delegated by the court to its officer, and when he performs the duty and makes report of his action, and it is confirmed, the rights of the parties are fixed, and neither of them can go behind the decree, unless some fraud should intervene.

If we should be mistaken in this view of the case, certainly the surrender of the bond to the complainants, after the obten-

tion of their decree, their institution of a suit upon it, and obtaining judgment, execution, and part satisfaction of their debt, do constitute an election of their remedy, and a confirmation of the act of the clerk, which would estop them from suing him for neglect of duty. This question has been expressly decided in New York, (see 1 Comstock, p. 433); and that, too, not in a case where there was a faulty performance of duty on the part of the clerk, but where he had clearly exceeded his powers, and committed an illegal act. It is in consonance, too, with the general rules adopted by the courts in regard to the responsibility of other public officers. If a sheriff, on the execution of bailable process, should take the notes or property of the defendant in the process, and discharge him out of custody, although the discharge is illegal, and renders the sheriff liable for escape, yet, if the plaintiff accept the notes or property, he is foreclosed from his remedy against the sheriff. See 2 B. & P. 151; 6 Cow. 465; and 4 Campb. 46. The bond of the defendants, in the chancery case, was made payable to the complainants, and they, by their acceptance of it, and recovery of judgment, have converted it into a security of a higher character, and made it their own; thus disabling the defendant Ramsey from pursuing any recourse he might have had on the property originally attached, or the parties to the bond.

It may be urged, in answer to the authorities adduced, that they were cases of an illegal exercise of authority by public officers, and that these acts must be disavowed *in toto* by the parties interested, or their acceptance would conclude them; but in the case now at issue, the act of the clerk was *primâ facie* legal, and the only mode of testing the insufficiency of the bond was by pursuing the obligors to insolvency. It will be seen, by reference to the cases themselves, that it was admitted by the counsel, that acts of omission could be cured by affirmance; and the only dispute there was, whether the same rule should be applied to cases of illegal exercise of powers, and the admission is true on principle. If the clerk is liable here at all, it must be on the ground that the bond was defective at the time of its reception; the complainants in the chancery suit, then, had the right of exception; if they did not except, and any right of action still remained to them, it must have been perfected on the obtention of their decree, and that was the period for their election.

The demurrer to the sixth plea was not sustainable, and properly overruled; the plea was a full answer to the declaration, and should have been negatived. The clerk of the court, whether acting ministerially or judicially in the reception of the bond, was not an insurer; he was only bound to act *bonâ fide*

and with reasonable discretion. See 7 Smedes & M. 641; 7 Yerg. 276.

Mr. Justice CATRON delivered the opinion of the court.

The defendant, William B. A. Ramsey, and his sureties, were sued on an official bond given by Ramsey as clerk of the Chancery Court held at Knoxville, Tennessee. The condition of the bond declares that the clerk shall "truly and honestly keep the records of said court, and discharge the duties of said office, according to law;" and the declaration alleges that said Ramsey did not truly and lawfully discharge the duties of his office, in this, that Bevins, Earle & Co. filed their bill in equity in the Chancery Court at Knoxville against Chase & Bowen, and that certain goods of theirs were attached, and put into the hands of said Ramsey, as receiver; and that by an order of court the injunction was dissolved, and the receiver, Ramsey, was directed to surrender the goods to Chase & Bowen, "upon their entering into bond with security to abide by and perform the judgment and decree of the court upon final hearing of the cause, if made against them;" and that by virtue of the order it became the duty of Ramsey, as clerk and master of said court, to take a bond as above prescribed. Nevertheless, he did not take from Chase & Bowen their bond, with sufficient sureties thereto, but, on the contrary, he took certain sureties, (five in number,) who were wholly insufficient to perform the decree of the court, and on said insufficient bond and security surrendered the goods to Chase & Bowen; and that afterwards, on a final hearing, a decree was rendered against Chase & Bowen in favor of Bevins, Earle & Co., for the sum of $6,303.64, with interest thereon, which remained unpaid.

The second and third breaches aver that Ramsey surrendered the goods without taking any bond, "with good and sufficient sureties," from Chase & Bowen; and,

The fourth breach avers, that no bond whatever was taken from Chase & Bowen, on the delivery of the goods to them.

The defendant relied on several pleas in defence, only two of which, the fourth and sixth, it is deemed necessary to notice. The fourth plea sets out the order dissolving the injunction, and the bond taken by Ramsey from Chase & Bowen, and their five sureties, and avers that, after the final decree was made against Chase & Bowen, the bond was, on the application of Bevins, Earle & Co., by order of the court, surrendered to them by the clerk and master, and was accepted by them; and under and by virtue of said bond, Bevins, Earle & Co. have demanded and brought suit against and received of the sureties in said bond large, sums of money; to wit, two thousand dollars, part and parcel of the penalty and condition of said bond; and

which were demanded, and received on, and in discharge of, said bond.

The sixth plea avers that the bond taken by Ramsey, as clerk and master, was for ten thousand dollars, and was in due form; and that in judging as to the sufficiency of the sureties, and in surrendering the property, said Ramsey acted *bonâ fide*, and in the exercise of his best judgment.

To this plea the plaintiffs replied, reaffirming that said Ramsey had not taken bond with good and sufficient security, as was his duty; and to the replication there was a demurrer.

As the declaration did not charge the clerk with bad faith, and the presumption of good faith being *primâ facie* in his favor, from the face of the bond, taken by him, neither the plea or replication could be of any force, because in their legal effect they are the same as that of the declaration; and so the court below held, and, going back to the declaration, declared it bad; and secondly, overruled the demurrer to the defendant's fourth plea. The plaintiffs were offered the liberty to amend their declaration and pleadings, but this they declined doing, and final judgment was rendered against them. Whether it was necessary to aver in the declaration that insufficient security was taken wittingly and knowingly, and consequently in bad faith, we do not propose to discuss, as it is a question more appropriately belonging to the State courts than to this court. But as judgment was given against the plaintiffs on the fourth plea, and as that judgment is conclusive, if the plea is good, we will consider that plea. The demurrer admits that Bevins, Earle & Co. obtained the bond of Chase & Bowen and their sureties; that they sued the sureties on it, and received of them two thousand dollars, part of the penalty; and which sum was received in discharge of the bond; whether the money was obtained by judgment or compromise, does not appear, nor is it material.

Chase & Bowen were principals to Ramsey, if he was in default for neglect of official duty; and so were the sureties to the bond responsible to him should he be compelled to pay in their stead. The clerk was the last and most favored surety, and if forced to pay the debt, he was entitled to all the securities Bevins, Earle & Co. had, to remunerate his loss; and, in such event, he would have been entitled to the bond on Chase & Bowen, and their sureties. And in the next place, it is manifest, that Ramsey cannot be in a worse situation than if he had been a party to the bond, in common with the other sureties; and in such case, it must be admitted that he would stand discharged.

We concur with the Circuit Court that the fourth plea was a good defence, and order the judgment to be affirmed.

Order.

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

THOMAS C. ROCKHILL, WADE T. SMITH, AND WILLIAM P. ROCKHILL, PLAINTIFFS, *v.* ROBERT HANNA, ASA B. STRONG, EDWARD HEIZER, AARON ALDRIDGE, ROBERT B. HANNA, DAVID SHIELDS, THOMAS JOHNSON, JEREMIAH JOHNSON, AND GEORGE BRUCE.

Three judgments were entered up against a debtor on the same day.

One of the creditors issued a *capias ad satisfaciendum* in February, and the other two issued writs of *fieri facias* upon the same day, in the ensuing month of March.

Under the *ca. sa.* the defendant was taken and imprisoned, until discharged by due process of law. The plaintiff then obtained leave to issue a *fi. fa.*, which was levied upon the same land previously levied upon. The marshal sold the property under all the writs.

The executions of the first *fi. fa.* creditors are entitled to be first satisfied out of the proceeds of sale.

Each creditor having elected a different remedy, is entitled to a precedence in that which he has elected.

Besides, the *ca. sa.* creditor, by imprisoning the debtor, postponed his lien, because it may happen, under certain circumstances, that the judgment is forever extinguished. If these do not happen, his lien is not restored as against creditors who have obtained a precedence during such suspension.

THIS case was brought up from the Circuit Court of the United States for the District of Indiana, upon a certificate of division in opinion between the judges thereof.

The facts in the case are succinctly stated in the opinion of the court, and also the questions certified.

It was submitted, on the part of the plaintiffs, by *Mr. Thompson*, upon a printed brief by *Mr. Morrison* and *Mr. Mayor*, and submitted on the part of the defendants, upon a printed brief, by *Mr. O. H. Smith.*

Mr. Thompson, for plaintiffs.

We shall in the outset assume, that the following principles must be carried into an examination of this case, and that without a recognition of which, the questions submitted cannot be

intelligently and correctly determined. It is, perhaps, superfluous to say, that these principles are only a reiteration of the long-established and uniform decisions of this court, viz.

1st. If the State of Indiana has a statute declaring and defining judgment liens on real estate, this court will give full effect to such statute.

2d. If the supreme judicial tribunal of the State has given construction to the statute, this court will follow that construction.

The transcript shows that in the court below there were three several judgments rendered on the same day, against the same defendant, but in favor of different plaintiffs, one of which was in favor of our clients, Rockhill, Smith & Rockhill; that the marshal sold real estate of the execution defendant, under executions issued upon all three judgments, offering to each set of plaintiffs a portion of the avails, according to the amount of their respective judgments; that Rockhill, Smith & Rockhill, the plaintiffs, rejected such apportionment, claiming the whole avails of the sale as their legal right, and that for refusing to pay over the whole, the plaintiffs instituted this suit against the marshal and his sureties on their bond.

We state the case thus briefly to call the special attention of the court to the two propositions above stated; and we insist that the questions submitted naturally and necessarily suggest the inquiry, as a first principle to be ascertained, has the State of Indiana a law on the subject of judgment liens?

"Judgments in the Circuit and Supreme Courts of this State shall have the operation of, and shall be liens upon the real estate of the person or persons against whom such judgments may be rendered, from the day of the rendition thereof." Revised Statutes of Indiana, 1838, page 306, § 22. The revised Statutes of 1843, page 454, are to the same effect.

We do not insist that the literal reading of the statute above cited, determines the questions submitted, in our favor; neither does it determine any thing against us. As to judgments of the same date, it is altogether silent. It neither in terms asserts the principle for which we contend, that priority should be accorded to the most vigilant creditor, nor the principle assumed and acted upon by the marshal, when he undertook to apportion the avails of the sale among the several creditors. They both rest upon the same foundation — a construction of the statute.

We proceed to show that the Supreme Court of Indiana has given the statute a construction that, if followed by this court, must determine the questions submitted, in favor of the plaintiffs. The case of Michaels v. Boyd, and others, Indiana Rep. 100, while it recognizes the doctrine that judgments rendered at

the same time, have, under the statute, no priority of lien over each other, it yet decides that the creditor whose execution is first issued and levied, gains priority, as the most vigilant creditor.

If any thing were required to add weight to the opinion, we might suggest that it was pronounced by Judge Blackford, whose reputation as a jurist, we suppose, is not entirely unknown to this court. It will be also noticed that the decision is sustained by the cases of Adrams *v.* Dyer, 8 Johns. 347; Waterman *v.* Haskin, 11 Johns. 228, and 1 Howard's Miss. Rep. 39.

It was argued below, that the decision of the Supreme Court of Indiana could not be considered a judicial construction of the local law of Indiana, on the subject of judgment liens. We suppose the argument will be pressed in this court. We cannot, however, believe it will find any favor here. The very second paragraph in Judge Blackford's opinion, cites the statute, by book and page, and his whole reasoning is in direct reference to the statute. The statute is the basis, the *substratum* of the decision.

We trust we shall not be considered guilty of the slightest disrespect, or as transgressing any rule of propriety, by alluding to the circumstance that at one important conjuncture of this case, his Honor Judge McLean allowed his judgment to be controlled by the same authorities cited by Judge Blackford in his opinion, which, by the by, was previous to the decision in Indiana. Judge McLean then ruled, that by our superior vigilance in taking out execution, levying, and selling, we had gained such a priority as entitled us to the whole of the proceeds of the sale. Afterwards, however, and after the second sale, (the first having been set aside by the court on the application of the attorneys for the other execution plaintiffs,) the learned judge, on the authority of the opinion of Chief Justice Marshall, in Rankin & Schatzell *v.* Scott, 12 Wheat. 177, had his former opinion shaken.

We therefore propose to show that the case in 12 Wheat. is not applicable to the case before the court.

Firstly. The judgments in that case were of different dates, and the court below had determined a priority in favor of the younger judgment, to the exclusion of the older one. The District Court of Missouri had decided that a sale by a sheriff, under a second judgment, but first execution, divested the lien of a first judgment. The decision was properly reversed; but the learned and able judge, in his opinion, never once alluded to the case of judgments of the same date. That was a question not before the court. The question was one between prior and subsequent judgment liens.

We are aware that the argument of the judge is said to be against us, but we cannot perceive it to be so. The opinion suggests an analogy between a statutory lien and a mortgage lien, as regards their similar binding effect. This we admit. The lien created by a prior judgment, in reference to a subsequent one, is very similar to that of a prior mortgage, duly recorded, in reference to a subsequent mortgage; and we feel that we can admit, without endangering our position, that in both the case of a judgment and a mortgage, the prior lien is entitled to prior satisfaction. The opinion, however, concedes, that even a prior lien might be displaced by some act of the party holding it; though it is said "the single circumstance of not proceeding on it, till a subsequent lien has been obtained and carried into execution, has never been considered such an act." Our case shows not only delay on the part of our adversaries, but delay for a consideration.

If, however, more is sought to be made of the analogy of the learned judge on the subject of the two kinds of lien than we concede, we shall insist, not only that the case itself is not in point, but that there is a substantial dissimilarity between them. It was said, we believe, by Lord Mansfield, that there is nothing so apt to mislead as a simile; and the remark will certainly hold true in regard to the parallel supposed to exist between a judgment lien and a mortgage lien. While a judgment lien is general, a mortgage lien is specific. A judgment creditor acquires no distinct or independent interest in the estate of his debtor. A mortgagee has such an interest in the particular thing mortgaged. He may take possession; he may eject the mortgagor.

It will be noticed that the opinion under review, like that of Judge Blackford, assumes to give construction to a local statute, on the subject of judgment liens. The opinion commences by quoting the statute of Missouri, as Judge Blackford's does that of Indiana. The Missouri statute had, however, received no judicial construction. This court had, therefore, full authority to construe it. The Indiana statute had received a construction which, right or wrong, this court, according to its own admission, is bound to follow.

Secondly. We consider that, in perfect consistency with the most exalted estimate of the ability of the eminent Judge who delivered the opinion in 12 Wheat., we have the right to suppose that, had the Supreme Court of Missouri given her statute the construction that the District Court did, he would have felt constrained to follow it, erroneous as he deemed it to be. This supposition we feel authorized to cherish, by the uniform decisions of this court on the subject of the adjudication of the

State courts on their local statutes. The authorities on this subject are so numerous and so clear, and must be so familiar to this court, that an array of them might be considered uncalled for. We hope, however, to be excused for referring to a few of them.

In the case of Shelby *v.* Guy, 11 Wheat. 367, the court holds the following language:—"That the statute law of the States must furnish the rule of decision to this court, as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable, that a fixed and received construction of their respective statute laws in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction."

"In construing local statutes respecting real property, the courts are governed by the decisions of the State tribunals." 6 Wheat. 119.

"Where the question upon the construction of the statute of the State, relative to real property, has been settled by any judicial decision in the State where the land lies, the Supreme Court, upon the uniform principle adopted by it, would recognize that decision as a part of the local law." Gardner *v.* Collins et al. 2 Pet. 58.

We only add a few quotations from the case of Green *v.* Neal, 6 Pet. 291—a case in which this court, in following a then recent decision of the State court, overruled its former construction of a local law, on the sole ground that the State court had changed its construction.

Mr. Smith, for defendants.

1. Did the plaintiffs obtain a preference by the issue and levy of the first execution? Certainly not; that execution was a *ca. sa.*, and the levy was on the body, not the lands.

2. Did the plaintiffs obtain a preference by the first sale of the lands, and the order of the court, to appropriate the proceeds to their execution to its amount? Certainly not; because the sale and the order were set aside by the court, and stood as if they had not been made.

3. Did the plaintiffs obtain a preference, by the order of the court, for the issue of the *vend. ex.* on which the lands were sold? Certainly not. As the clerk had full power to issue all the writs, without any order of court, as is the uniform practice, and all the writs were issued by the clerk on the same day, placed in the hands of the marshal at the same time, and the property advertised and sold under all the writs by the marshal at the same time.

4. Did the plaintiffs obtain a preference, by the delay of the other judgment plaintiffs, to issue their writs of *vend. ex.* on their levy? Clearly not. See 4 McLean, 554; Rankins *v.* Scott, 12 Wheaton, 177.

5. The original general liens being equal, did the issuing and service of the *ca. sa.*, and imprisonment of Allen by the plaintiffs, suspend or displace the lien of their judgment, so as to give the other judgments a priority of lien on his real estate? We contend that they did, and rely upon the following authorities: Tayloe *v.* Thompson, 5 Peters, 358; Bigalow *v.* Cooper, 1 Cowen, 56; Ranson *v.* Keys, 9 Cowen, 128; Sunderland *v.* Loder, 5 Wendell, 58.

6. Did the issue of the writs of *fieri facias* by the other plaintiffs on their judgments, and their levy on the lands in controversy, pending the imprisonment of the defendant in execution on the *ca. sa.*, give to the judgments, executions, and levy a special lien on the lands levied upon, and a preference for the whole proceeds, to the amount of their judgments? So we contend, and rely upon the following authorities to sustain the position: Adrams *v.* Dyer, 8 Johns. 347; Waterman *v.* Haskins, 11 Johns. 228; Burney *v.* Boyett, 1 Howard, Miss. R. 39; Michaels *v.* Boyd and others, Smith's Indiana R. 100.

Mr. Justice GRIER delivered the opinion of the court.

This case comes before us on a certificate of division of opinion between the Judges of the Circuit Court of the United States for the District of Indiana. It is an action on the official bond of the marshal, and the questions certified arise on the following facts: Rockhill & Co., the plaintiffs in this issue, and Price & Co., and Siter & Co. had each entered up judgments on the same day, (19th November, 1838,) against John Allen.

On 5th of March, 1839, Price and Siter issued *fi. fas* which were levied on the lands of Allen. On the 7th of February, 1839, plaintiffs issued a *ca. sa.*, on which the defendant, Allen, was arrested and imprisoned till the passage of the act of General Assembly of Indiana, of 13th of January, 1842, to abolish imprisonment for debt; by virtue whereof he was released, on the ground that this act had been adopted by act of Congress. The plaintiff afterwards, in March, 1844, on affidavit and proof of the defendant's discharge by force of the insolvent law, had leave of the court to issue a *fi. fa.* which was levied on the same land previously seized in March, 1839, on the executions issued on the other judgments; and the marshal was proceeding to sell, when writs of *vend. exp.* on these judgments were put in his hands. A sale was made,

but afterwards set aside by the court. In May, 1844, writs of *vend. exp.* on all three of the judgments were put into the hands of the marshal—on these, the property of Allen was sold, the money raised being insufficient to pay all the judgments. Plaintiff (Rockhill) claimed that the money should be applied first to the satisfaction of his judgment; Price and Siter claimed that it should be applied to satisfy their judgments first. Whereupon the court certified a division of opinion on the following questions:

"1st. Whether or not the plaintiffs in this suit are entitled to more than their distributive share of the proceeds of the sale.

2d. Whether they are not entitled to the whole proceeds, to the extent of what is justly due on their judgment.

3d. Or whether the executions first levied are not entitled to the whole proceeds of the sale.

4th. Or whether there can be any preference recognized by reason of superior diligence, the judgments being of equal dates, and not impeached."

In the State of Indiana, judgments are liens upon "the real estate of the persons against whom such judgments may be rendered, from the day of the rendition thereof." As the statute provides for no fractions of a day, it follows that all judgments entered on the same day have equal rights, and one cannot claim priority over the other. In England, when several judgments are entered to the same term, (and by fiction of law, the term consists of but one day,) the judgment creditor, who first extends the land by *elegit*, is thereby entitled to be first satisfied out of it. The case would be much stronger, too, in favor of the first *elegit*, if one of three judgments had levied a *fi. fa.* on the goods and chattels of the defendant, the second taken his body on a *ca. sa.*, and the third laid his *elegit* on his land. For each one, having elected a different remedy, would be entitled to a precedence in that which he has elected. This principle of the common law has been adopted by the courts of New York, as is seen in the cases of Adams *v.* Dyer, 8 Johns. 350, and Waterman *v.* Haskins, 11 Johns. 228; and also by the Supreme Court of Indiana, in Marshal *v.* Boyd and others, where it is said, the mere delivery of an execution, as in case of personal property, will not give a priority, but the execution first begun to be executed, shall be entitled to priority.

The application of these principles to the present case would give the preference to the judgments of Siter and Price, which were levied on the land five years before the plaintiff's levy on the same. An execution levied on land, is begun to be executed, and is an election of the remedy by sale of it; and

the mere delay of the sale, if not fraudulent, injures no one and cannot postpone the rights of the creditor who has first seized the land and taken it into the custody of the law for the purpose of obtaining satisfaction of his judgment. If he has obtained a priority over those whose liens are of equal date, by levying his execution, he is not bound to commence a new race of diligence with those whose rights are postponed to his own. There may be a different rule as to a levy on personal property, where it is suffered to remain in the hands of the debtor. But liens on real estate are matters of record and notice to all the world, and have no other limit to their duration than that assigned by the law.

But we do not think it necessary to rest the decision of this case, merely on the question of diligence, or to decide whether this doctrine has been finally established as the law of Indiana. The plaintiff's lien does not, by the statement of this case, stand on an equality as to date with that of the other judgments. By electing to take the body of his debtor in execution he has postponed his lien, because the arrest operated in law as an extinguishment of his judgment. It is true, if the debtor should die in prison, or be discharged by act of the law without consent of the creditor, he may have an action on the judgment, or leave to have other executions against the property of his creditor. The legal satisfaction of the judgment, which for the time destroys its lien and postpones his rights to those whose liens continue, is not a satisfaction of the debt, but, as between the parties to the judgment, it operates as a satisfaction thereof. The arrest waives and extinguishes all other remedies on the goods or lands of the debtor while the imprisonment continues, and if the debtor be discharged by the consent of the creditor, the judgment is forever extinguished, and the plaintiff remitted to such contracts or securities as he has taken as the price of the discharge. But if the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon as against creditors who have obtained a precedence during such suspension. The case of Snead *v.* McCoul, 12 How. 407, in this court, fully establishes this doctrine. It is to be found in the common law as early as the Year Books, and is admitted to be the law in almost every State in the Union. See Year Book, 33 Henry VI. p. 48; Foster *v.* Jackson, Hobart, 52; Barnaby's case, 1 Strange, 653; Vigers *v.* Aldrich, 4 Burr. 2483; Jaques *v.* Withy, 1 T. R. 557; Taylor *v.* Waters, 5 Maule and Selwyn, 103; *Ex parte* Knowell, 13 Vesey, jun. 193, &c., &c., &c. And in New York, Cooper *v.* Bigelow, 1 Cow.; Ransom *v.* Keys, 9

Cow. 128; 5 Wend. 58. In Pennsylvania, Sharp v. Speckenyle, 3 Serg. & R. In Massachusetts, Little v. The Bank, 14 Mass. Rep. 443.

The insolvent law of Indiana which discharges the person of the debtor from imprisonment upon his assigning all his property for the benefit of his creditors, provides that his after acquired property shall be liable to seizure, and also that liens previously acquired shall not be affected by such assignment and discharge; but it does not affect to change the relative priority of lien creditors, as it existed at the time of the discharge, or to take away from any lien creditor his prior right of satisfaction, which had been vested in him previous to such discharge. Neither the letter nor spirit of the act will permit a construction which by a retrospective operation would divest rights vested before its passage.

We are of opinion, therefore, that the several questions certified from the court below, should be answered as follows: —

1st. That plaintiffs in this suit are not entitled to more than their distributive share of the proceeds of the sale.

2d. That they, are consequently, not entitled to the whole proceeds to the extent of what is due on their judgment.

3d. The executions of Siter & Co. and of Price & Co. are entitled to be first satisfied from the proceeds of the sale.

4th. That the decision of the preceding questions being a disposition of the whole case, it is unnecessary to give any answer to the fourth question.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court.

1. That the plaintiffs in this suit are not entitled to more than their distributive share of the proceeds of the sale.

2. That they are consequently, not entitled to the whole proceeds to the extent of what is claimed on their judgment.

3. The executions of Siter & Co. and of Price & Co. are entitled to be first satisfied from the proceeds of the sale.

4. That the decision of the preceding questions being a disposition of the whole case, it is unnecessary to give any answer to the fourth question, which is an abstract proposition

not necessary to be decided by this court. Whereupon it is now hereby ordered and adjudged by this court, that it be so certified to the said Circuit Court.

CORNELIUS KANOUSE, PLAINTIFF IN ERROR, v. JOHN M. MARTIN.

Where a citizen of New Jersey was sued in a State court in New York, and filed his petition to remove the case into the Circuit Court of the United States, offering a bond with surety, the amount claimed in the declaration being one thousand dollars, it became the duty of the State court to accept the surety, and proceed no further in the cause.

Consequently, it was erroneous to allow the plaintiff to amend the record and reduce his claim to four hundred and ninety-nine dollars.

The case having gone on to judgment, and been carried by writ of error to the Superior Court, without the petition for removal into the Circuit Court of the United States, it was the duty of the Superior Court to go behind the technical record, and inquire whether or not the judgment of the court below was erroneous.

The defendant was not bound to plead to the jurisdiction of the court below; such a step would have been inconsistent with his right that all proceedings should cease when his petition for removal was filed.

The Superior Court being the highest court to which the case could be carried, a writ of error lies to examine its judgment, under the 25th section of the Judiciary Act.

THIS case was brought up from the Superior Court of the city of New York, by a writ of error issued under the 25th section of the Judiciary Act.

A motion was made at the last term of this court, by *Mr. Martin*, to dismiss the case, for want of jurisdiction, which is reported in 14 Howard, 23.

The facts are stated in the opinion of the court.

It was argued by *Mr. Garr*, for the plaintiff in error, and *Mr. Martin*, for the defendant.

The counsel for the plaintiff in error first filed an elaborate brief, to which the counsel for the defendant replied. Then there was filed a reply to defendant's argument, and then a counter statement and points by the counsel for the defendant in error. From all these, the reporter collects the views of the respective counsel, as far as they concerned the points upon which the judgment of the court rested.

Mr. Garr, for the plaintiff in error.

The questions arising in this case are the following:

1st. Whether the Court of Common Pleas had jurisdiction to proceed further in the cause, and to render a judgment

therein, after the defendant had duly petitioned for the removal of it to the Circuit Court of the United States.

2d. Whether the Superior Court of the city of New York erred in refusing to look beyond the judgment-roll, and in excluding from its consideration the proceedings brought before it by the allegation of diminution and *certiorari*, that proved the existence of the errors complained of.

3d. Whether the Court of Appeals of the State of New York erred in holding that the defendant below was precluded from his writ of error, by it not appearing on the record that he had appealed from the order of the Court of Common Pleas, denying his application to remove the cause.

4th. As to the sufficiency of the matters set forth by the defendant in error in his plea to the special assignment of errors, and in the subsequent pleadings that terminated in a demurrer.

First. I. The defendant below had, at the time of entering his appearance in the Court of Common Pleas, a legal right to remove the cause to the Circuit Court of the United States, if the matter then in dispute exceeded the sum or value of $500. 12th sect. of Judiciary Act of 1789.

II. That the matter then in dispute exceeded the sum or value of $500, was manifest by uncontradicted evidence of the highest nature, viz. the declaration in the cause, the sum claimed in which (when the action is for damages) is the sole criterion by which to determine the amount in dispute. Martin *v.* Taylor, 1 Wash. C. C. Rep. 2; Muns *v.* Dupont, 2 Ib. 463; Sherman *v.* Clark, 3 McLean's Rep. 91; Gordon *v.* Longest, 16 Peters, 97; 1 Kent's Com. 6th ed. 302, note b; Opinion of Judges Nelson and Betts, in Martin *v.* Kanouse, U. S. Circuit Court, April 25, 1846, Appendix, p. 37.

III. By the filing of the petition, and the offer of the surety prescribed by the statute, (on the 18th of September, 1845,) the defendant's right to a removal of the cause was perfected and absolutely vested; and it thereupon instantly became "the duty of the State court to accept the surety, and proceed no further in the cause." 12th sect. of Judiciary Act.

IV. The Common Pleas erred in afterwards receiving (on the 1st of October) an affidavit of the plaintiff, reducing his demand below $500, and thereupon denying (on the 6th of October) the motion for removal, because,

1. It is only where property, and not damages, is the matter in dispute, that the court, for the purpose of determining the amount, looks at any evidence beyond the declaration. In such a case, the court will receive affidavits, in order to ascertain the value. Cooke *v.* Woodrow, 5 Cranch, 13.

2. Mr. Martin's affidavit, had it even been admissible, was

insufficient. It did not deny any of the facts alleged in the petition, nor did it even allege that there had been a mistake in the declaration, and that he had not intended to demand by it a sum exceeding $500. On the contrary, the affidavit merely states that the demand made by the declaration was more than "the actual amount due to him;" that such amount was less than $500, and that he "now," (that is, at the time of making the affidavit, being thirteen days after the filing of the petition, and after the defendant's right to a removal had become perfect,) limits and reduces his claim to the sum of $499.56.

3. The act of Congress does not provide that the State court may retain its jurisdiction, if the plaintiff will reduce his demand below $500.

4. The jurisdiction depends upon the state of things at the time of the action brought, and is not affected by any subsequent event. Mollan v. Torrance, 9 Wheat. 537; Keppel v. Heinrich, 1 Barb. S. C. Rep. 449.

If Mr. Martin, the plaintiff, had, after the bringing of his action, removed from the State of New York, and become a citizen of the same State with the defendant, his change of residence would not have restored jurisdiction to the Court of Common Pleas. Clark v. Matthewson, 12 Pet. 164–171. Upon the same principle, his making an affidavit reducing below $500 the claim which he therein admitted he had made by his declaration, could not restore the jurisdiction.

5. By the defendant's application to remove the cause, the Court of Common Pleas lost jurisdiction over it; and as that jurisdiction could not be restored by any subsequent act of the plaintiff, or proceeding in that court, it follows that the plaintiff's affidavit reducing his demand, the amending of the declaration, and the subsequent proceedings in the cause, were *coram non judice*, and, as such, erroneous and void. Wright v. Wells, Pet. C. C. Rep. 220; United States v. Myers, 2 Brock. C. C. Rep. 516; Gorden v. Longest, 16 Pet. 97; Hill v. Henderson, 6 Smed. & Marsh. 351; Campbell v. Wallin's Lessee, 1 Mart. & Yerg. 266.

6. The errors complained of were not in matters of mere practice, or matters in regard to which the court below had an arbitrary discretion. They were in matters of substance; they consisted in the court's withholding a right to which the defendant was entitled under the act of Congress, and in their persisting to exercise jurisdiction, and to amend the declaration, and render a judgment, after it had "become their duty to proceed no further in the cause."

"Where the law has given to the parties rights, as growing out of a certain state of facts, there discretion ceases." Gordon

v. Longest, *supra;* People *v.* Superior Court of New York, 5 Wend. 125, and 10 *ib.* 291.

Mr. Martin, for defendant in error.

First Point. The State court had jurisdiction of the cause until the plaintiff in error fully complied with all the requirements of the United States statute, and until the State court had so decided, and made an order for its removal.

The New York Common Pleas is a common-law court, and had an original jurisdiction of this cause, of which it could not be deprived by a paramount statute. *Ex parte* Bollman, 4 Cranch, 75. This jurisdiction, and the right of the State court to decide on the application for a removal of the cause, is conceded in the act of Congress, by requiring the presentment of a petition for such removal.

But it is insisted, by the plaintiff in error, at pages 14, 15, and 16, of his argument, that "by the filing of the petition, and the offer of the surety prescribed by the statute, the defendant's right to a removal of the cause was perfected and absolutely vested; and it thereupon instantly became the duty of the State court to accept the surety and proceed no further in the cause;" and that, "by the defendant's application to remove the cause, the Court of Common Pleas lost jurisdiction over it."

The court will observe that nothing is here said about the appearance required by the act; but it is contended that an instantaneous change of jurisdiction was effected by filing the petition and offering the surety only.

For the sake of argument, let it be supposed that a false appearance has been entered, and a spurious petition filed, and insufficient sureties offered,—does a change of jurisdiction instantly follow? If it does, then the State court can have no opportunity to protect its own jurisdiction or the rights of its suitors against fraud—no time to look into the petition or bond, to see if the one be properly authenticated, or the other duly executed; or to ascertain whether the real amount in controversy exceeds $500 or not.

Upon this theory the State court is paralyzed, and struck dumb and blind, by the mere presentation of a set of papers, no matter how defective in form or fraudulent in execution; and no matter what evidence may be produced—an affidavit or a bill of particulars, to satisfy the court that the amount is less than $500,—and no matter how well satisfied the court may be of fraud in the papers, or deficiency in the amount to entitle the applicant to remove the cause.

This is probably too absurd to be seriously maintained, even

in this case; and it will doubtless be considered that the State court has a right to judge of the regularity and sufficiency of the applicant's papers; and that jurisdiction must remain with the State court long enough, at least, to enable the court to inspect them, and decide upon their sufficiency.

If this be conceded, as it is submitted it must be, it must also be conceded that the court may retain jurisdiction to ascertain the true amount in controversy; and if it may retain jurisdiction an hour for these purposes, it may retain it for such further time as may be reasonable and necessary to enable the parties to obtain the requisite evidence to satisfy the court upon any of the matters of which it may inquire. And this is destructive of the whole theory of an instantaneous change of jurisdiction.

These tests of the plaintiff's theory show its absurdity, and the correctness of the decision of the United States Circuit Court for the Southern District of New York, on the defendant's motion in this case in that court.

On that motion it was held, in substance and effect, that a cause was not actually removed into the United States Circuit Court, until certified copies of the papers in the State court, and of an order for their transmission, were sent to, and entered in the United States court.

This decision, if correct, sets the question of the actual jurisdiction of this case, pending the application for its removal, at rest. It also furnishes a sufficient reason for the plaintiff's unwillingness to apply to that court, as directed by the Supreme Court of the State, for a mandamus to compel the New York Common Pleas to grant an order for the removal of the cause. He had not filed copies of his papers in the United States court, so authenticated as to warrant the United States court in proceeding upon them, and therefore had not done what was necessary to authorize him to ask the assistance of that court, had he been otherwise entitled to it.

Second Point. The plaintiff in error did not so comply with the requirements of the 12th section of the United States Judiciary Act, as to divest the State court of its jurisdiction and entitle himself to an order for the removal of the cause, because he did not enter his appearance in the State court at the time of filing his petition, &c. See United States Stat. at Large, p. 79.

Third Point. The State court properly retained its jurisdiction of the cause; and was not bound to grant an order for its removal into the United States court, because it did not appear to the satisfaction of the State Judge, that the amount in controversy exceeded $500, exclusive of costs.

By the 12th section of the United States act, before cited,

this is expressly declared to be necessary to entitle the applicant to a removal of the cause. The terms of the statute are clear and unequivocal. The amount must "be made to appear to the satisfaction of the court."

This language is peculiar to the 12th section of this act, and is not found in the 22d section of it, authorizing the removal of causes from the circuit courts to this court by writ of error, nor in the act of 1803, (2 United States Stat. p. 244,) authorizing like removals by appeal where the amount exceeds $2,000; nor in the act of 1816, (3 United States Stat. 261,) authorizing writs of error to the United States Circuit Court of the District of Columbia, where the amount exceeds $1,000.

In none of these sections is a discretion expressly given to the court from which the cause is to be removed, as in the 12th section.

This constitutes the basis of a very important distinction between this case and most of the cases cited by the plaintiff in error; and when taken in connection with the fact, that in no one of those cases was there any dispute about the amount in controversy before the State court, it renders them wholly inapplicable to this case, as authorities, to show that the declaration is conclusive as to amount.

Upon this point they leave the present case entirely free from the control of prior adjudications.

This distinction also furnishes a very conclusive proof that Congress did not intend that the same rules of evidence should be applied in ascertaining the amount in dispute in these two classes of cases — else why declare in the one that the amount must be made to appear to the satisfaction of the court, and remain silent in the other?

The inference from all this is irresistible, that Congress meant to give the State courts a discretion, not only as to the amount, but as to the evidence to show it.

In Gordon v. Longest, (16 Pet. 97, which is the only reported case that has come before this court under the twelfth section,) the general discretion of the State judge was admitted by this court; although "in that case" the court held that a claim of $1,000 in the writ was conclusive, there being no evidence before the State judge, or in this court, that the amount was less.

Under this state of facts it was held that, although the State court had a discretion as to the amount in controversy, yet it was a "legal discretion," to be reasonably exercised, and that "on the facts of the case, the State judge had no discretion" in that case, and could not arbitrarily refuse to allow a removal of it, when it appeared by undisputed evidence that the amount exceeded $500.

This, it is submitted, is all that was decided in Gordon *v.* Longest; and if the court had gone as far as is contended for by the plaintiff in this case, and had declared the evidence furnished by the writ or declaration to be absolutely conclusive upon the State court, the decision would have been not only against the manifest meaning of Congress, but inconsistent with itself.

It would have been inconsistent with itself, because there is nothing concerning the amount in dispute upon which a "legal discretion" can be exercised, except evidence of the amount; and if this court were to take away all discretion concerning this evidence, by declaring this or that sort of evidence conclusive, it would be tantamount to a declaration that the State courts have no discretion at all.

The amount claimed must always be over or under $500, or exactly that sum; and it must always be made by writ, declaration, or complaint. If the claim be exactly $500 or under, no application for a removal will ever be made. The only case, therefore, in which any discretion at all can be exercised by a State court is, where a claim is made for more than $500. And if the mere claim were always conclusive, the amount would thereby be unalterably fixed, and there would be no room left for discretion.

From this examination of the facts and opinion in the above case, it will be seen that it is a controlling authority for the defendant in error; and clearly shows that the State court is authorized by this statute to consider any legal evidence which the parties may offer to satisfy the court of the true amount in dispute; and that the judge had a right to receive and listen to an affidavit in this case, in which it was solemnly sworn: "that the amount of damages mentioned at the foot of the declaration in this cause, is not the actual amount due to this deponent as plaintiff in said cause, nor does it show the amount he seeks or expects to recover therein; and the whole of said amount really due deponent, and so sought to be recovered is less than $500; and that he is now ready and willing, and hereby offers, to settle and discontinue this suit on payment to him of a less sum than $500, and to give the said defendant a full discharge of and from all claims and demands which this deponent, as plaintiff in this suit, has made, or can or may recover against the defendant."

After hearing this affidavit, and on considering the facts thereby disclosed in connection with the language of the act, "and being satisfied that the actual amount in controversy herein is less than $500," the judge denied the plaintiff's motion.

In doing so, he looked at no authority but the act itself. Its language seemed too clear and plain to be questioned, and he exercised his judgment and discretion without hesitation; and the plaintiff in error has not been able to find a court, from that day to this, which doubted that he had the discretion, and exercised it rightly.

On this point, the plaintiff's own authorities are against him; for, in Wright *v.* Wells, (Pet. C. C. Rep. 220,) Mr. Justice Washington said: "the State court was not bound to grant the removal, unless it was satisfied that the amount exceeded $500."

In Campbell *v.* Wallen's Lessees, cited by the plaintiff from 1 Martin & Yerger's Rep. 268, the Supreme Court of Tennessee said, that "security need not be given until it has been judicially decided that, upon the facts set forth in the petition, as it respects citizenship, value of matter in dispute, &c., the applicant is entitled to a removal." In the case now here, the Supreme Court of the State of New York has said the same thing in effect. See 2 Denio's Rep. 197.

In Carey *v.* Cobbet, 2 Yeates, 277, the Supreme Court of Pennsylvania said, that "a bill of exceptions will not lie against the opinion of the court, in refusing the removal of an action into the United States court;" and finally, this court itself, in Gordon *v.* Longest, concedes a like discretion to the State court.

All these cases arose on the twelfth section of the act, except Carey *v.* Cobbet; and they are the only ones cited by the plaintiff which did so arise, except Muns *v.* Dupont, 2 Wash. C. C. Rep. 463; and, in this latter case, Justice Washington listened to, and relied on an affidavit as evidence to fix the amount in controversy.

But it is said, at pages 14 and 15 of the plaintiff's argument, that the original declaration "was uncontradicted evidence of the highest nature," and that the Common Pleas erred in afterwards receiving an affidavit of the plaintiff reducing the demand below $500."

In the first place, it is not true that a declaration, while in paper, is evidence "of the highest nature." If it were so, it would settle the rights claimed under it, for it would be a record, and could not be contradicted even by a plea.

It would settle the facts alleged in it beyond all controversy; and the proposition is practically absurd.

A declaration before judgment is like any other paper in the proceedings of a cause, and may be disputed and amended until the matters alleged in it have been finally adjudicated and settled, and until it has been enrolled, and then it becomes a re-

cord, and is "the highest evidence," and not until then. 1 Salk. 329; 1 Ld. Raymond, 243-9; J. R. 290. Neither was the declaration "uncontradicted," as has already been shown.

In the next place, the statement, that the Common Pleas received the plaintiff's affidavit, "reducing his demand below $500," is not true; the affidavit did not "reduce the demand," nor was it received for that purpose.

It merely showed the true amount of the demand, and that the plaintiff's attorney, Mr. Westervelt, had overstated it in the declaration, and the affidavit was received for that purpose, and for no other.

The true amount in controversy in this case was always less than $500, and it never belonged to a class of cases of which Congress intended the federal courts should have jurisdiction. And what reason, founded either on public policy or private right, can be assigned for depriving the State court of the means of satisfying itself whether the actual amount is such as to entitle the applicant to a removal or not?

In the United States *v.* Daniel, 4 Cranch, 316, a judgment had been obtained in a United States circuit court for more than $2,000, on the penalty of a bond of which the condition was less than $2,000. On a motion to dismiss the writ of error by which the judgment had been removed into this court, it was held, that the amount of the condition of the bond, and not of the judgment, controlled the jurisdiction, and the writ was dismissed.

Why should not the true amount, and not the fictitious one, be allowed to control the jurisdiction in the present case, as well as in the one just cited? They both sound in damages; the fiction in the one case was in the judgment, in the other in the declaration. Why should a declaration be considered more conclusive than a judgment?

Fourth Point. "While a court has jurisdiction, it has a right to decide any question which occurs in the cause."

Fifth Point. The plaintiff in error did not present the decision of the New York Common Pleas in this case to the appellate courts of the State of New York, as required by the laws of that State, to enable those courts to review that decision; and they have so decided; and this court will be governed by their decisions on this point.

Finally, it is submitted, that the original jurisdiction of the State court was not divested, nor the cause removed, by any proceedings of the plaintiff in error.

First. Because the plaintiff in error did not pursue the regular course of practice in entering the cause in the United States Circuit Court. See 1 Blatch. Rep. 150;

Second. Because he did not enter his appearance in the State court at the time of filing his petition for a removal, as required by the United States statute.

Third. Because he did not make it appear, to the satisfaction of the State court, that the matter in dispute exceeded the sum of $500, exclusive of costs, as required by the same statute.

Fourth. That the State court, having jurisdiction of the cause, had a right to make orders and proceed to judgment therein.

Fifth. That it appears, from the judgment of the New York Superior Court and Court of Appeals, that no question arising under the Constitution or laws of the United States was decided by either of them; but only certain questions relating to their own jurisdiction under local State laws, to review a chamber order, made by a single judge of an inferior State court, and certain questions of costs. And it is further submitted, that such decisions will not be revised by this court. And that the refusal of Judge Daly, of the New York Common Pleas, to grant an order for the removal of the cause, is the only decision in this case which this court will review. And that his decision was right.

Mr. Justice CURTIS delivered the opinion of the court.

This is a writ of error to the Superior Court of the city of New York. Upon the return of the writ at the last term, the defendant in error moved to dismiss it for want of jurisdiction. This motion was overruled, and the opinion of the court is reported in 14 Howard, 23. At the present term, the case has been submitted on its merits upon printed arguments filed by the counsel for the two parties.

The action was, originally, a suit in the Court of Common Pleas for the city and county of New York. The plaintiff was a citizen of the State of New York, and the defendant a citizen of the State of New Jersey; and at the time of entering his appearance, he filed his petition for the removal of the cause into the Circuit Court of the United States for the southern district of New York, and offered a bond with surety; the form of this bond, or the sufficiency of the surety does not appear to have been objected to. The declaration then on file demanded damages in the sum of one thousand dollars. That was the amount then in dispute between the parties. The words "matter in dispute," in the 12th section of the judiciary act, do not refer to disputes in the country, or the intentions or expectations of the parties concerning them, but to the claim presented on the record to the legal consideration of the court. What the plain-

tiff thus claims, is the matter in dispute, though that claim may be incapable of proof, or only in part well founded. So it was held under this section of the statute, and in reference to the right of removal, in Gordon v. Longest, 16 Peters, 97; and the same construction has been put upon the eleventh and twenty-second sections of the judiciary act, which makes the jurisdiction of this court and the Circuit Court dependent on the amount or value of "the matter in dispute." The settled rule is, that until some further judicial proceedings have taken place, showing upon the record that the sum demanded is not the matter in dispute, that sum is the matter in dispute in an action for damages. Green v. Liter, 8 Cranch, 229; Wise v. The Col. Turnpike Co. 7 Cranch, 276; Gordon v. Ogden, 3 Peters, 33; Smith v. Honey, 3 Peters, 469; Den v. Wright, 1 Peters C. C. R. 64; Miner v. Dupont, 2 Wash. C. C. R. 463; Sherman v. Clark, 3 McLean, 91.

Without any positive provision of any act of Congress to that effect, it has long been established, that when the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties would oust it. Morgan v. Morgan, 12 Wheat. 290; Clarke v. Mathewson, 12 Peters, 165. And consequently when, by an inspection of the record, it appeared to the Court of Common Pleas that the sum demanded in this action was one thousand dollars, and when it further appeared that the plaintiff was a citizen of the State of New York, and the defendant of the State of New Jersey, and that the latter had filed a proper bond with sufficient surety, a case under the twelfth section of the judiciary act was made out, and, according to the terms of that law, it was "then the duty of the State court to accept the surety, and proceed no further in the cause."

But the court proceeded to make inquiry into the intention of the plaintiff, not to claim of the defendant, the whole of the matter then in dispute upon the record, and allowed the plaintiff to reduce the matter then in dispute to the sum of four hundred and ninety-nine dollars, by an amendment of the record. It thus proceeded further in the cause, which the act of Congress forbids. All its subsequent proceedings, including the judgment, were therefore erroneous.

But it is objected that this is a writ of error to the Superior Court, and that by the local law of New York, that court could not consider this error in the proceedings of the Court of Common Pleas, because it did not appear upon the record, which, according to the law of the State, consisted only of the declaration, the evidence of its service, the entry of the appearance of the defendant, the rule to plead, and the judgment for want of a

plea, and the assessment of damages; and that these proceedings, under the act of Congress, not being part of this technical record, no error could be assigned upon them in the Superior Court. This appears to have been the ground upon which the Superior Court rested its decision. That it was correct, according to the common and statute law of the State of New York, may be conceded. But the act of Congress, which conferred on the defendant the privilege of removal, and pointed out the mode in which it was to be claimed, is a law binding upon all the courts of that State; and if that act both rendered the judgment of the Court of Common Pleas erroneous, and in effect gave the defendant a right to assign that error, though the proceeding did not appear on the technical record, then, by force of that act of Congress, the Superior Court was bound to disregard the technical objection, and inspect these proceedings, unless, which we shall presently consider, there was some defect in its jurisdiction which disenabled it from doing so.

The reason why the Superior Court declined to inspect these proceedings was, that the defendant did not plead them to the jurisdiction of the Court of Common Pleas, and thus put them on the record. And it is generally true, that a party claiming a right under an act of Congress, must avail himself of some legal means to place on the record that claim, and the facts on which it rests; otherwise he cannot have the benefit of a reëxamination of the judgment upon a writ of error. But this duty does not exist in a case in which he cannot perform it without surrendering some part of the right which the act secured to him, and in which the court, where the matter is depending, is expressly prohibited from taking any further proceeding. In this case, the right of the defendant to remove the cause to the next term of the Circuit Court was complete, and the power of the Court of Common Pleas at an end. To require the defendant to plead, would deny to him his right to have all proceedings in that court cease, and would make all benefit of that right dependent on his joining in further proceedings in a court forbidden by law to entertain them. It would engraft upon the act of Congress a new proviso that, although the court was required to proceed no further, yet it might proceed, if the defendant should fail to plead to the jurisdiction; and that, though the defendant had done all which the laws required, to obtain the right to remove the suit, yet a judgment against him would not be erroneous, unless he should do more.

In our opinion, therefore, the act of Congress not only conferred on the defendant the right to remove this suit, by filing his petition and bond, but it made all subsequent proceedings of the Court of Common Pleas erroneous, and necessarily

required the court, to which the judgment was carried by a writ of error, to inspect those proceedings which showed the judgment to be erroneous, and which could not be placed on the technical record consistently with the act which granted the right of removal.

It should be observed that the judgment of the Superior Court did not proceed upon any question of jurisdiction. If it had quashed the writ of error, because the laws of the State of New York had not conferred jurisdiction to examine the case, this court could not have treated that judgment as erroneous. But entertaining jurisdiction of the writ of error, it pronounced a judgment, "that the judgment aforesaid, in form aforesaid given, be in all things affirmed and stand in full force and effect;" and it did so, because the plaintiff in error, by omitting to plead to the jurisdiction, had not placed on the record those proceedings which rendered the judgment of the Court of Common Pleas erroneous. The error of the Superior Court was therefore an error occurring in the exercise of its jurisdiction, by not giving due effect to the act of Congress under which the plaintiff in error claimed; and this error of the Superior Court, in the construction of this act of Congress, it is the province of this court to correct.

Though the point does not appear to have been made in Gordon v. Longest, yet it was upon this ground only that this court could have rested its decision to look into the proceedings for the removal of that suit from the State court. For it is as true in this court as in the Superior Court of New York, that, upon a writ of error, this court looks only at the technical record, and affirms or reverses the judgment, according to what may appear thereon. Inglee v. Coolidge, 2 Wheat. 363; Fisher's Lessor v. Cockerell, 5 Peters, 248; Reed's Lessee v. Marsh, 13 Peters, 153. But this is only one of the rules of evidence for the exercise of its jurisdiction as a court of error; it prescribes what shall and what shall not be received as evidence of what was done in the court below; and when an act of Congress cannot be executed without disregarding this general rule, it becomes the duty of this court to disregard it. The plaintiff in error, having a right to have the erroneous judgment reversed, must also have the right to have the only legal proceedings, which could be had consistently with the act of Congress, examined to show that error.

It is unnecessary to refer to the proceedings in the Court of Appeals any further than to say, that the appeal was dismissed for want of jurisdiction, that court not having cognizance of appeals from the decisions of a single judge at a special term. It is stated by counsel, that when these proceedings took place

in the Court of Common Pleas, there was, by law, no distinction between general and special terms of the Court of Common Pleas, and that, therefore, the plaintiff in error could not, by any proceeding, have entitled himself to go to the Court of Appeals.

We have not thought it necessary to inquire into this, because we are of opinion that the defendant was not bound to take any appeal to the general term, if there was such an one then known to the law. His right to remove the suit being complete, he could not be required, consistently with the act of Congress, to follow it further in the Court of Common Pleas; and the power of that court being terminated, it could not lawfully render a judgment against him; and it is of that judgment he now complains. The only legal consequence, therefore, of his not appealing to the general term is, that the Superior Court is the highest court of the State to which his complaint of that judgment could be carried, and therefore, under the twenty-fifth section of the judiciary act, a writ of error lies to reëxamine the judgment of that highest court.

The judgment of the Superior Court must be reversed, and the cause remanded, with directions to conform to this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Superior Court of the city of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court, in this cause be, and the same is hereby reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Superior Court, for further proceedings to be had therein, in conformity to the opinion of this court.

ARTEMAS L. BROOKS, IGNATIUS TYLER, WILLIAM W. WOODWORTH, AS ADMINISTRATOR OF WILLIAM WOODWORTH, DECEASED, AND ALSO AS GRANTEE, AND JAMES G. WILSON, APPELLANTS, v. JOHN FISKE AND NICHOLAS G. NORCROSS, DOING BUSINESS UNDER THE FIRM OF FISKE & NORCROSS.

A machine for planing boards and reducing them to an equal thickness throughout, which was patented by Norcross, decided not to be an infringement of Woodworth's planing machine, for which a patent was obtained in 1828, reissued in 1845.
The operation of both machines explained.

(*Mr. Justice Curtis* did not sit in this cause, having been of counsel for the patentee.)

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

The appellants were the owners of the Woodworth patent for a planing machine, the documents respecting which are set forth *in extenso*, in the report of the case of Wilson *v.* Rousseau, 4 Howard, 646. They filed a bill against the appellees for an injunction to restrain them from using a certain planing machine, known as the Norcross machine, upon the ground that it was an infringement of their letters-patent. Other matters were brought into the bill, which it is not material here to state.

In their answer, the appellees say, that they have jointly, under the firm of Fiske & Norcross, and not otherwise, used one planing machine and no more, since December 25th, 1849, at their mill in said Lowell, and nowhere else; but they believe, and therefore aver, that said machine is not the same in principle and mode of operation as the said Woodworth machine, but is substantially different therefrom, and contains none of the combinations claimed in the said Woodworth patent, but is a new and different invention, secured to said Norcross by letters-patent, duly granted and issued to him by the United States of America, on the twelfth day of February, in the year one thousand eight hundred and fifty; to which, or a duly certified copy thereof, they refer as an exhibit, with this their answer, for the purpose of showing the substantial difference between said machines.

The answers then admit the filing of the bill of complaint charged in this bill to have been filed against them in 1844, and the making of the agreement recited in this bill; but they say that the machine referred to in that agreement, and which they were then using, was constructed according to a patent granted to one Hutchinson, on the 16th July, 1839, but they admit that

it embraced the first combination claimed in the Woodworth amended patent. The answers further contain the following averments:

"And these defendants, further answering, say that they believe, and therefore aver, that the said Woodworth patent is void in part, for want of novelty in the first claim therein, to wit, for the employment of rotating planes in combination with rollers or any analogous device to keep the board in place; the same thing substantially having been before patented in France, to wit, in 1817 and 1818, by Sir Louis Victor, Joseph Mari Roguin, and in 1825 by Sir Leonore Thomas de Manneville, and described in the printed publication commonly called Brevets d'Inventions, vol. 23, pages 207 to 212, plates 27 and 28, and vol. 41, pages 111 to 116, plate 12; and these defendants refer also to the Hill machine, mentioned in the said patent of Norcross, as publicly used by Joseph Hill, of Lynn, prior to the pretended invention of the said combination by the said William Woodworth, deceased."

"And these defendants further say, that they believe, and therefore aver, that the said patent issued to William W. Woodworth, July 8, 1845, is not for the same invention as the original patent issued to William Woodworth, December 27, 1828, exclusive of the part disclaimed January 2d, 1843, as alleged in the plaintiffs' bill."

"And these defendants, further answering, say that they are informed by numerous and able experts, and they verily believe, and therefore aver, that the machine used by them and patented by said Norcross, as aforesaid, is not an infringement of the said Woodworth patent, nor of any rights of the plaintiffs under the same; and they pray that the question of infringement may be tried by a jury under the direction of the court."

To this answer a general replication was filed.

Much evidence was taken, and in March, 1852, the cause came on to be heard upon the bill annexed, general replication, and the proofs taken therein, before the Judge of the District Court, Mr. Justice Curtis having been of counsel in the case. The court adjudged that the machine made and used by the defendants, and complained of in the said bill, is not an infringement of the right secured to the complainants under and by virtue of the letters-patent reissued and granted to William W. Woodworth, administrator, on the eighth day of July, in the year one thousand eight hundred and forty-five, referred to in the said bill, and under and by virtue of the several mesne conveyances recited in the said bill; and thereupon the court doth order, adjudge, and decree, that the complainants' said bill be, and the same hereby is, dismissed with costs.

The complainants appealed to this court.

It was argued by *Mr. Keller* and *Mr. G. T. Curtis*, for the appellants, and *Mr. Whiting* for the appellees.

The reporter finds himself unable to give an intelligible explanation of the arguments of counsel, without introducing engravings, which would be out of place in a law book. In fact, models were used in the argument before the court. He is compelled, therefore, to omit all the arguments of counsel.

Mr. Justice CATRON delivered the opinion of the court.

The bill before us was filed against Fiske and Norcross by the assignees of Woodworth's patented machine for planing boards, and of tonguing and grooving them.

It is alleged that a planing machine, patented to Norcross, and used by the defendants, was substantially in its combination, and in the result it produced, the same as that assigned to the complainants, for a district in which the defendant's machine was used; that the complainant's patent was the elder, and that the use of Norcross's machine was an infringement of that invented by William Woodworth.

The Circuit Court dismissed the bill on the hearing; and it is this decree we are called on to revise. The contest in the court below, could hardly have been more stringent; and much consideration was obviously bestowed on the case by the judge who decided it, as appears from his opinion, which is laid before us, the accuracy of which opinion and the decree founded on it, we are called on to examine. Before doing so, it is proper to state, that the machine used by the defendants, does not tongue and groove boards, and that this part of Woodworth's machine is not in controversy.

It is insisted that Woodworth's monopoly extends to his mode of reducing a plank to an equal thickness, and a principal question is whether the patentee sets up any such claim. It is provided, by the 6th section of the act of 1835, that in case of any machine the inventor shall fully explain the principle and the several modes in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions: "And shall particularly specify and point out the part, improvement, and combination, which he claims as his own invention or discovery." An improvement of a machine is here claimed as having been invented, and the statute requires that such improvement shall be particularly specified; it is to be done in writing, and the applicant is to swear that he believes he is the first inventor of the improvement. This is required, so that the public may know what they are

prohibited from doing during the existence of the monopoly, and what they are to have at the end of the term, as a consideration for the grant.

In the words of Lord Campbell, in Hastings v. Brown, 1 Ellis & Blackburn, 453, "The patentee ought to state distinctly what it is for which he claims a patent, and describe the limits of the monopoly;" or, in the language of this court, in Evans v. Eaton, 7 Wheat. 434. It is for the purpose of warning an innocent purchaser, or other person, using the machine, of his infringement, and at the same time, of taking from the inventor the means of practising upon the credulity or fears of other persons, by pretending that his invention was different from its ostensible objects.

Have these requirements been complied with by Woodworth, as respects a claim for planing boards to an equal thickness? He obtained a patent for his machine in 1828, which was surrendered by his executor in 1845, for want of a proper specification, and a second patent issued, and on this reissued patent the case rests. For its better understanding, we give extracts from the claim and specification; they are the same that were relied on by the Circuit Court, and are as follows: "What is claimed therein as the invention of William Woodworth, deceased, is the employment of rotary planes, substantially such as herein described, in combination with rollers, or any analogous device to prevent the boards from being drawn up by the planes, when cutting upwards; or from the reduced or planed to the unplaned surface as described." And afterwards,

"The effect of the pressure rollers in these operations, being such as to keep the boards, &c., steady, and prevent the cutters from drawing the boards towards the centre of the cutter wheel, whilst it is moved through by machinery. In the planing operation the tendency of the plane is, to lift the boards directly up against the rollers; but in the tonguing and grooving the tendency is to overcome the friction occasioned by the pressure of the rollers."

This language, so far from claiming the new truth or the result now contended for as the invention or discovery, does not describe or even suggest either of them.

The claim, or summing up, however, is not to be taken alone, but in connection with the specification and drawings; the whole instrument is to be construed together. But we are to look at the others only for the purpose of enabling us correctly to interpret the claim.

The specification begins by saying, "the following is a full, clear, and exact description of the method of planing, tonguing, and grooving plank or boards, invented by William Woodworth, deceased.

Here the invention is denominated a method of planing, tonguing, and grooving, but not of reducing to an uniform thickness.

The specification, then, after describing the mode of preparing the board, proceeds thus: "When the plank or boards have been thus prepared, (on a separate machine,) they may be placed on or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting or planing and reducing wheel, which wheel may be made to revolve either horizontally, or vertically, as may be preferred. The carriage which sustains the plank or board to be operated upon, may be moved forwards by means of a rack and pinion, by an endless chain, or band, by geared friction rollers, or by any of the devices well known to machinists for advancing a carriage, or materials to be acted upon in machines for various purposes. The plank or board is to be moved on towards the cutting edges of the cutters, or knives, on the planing cylinder, so that its knives or cutters, as they revolve, may meet and cut the plank or board, in a direction contrary to that in which it is made to advance. The edges of the cutters are in this method prevented from coming first into contact with its surface, and are made to cut upwards from the reduced part of the plank towards said surface; by which means their edges are protected from injury by gritty matter, and the board, or plank, is more evenly and better planed than when moved in the reversed direction."

There is afterwards a reference to, and explanation of, the drawings, as follows: "In the accompanying drawings, figure 1, is a perspective representation of the principal operating parts of the machine, when arranged and combined for planing, tonguing, and grooving; and when so arranged as to be capable of planing two planks at the same time, the axis of the planing wheel being placed vertically."

And again, "the rollers f. f. f. which stand vertically, are to be made to press against the plank and keep it close to the carriage, and thus prevent the action of the cutters from drawing the plank up from its bed, in cutting from the planed surface upwards; they may be borne against it by means of weights or springs, in a manner well known to machinists. In a single horizontal machine, the horizontal friction rollers may be geared, and the pressure rollers placed above them to feed the board, with or without the carriage, a bed plate being used directly under the planing cylinder."

And afterwards, in describing the process for tonguing and grooving, he says: "The edges of the plank, as its planed part passes the planing cylinder, are brought into contact with the above described tonguing and grooving wheels, which are so

placed upon these shafts, as that the tongue and groove shall be left at the proper distance from the face of the plank; the latter being sustained against the planing cylinder by means of the carriage, or bed plate, or otherwise, so that it cannot deviate, but must be reduced to a proper thickness and correctly tongued and grooved."

"To meet the different thickness of the plank or boards, the bearings of the shaft of the cylinder must be made movable by screws, or other means, to adjust it to the work; or the carriage or bed plate may be made, so as to raise the board or plank up to the planing cylinder."

The means to produce the result, of reducing the board to an equal thickness in a horizontal machine, are the pressure rollers f. f. above the plank; operating in connection with two feed rollers; and the pressure rollers (says the specification) "may be held down by springs or weighted levers, which it has not been necessary to show in this drawing, as such are in common use." These rollers are not claimed as new, but are here admitted to be old, and to have been in common use when the patent was granted; nor is any intimation given in the specification or claim, that the pressure rollers were intended to be used in any combination for the purpose of reducing a board to an equal thickness. In the description of the original machine, patented in 1828, the pressure rollers are not mentioned at all, but they are set forth as having belonged to the original machine in the amended specification of 1845; and which last-described machine, experts declare, materially differs from the original as patented in 1828. But as it is not necessary, in this case, to go into the allegation of variance set forth in the answer, we will proceed at once to examine the question of infringement. And to to do this, we must first inquire what Woodworth's claim to novelty of combination and invention is. His rotary cutter wheel is old, his bed plate is old, and his pressure rollers are old likewise.

The invention relied on is a new combination in the machine of three elements, to produce the result of planing a plank against its motion through the machine; and the claim of monopoly is the employment of rotary planes in combination with the face of a bench, and pressure rollers, to prevent the board from being drawn up by the planes when cutting upwards, or from the reduced or planed to the unplaned surface, as described.

As the board advances on the rotary cutters they will strike it thirty times in a second, and violently tend to lift it into the knives; and to keep it down to the bench, a strong pressure is required. And in the next place, the cutters being over the horizontal bed and stationary, at a fixed distance from it, and the

board pressed down to it so forcibly as to crush out the winds in warped lumber, the machine will of necessity reduce the board to an equal thickness throughout.

Norcross's planing machine is an improvement of Hill's, which was in use when Woodworth invented his in 1828. Hill used the rotary cutter, which he placed on the underside of the bench with a section cut through it; the cutters extending through the bench to the upperside, so far as to take from the board, passing over the flat surface above, the depth of wood desired. Feed rollers were employed to forward the board, and a steel spring (made of the section of a hand-saw) was used to keep the board steady. The spring pressed a smooth metal surface on the board, and operated as a pressure roller does. But then, this spring was not used for the purpose that Woodworth used his pressure rollers; in this, that the face of the bench above the cutters, prevented the board from being drawn into them; the cutters drew it down to the bench, so that this bench is the analogous device to Woodworth's pressure rollers, and is also in combination with the rotary cutters; hence these two elements existed, thus combined, when Woodworth got his patent.

Hill's machine had a bar immediately over the cutters, and covering the cut through the bench, where the knives revolved; between this bar, and the bench, the feed rollers forced the board, but as the rest bar was stationary, and the cutter wheel also stationary, and the cutters extended to a fixed distance above the upper face of the bench, the consequence was, that the board came through the machine of an unequal thickness. To overcome this defect, Norcross made the rest bar, (previously stationary,) the cap of a square frame, on the vertical side pieces of which he fixed the journals of his cutter wheel, the cutters and rest bar being stationary relatively to each other, and always the same distance apart. This frame is supported in a stationary guide frame fastened to the bench, and so made as to allow a free vertical movement up and down of the rest bar, and cutting cylinder. As the board passes over the face of the bench, and under the rest bar, the whole weight of the sliding frame rests on the board, and as the cutters strike it at a guaged distance from the bar, and as they move up and down with the bar, it follows that when the board in its rough state is of an unequal thickness, and the side presented to the cutters is pressed down to the bench, the thicker parts of the board will force up the movable frame and draw up the rest-bar and cutters above the bench, equal to the increased thickness of the board, which will be dressed to the thickness of the space the cutters and rest are set apart. Opposite to the outer part of the rest F, that section of the bed over which the planed surface of the board passes,

is a bar, horizontal to the rest. The two bars form a throatpiece which serves to hold the board steady as it passes through the machine.

In view of this state of facts the rule is, that if a combination has, as here, three different known parts, and the result is proposed to be accomplished by the union of all the parts, arranged with reference to each other, the use of two of these parts only, combined with a third, which is substantially different in the manner of its arrangement and connection with the others, is not the same combination, and no infringement.

The combination and arrangement, as appears from the testimony of experts, and by a comparison of the models and drawings presented to us, was the only novelty in the invention of Woodworth. Bentham, in April, 1793, described a rotary cutter and an adjustable bench, which, when adjusted, became fixed, so that the board would be of a determinate thickness when passed between them.

The Hill machine cut the plank from its planed to its unplaned surface, and had feed rollers and a spring to keep it down to the bed; while the bed served to prevent the plank from being drawn into the cutters.

The Baltimore machine (as the one witness who describes it deposed) reduced the plank to a uniform thickness by passing it between a fixed bed and a fixed cutter, and kept it down on the bed by a pressure roller.

The French machine of Roguin patented, and in use as early as 1818, had the rotary cutter and bench; they were stationary relatively to each other, and must have cut the board of an even thickness had it been pressed so hard to the bed as to force out the warps; but this seems not to have been the case. The cut of the planes was with the advance of the board through the machine, and from the unplaned to the planed surface; and for this reason the lift of the cutters was very slight. The plank was kept steady by a rest bar as in Hill's machine.

This is all we deem necessary to describe, in regard to other machines, to the end of passing judgment on the question of infringement. As to the question of originality of the Woodworth machine, compared with the other earlier planing machines produced in evidence, and explained by experts; and secondly, as to the question, whether the original machine, for which Woodworth obtained his patent in 1828, had, or had not pressure rollers in connection with other rollers, and which are now claimed as the main element of the machine repatented in 1845, we forbear from deciding, as we suppose these questions would be more appropriately left to a jury on issues, where the witnesses could be heard in open court. It is deemed proper to

remark that the fact of procuring a patent for a new and useful machine in 1845, under the assumption of a reissue, which was not useful as patented in 1828, for want of feed and pressure rollers, now used as is alleged in defence, would present a question of fraud, committed on the public by the patentee by giving his reissued patent of 1845, date, as an original discovery, made in 1828, and thereby overreaching similar inventions made between 1828 and 1845.

There is one feature in Norcross's machine, and covered by his patent, which is not claimed to be an infringement. It is this: as the board passes under the rest bar F, it is weighted down on the edge of that section of the bed over which the plank first passes. The rest bar is slightly concave and bears heavily on the planed end of the plank; the further side of that section of the bed over which the board last passes, being somewhat depressed, and made lower by a bevelling than the opposite section. By this means, the board is bent, and struck by the cutters on a concave surface; the grain of the wood being condensed by the bend in the boards, so as to grasp the knots more firmly, and prevent them from being thrown out by the cutter and also to prevent the fibres from eating into the planed surface. Because of the board being bent, the Norcross machine cannot be used for tonguing and grooving boards, as the edges of the board must be straight to perform these operations.

From the distance the pressure rollers, in Woodworth's machine, have to be separated so as to give the cylinder room to rotate, the board tends to curve upwards, and is cut on a convex surface, thus loosening the knots, and causing them to be thrown out, and causing the surface of the planed board to be eaten in where the wood is cross-grained or coarse, and also to be uneven, and full of small ridges.

We must, however, disregard this last improvement in Norcross's machine, and also discard the parts of Woodworth's machine which tongue and groove, and treat his invention as a single machine for planing boards on one side only; and, on this state of the facts, try the question of infringement. To infringe, Norcross must use all the parts of Woodworth's combination. 1. The use of rollers to keep the board firmly to the bed, and prevent it from being drawn into the cutters and torn to pieces, and to press out the warps, is the principal claim to invention. Norcross uses no such pressure rollers, nor can they be employed in his machine to such purpose.

But it is insisted that the section of the bed plate in Norcross's machine, over which the unplaned board passes before it reaches the cutter, is equivalent to the pressure roller of Woodworth; and that the throat-piece is equivalent, in its operation, to his

stationary roller. 2. That Norcross uses his rest F, as an equivalent to Woodworth's bed plate; that the front section of the bed being used for the pressure roller, and acting in combination with the rest F, representing Woodworth's bed plate, and the cutter operating alike in both machines, it follows that Norcross, in fact, used Woodworth's combination; but disguised it by turning Woodworth's machine upside down.

The remarks of Judge Sprague, (who decided this cause in the Circuit Court,) made in answer to the foregoing argument, are so distinct, and satisfactory to us, that we deem proper that they should be adopted in this opinion. They are as follows:

"The plaintiff's witnesses, when asked in what part of the defendant's machine they find the plaintiff's pressure roller, are divided in opinion; some of them say that it is the bed, because that prevents the board from being drawn into the axis of the cutter, considering that function as the characteristic of the plaintiff's roller. Others find it in what is called the rest, because that presses the board down upon the bed. But in the Hill machine, the roller performed the same office of pressing the board down, and the bed the same office of preventing it being drawn towards the axis. If either of these sets of witnesses be correct the Hill machine contained the plaintiff's pressure roller, and as it had also a bed piece and rotary cutter, it would follow that it had the plaintiff's combination. Such a construction, therefore, cannot be maintained. The truth is, that after the Hill machine, it was only left to Woodworth to make some new arrangement of the three elements, that is, some new mode of combination. Woodworth's invention may be regarded as an improvement upon Hill's. If Norcross uses this improvement then he infringes, whatever he may add to it, or with whatever new invention he connects it. If he does not use this improvement he does not infringe, although he may by other means work out the same ultimate result."

"What, then, is the improvement which Woodworth made on the Hill machine? He took the rotating cylinder, which was in a fixed position below the bed, and placed it in a fixed position above the bed. This is the only change in the arrangement of the three elements. But it transferred to the pressure roller a function which had before been performed by the bed. In Hill's machine the pressure roller only kept the board down upon the bed, the latter keeping it from being drawn into the axis of the cutter. In Woodworth's, the pressure roller performs both these offices. The effect of this is to plane the board on the upper side instead of the lower, and the result of that is, that the board comes out of an uniform thickness, which was not accomplished by Hill. In his machine, the rotary cylinder being

placed below the bed, with the knife projecting above it, the edge of the knife was kept at a fixed distance above the upper surface of the bed, and cut from the lower side of the board, through its whole length and breadth, so much of it as was equal to that distance. Thus, if the edge of the knife was a quarter of an inch above the bed, and the board be pressed closely to it, it would take off a quarter of an inch of the under side of the board through its whole extent, and if it was of an unequal thickness before, it would remain of an unequal thickness. By placing the cylinder in a fixed position above, and keeping a certain distance between the edge of the cutter and the bed, and all of the board above that distance being taken off by cutting on the upper side, it necessarily comes out of a uniform thickness."

"Now let us look at the Norcross machine. If it has any part which is equivalent to the pressure roller, it is the rest. Let us, then, for the sake of clearness, consider that to be a pressure roller. What then has been done by Norcross? He has left the arrangement of the three elements the same as it was in Hill's. The rotary cylinder is below the bed; the pressure roller still keeps the board down upon the bed, and the bed keeps it from being drawn into the axis of the cutter. His improvement is this: He has made the cutting cylinder movable, vertically, which it was not before, and has connected it with his rest, that is, with the pressure roller, so that when the latter is forced upwards by the increased thickness of the board, it draws the cutter upwards with it, which thereby is made to cut just as much more from the under side of the board, as the roller is pressed up by the increased thickness. By this contrivance, the edge of the cutter is kept in a fixed relation to the rest, or, in other words, the pressure roller; the space between them being always the same, whereas in Hill's, and also in Woodworth's, the edge of the knife had a fixed relation to the bed, and not to the pressure roller. The defendant, therefore, has made a new and independent invention, and does not use the arrangement, or mode of combination of the plaintiff."

For the reasons above stated, we are of opinion that the machine of the respondents did not infringe the patent of the complainants, and therefore order that the decree of the circuit court dismissing the bill, be affirmed.

Mr. Justice McLEAN, Mr. Justice WAYNE, and Mr. Justice NELSON, dissented.

Mr. Justice McLEAN.

I dissent from the opinion of the court. The defendants rest their defence on three grounds:

1. A want of novelty in Woodworth's invention.

2. That in the new patent of Woodworth, issued on the surrender of the old one, to correct the specifications, a new invention is claimed, not contained in the first patent.

3. That the defendant's machine is substantially different from the plaintiff's.

The Woodworth patent has been a subject of investigation frequently before the circuit courts of the United States, and of this court. And although the originality of the invention has been, I believe, uniformly sustained, still, the fact of novelty depends upon proof, and may be disputed by any one against whom suit is brought. The patent is *primâ facie* evidence of right in the patentee. A defence which denies the novelty of the invention, must be proved.

The original patent of Woodworth is dated the 27th of December, 1828. He describes his invention to be an "improvement in the method of planing, tonguing, grooving, and cutting into mouldings, of either plank, boards, or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick, and cutting mouldings, or facing metallic, mineral, or other substances. He then describes the machinery by which this result is produced. And he says, in the conclusion, that he does not claim the invention of circular saws, or cutter wheels, knowing they have long been in use; but he claims as his invention, the improvement and application of cutter or planing wheels to planing boards, &c., as above stated, &c.

There is no claim, in his written specifications, for pressure rollers on both sides of the cutting cylinder, which confine the board to its place, and necessarily reduced it to an equal thickness; but in the drawings, these rollers appear at the proper places, and are so arranged as to reduce the board to a uniform thickness.

The written specifications, including the drawings, constitute a part of the patent, and must be construed as the claim of the plaintiff. In Ryan v. Goodwin, 3 Sumner, 514, it is said, if the court can perceive, on the whole instrument, the exact nature and extent of the claim made by the inventor, it is bound to adopt that interpretation, and to give it full effect. The same is held in Wyeth v. Stone, 1 Story, 270, 286; and in Ames v. Howard, 1 Sumner, 482, 485, it is said "the drawings are to be taken in connection with the words, and if, by a comparison of the words and the drawings, the one would explain the other sufficiently to enable a skilful mechanic to perform the work, the specification is sufficient." Bloxam v. Elsee, 1 Car. & Payne, 558, is to the same effect.

Formerly, patents were construed strictly as giving mono-

plies; but of late years, in England, inventions are treated differently, and a liberal view is taken in favor of the right. Blanchard v. Sprague, 3 Sumn. 535, 539. This has been the settled doctrine in this country, and it is founded upon the highest considerations of policy and justice. The opinion, delivered by my brother Curtis this morning, as the organ of the court, cites the authorities.

No patent, it is believed, which has ever been granted in this country, has been so much litigated as this one. This affords no unsatisfactory evidence of its value. Very shortly after Woodworth's machine was put in operation, a system of piracy was commenced, and, although twenty-five years have elapsed, numerous suits are still pending contesting the right. Mr. Justice Story was one of the first judges whose duties required him to scrutinize this patent in all its parts, and he sustained it in all. This was before the specifications were corrected. And this court also sustained it, in 7 How. 712, where it says, "the specifications accompanying the application for a patent are sufficiently full to enable a mechanic with ordinary skill to build a machine." And this is what the law requires.

In the corrected specifications the patentee says: "Having thus fully described the parts and combinations of parts, and operation of the machine for planing, tonguing, and grooving boards or plank, and shown various modes in which the same may be constructed and made to operate, without changing the principle or mode of operation of the machine, what is claimed therein, as the invention of William Woodworth, deceased, is the employment of rotary planes, substantially as herein described, in combination with rollers or any analogous device, to prevent the boards from being drawn up by the planes, when cutting upwards, or from the planed to the unplaned surface, as described. And also the combination of the rotating planes with the cutter wheels, for tonguing and grooving, for the purposes of planing, tonguing, and grooving boards, &c., at one operation, as described."

"And, finally, the combination of either the tonguing or grooving cutter wheel, for tonguing and grooving boards, &c., with the pressure rollers, as described; the effect of the pressure in these operations being such as to keep the boards, &c., steady, and prevent the cutters from drawing the boards towards the centre of the cutter wheels, whilst it is moved through by machinery," &c.

L. Roguin, of France, in the years 1817 and 1818, invented a machine for planing, grooving wood, moulding, &c., it is alleged, substantially on the same principles as Woodworth's machine.

A considerable number of experts were examined, in the Circuit Court, on both sides, and their opinions, as usual in such cases, were directly in conflict. Such testimony, being written, cannot lead the court to a satisfactory result, by weighing the evidence, as might be done by a jury, where the witnesses are examined in open court. There seems to be no other mode of arriving at a correct conclusion, than to read what the experts have said, and make up an opinion on the specifications of the patents, and on an examination of the models.

The French machine was improved in 1818. The patentee says: "The parent idea of the first machine could not vary. This parent idea consisted in subjecting the wood to the action of a tool of a particular shape, and to impart to this tool a rotary movement; but the choice remained, either of making the tool stationary, and causing the wood to advance under it with a slow and progressive motion — one rotary, the other progressive. The first was adopted in the construction of the machine described in support of the petition for letters-patent; the second has been adopted in the construction of the improved machine."

After describing the structure of the cylinder, he says: "It is borne by a cast-iron carriage, and to the back part of this carriage is attached an iron axletree, bearing two brass pinions, which gear into a rack, and tend to regulate the movement of the carriage. The bench moves itself vertically by means of screws which support it, and tend to raise it or lower it, according to the thickness of the wood to be worked." "Four small, graduated plates of metal, placed in the interior angles of the superstructure, act as a regulator to fix this bench in a perfectly horizontal position." "Two iron squares abut the bench at both ends." "Experience," he says, "has taught that the weight of the bench was not sufficient, singly, to prevent the vibration imparted to it by the machine when in operation, and there resulted from this vibration waves on the surface of the planed board." This was obviated by the weight of the carriage. "The carriage is of cast iron, and weighs about two hundred and forty-one pounds. It is necessary that the carriage should be of sufficient weight, so as not to be raised by the strain of the tool."

"The back part of the bench carries a claw, against which the wood is rested and stopped, like a carpenter's bench. At the other extremity, the wood is stopped by movable dogs, which pass under a bar through which passes pressure screws." And he further says: "We have seen, in the description of the first machine, that the piece called guide (because it serves effectually to guide the wood under the tool for grooving and

moulding) was fixed on the superstructure of the bench. In the new machine, this piece is borne by the carriage."

From this description it appears, that the planing cylinder is carried by an iron frame, and passes over the surface of the board, which is fastened on a bed by a claw at one end, and at the other by movable dogs." This bench, on which the board is placed, is movable vertically, so as to be adjusted by screws to the thickness of the wood to be worked.

The wood is fastened on this adjustable bed, and the iron frame which carries the cutting cylinder is of sufficient weight to keep the cutters on the board, but this machinery cannot reduce the plank to the same thickness. When the bench rises or falls, the whole surface of the plank rises and falls, and the cutting knives cannot so operate by pressure on so long a surface as to reduce the inequalities of the board. But this can be done by pressure rollers, as in Woodworth's machine, on each side of the cutting cylinder — one adjustable, so as to admit the unplaned plank; the other fixed, so as to admit the passage of the plank, when reduced to the required thickness. The French machine may present a smooth surface, but the inequalities of the board will not be removed. They will remain in the same proportion as before the planing operation.

It is argued, that the piece or bar which, in the first machine, was fastened to the bench, and which, in the improved one, was annexed to the carriage, operated as a pressure roller. If this were admitted, it would not remove the difficulty, as one pressure roller or bar could answer no valuable purpose. There must be two rollers, one adjustable, as above stated, or two fixed rollers, or bar and an adjustable bed, to reduce the plank to an equal thickness. But if L. Roguin be permitted himself to describe the function of this bar, it is, "to guide the wood under the tool for grooving, tonguing, and moulding." Shall the language of the inventor be misapplied, and this bar be appropriated to a use which it would seem he never thought of, to render invalid Woodworth's patent?

Several of the witnesses on both sides gave their testimony from the description of L. Roguin's patent, published in a book called "Brevets d'Inventions;" but, as that book was not published until after Woodworth's invention, its description is evidence only so far as it agrees with the specification attached to the patent of L. Roguin. And it does appear, from the original specifications, filed by him, a certified copy of which has been recently procured by M. Perpigna, that there are some material variances. We must therefore look to the authentic paper and drawings, as certified, for evidence in regard to the machine.

The organization of this machine does not seem to be on

the same principle as Woodworth's, and the result is different.

The other French machine, alleged to be similar to that of Woodworth's, is De Manneville's. This machine was patented in France in 1825 and described in the printed work called "Brevets d'Inventions." The patent embraced two machines, having for (their) object the grooving, planing, and reducing to a uniform thickness, wood intended for inlaid work; as well as all sorts of boards, whatsoever may be their dimensions. The inventor calls them a groover and planer.

The description of this machine by the inventor is confused, and scarcely intelligible. One of the defendants' witnesses describes it as having two planes, one of which is called rough, the other smooth, both of which are kept down to the face of the board by a tool-bearer, and are moved backward and forward by a crank motion. The rough plane is movable to and from the board, by being held to it by a spring; the smooth plane, or finisher, is immovable, principally, from the board, except to separate the shavings from it. The position of the board is edgewise, resting on the horizontal rollers — friction rollers; and it is carried through by a pair of fluted cylinders or rollers, vertical, and parallel to each other; which rollers press upon each side of the board, one of which, the back one, is made to slide in its boxes, held up by a spring, and thus made to yield to the inequalities of the thickness of the board. Another pair of rollers, holding the same vertical position, called discharging cylinders, neither of which is yielding, nor are they fluted; and to adjust the different thicknesses, the inventor suggests rollers of different diameters, and on an adjustable bed.

Any one can at once see that this is not an organization of machinery similar to Woodworth's machine. It is not the same principle, nor is it in substance like it. This remark is made in regard to the combination claimed by Woodworth, and not to all the elements of which that combination is formed. In the Manneville machine there is no combination of pressure rollers with rotary cutters, as in Woodworth's; the cutters have a reciprocating motion instead of a rotary one. Several of the elements in both machines are the same, but they are not so arranged as to act in the same manner or on the same principle.

Some of the witnesses for the defendants think, that from the two French patents, the Woodworth machine might be constructed without invention; but these machines must be considered singly, and not together. In the defence it is alleged, in reference to Woodworth's machine, that "the same thing substantially was patented in France, in 1817 and 1818, by L.

Roguin, and in 1825, by Manneville. The defence, in this respect, is not sustained, as neither of the patents are substantially the same as Woodworth's.

The next point for consideration is, whether, in the amended specifications of Woodworth's patent, in 1845, a new invention was claimed, not embraced in the original patent.

It must be admitted, that the subject-matter of the new patent is the same. The patent was surrendered, to correct defective specifications, which did not result from any fraudulent intent. This right was secured to the patentee by the thirteenth section of the patent act of 1836; and, on an application to the commissioner of patents; he, finding there had been no fraud, a new patent was issued for the same invention, more accurately described, as the law authorized.

In the case of Woodworth *v.* Stone 3 Story's Rep. 749, and Allen *v.* Blunt, Ib. 742, it was held, that the action of the commissioner, in accepting a surrender of a patent and issuing a new one, concluded the parties, unless fraud be shown. And in Stimpson *v.* West Chester Railroad, 4 Howard, 380, this court say, "In whatever manner the mistake or inadvertence may have occurred is immaterial. The action of the government in renewing the patent, must be considered as closing this point, and as leaving open for inquiry, before the court and jury, the question of fraud only."

The corrected specifications of the new patent, on a surrender, would necessarily be different from those that were defective. And it is the duty of the commissioner not to permit a new invention to be claimed under the pretence of correcting defective specifications.

Some things are omitted in the new patent which were claimed in the old one. But the principal objection on this ground seems to be, that pressure rollers were claimed in the new patent, and were not claimed in the old one. This is a mistake, as has already been shown. These rollers were represented in the drawings, and in that way were more accurately described than they could have been by a written specification. These drawings are a part of the patent. It does not appear that the corrected specifications embrace a new invention, not included in the original patent.

The third and last point is, whether the defendants' machine is an infringement of the plaintiffs'.

In the opinion of the Circuit Court in this case, it is said, "The defect in the Hill machine was, that it did not reduce the board to a uniform thickness. This desideratum the plaintiff has obtained by an improvement, for which he was entitled to a patent. The defendant has accomplished the same pur-

pose without using the improvement of the plaintiff, but merely by a new invention of his own, and therefore does not infringe."

From these remarks it would seem, that the Circuit Court considered Woodworth as entitled to a patent, "for reducing boards to a uniform thickness," but that his patent does not cover it. In this the Circuit Court was mistaken, as I shall endeavor to show, in fact and in law.

It is not controverted, that Woodworth's combination of machinery does reduce boards to an equal thickness. He did not and could not claim a patent for reducing a board to a uniform thickness; for an exclusive right could not be given for such a result. For centuries, boards have been reduced to a uniform thickness by hand planes, and, perhaps, by other means. What, under the patent law, could Woodworth claim? He had a right to claim, as he did claim, a combination of machinery which would produce such a result. Was it necessary, in the summing up of his claim, which is done to distinguish what he has invented from parts of his machine which he has not invented, that he should claim the combination of his machine for the purpose of reducing boards to a uniform thickness? This would have limited his invention to that purpose, when it was applicable, and was intended to be applied, to that and many other purposes.

By the sixth section of the patent law of 1836, an inventor is required to describe his invention in every important particular, in his application for a patent, so as to enable those skilled in the art or science to which it appertains, to make, construct, compound, and use the same; and if the invention be a machine, he is required to state "the several modes in which he has contemplated the application of the principle or character by which it may be distinguished from other inventions; and "shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention and discovery." He is required to accompany the whole with a drawing, and, if a machine, a model, &c.

Is it not clear that Woodworth has explained the principle, and the several modes in which he has contemplated the application of the principle or character of his machine, by which, in the language of the act, it may be distinguished from other inventions? The plank is planed, tongued, and grooved, by an organization of machinery unknown before. This is all, in the summing up, which the act requires.

It is objected that Woodworth does not include, in his claim, that of reducing a plank to a uniform thickness. The invention consists in the means through which this is done. A result, or

an effect, is not the invention. This appears to have been the turning point in the opinion of the Circuit Court.

But Woodworth has, in the specifications of his machinery, stated that the board is necessarily reduced to a uniform thickness. He says "The edges of the plank, as its planed part passes the planing cylinder, are brought into contact with the above-described tonguing and grooving wheels, which are so placed upon their shafts, as that the tongue and groove shall be left at the proper distance from the face of the plank, the latter being sustained against the planing cylinder by means of the carriage, or bed plate, or otherwise, so that it cannot deviate, but must be reduced to a proper thickness, and correctly tongued and grooved." Here Woodworth describes the combined operation of planing, tonguing, and grooving; and by which the plank is reduced to a proper thickness, that is, the required thickness; and correctly tongued and grooved," &c. This is the effect of his machine in planing boards clearly, described.

He says, the board is kept against the planing cutters by means of the carriage, or bed plate, or otherwise. The pressure rollers are claimed in his specification written, and also in his drawings, which show how they are to be applied. He also says, "Fig. 7 represents the same machine with the axes of the planing cylinder placed horizontally, and intended to operate on one plank only at the same time. A A is the frame; B B the heads of the planing cylinder; C C the knives or cutters attached to said heads, to meet the different thicknesses of the plank; the bearings of the shaft of the cylinder may be made movable by screws or other means, to adjust it to the work, or the carriage of the bed plate may be made so as to raise the plank up to the planing cylinder."

The patent of the defendants was issued February 12th, 1850. It is alleged to be an improvement upon Hill's machine. That machine, from the description, consisted of a planing cylinder, a platform bench, with an aperture in it, through which the planing cutters operated, so as to cut away any required thickness from the surface of the plank subjected to its action; the relation of the cylinder to the bench was permanent; a spring plate bore upon the plank nearly opposite to the cylinder, and forced it towards the cylinder and bench; feeding rollers carried the plank forward, the same as in Woodworth's machine.

By this operation a stratum of equal thickness was cut from the plank, leaving a smooth surface, but not removing the inequalities of the board. The combination of machinery was different in principle from Woodworth's, and, consequently, the result was different.

Norcross says, his invention is an improvement of Hill's machine, and "renders it capable of reducing or planing a board to an equal thickness throughout its length." He says, "Hill's machine was capable of planing or reducing a board on one side, or removing from such side a stratum or layer of wood of an equal thickness," but this did not make the board of uniform thickness.

The amended machine contains rotatory planes which cut, from the planed to the unplaned surface of the plank; an adjustable bar and rest, is at a fixed distance from the cutting action of the planes; the rotating planes and this rest bar were so connected together in a separate frame as to move vertically with the frame, and is borne downwards by their weight; two bars, one before and the other behind the rotating planes, and on the face of the plank cut by them, to cause its opposite face, in its progress through the machine, of whatever thickness and however warped, to pass in contact with the rest bar F. One of the said bars is termed a platform B, and the distance between this and the rest bar F, is variable and self-adjusting to the varying thickness of the plank before it is planed, and the other, called a horizontal bar or throat-piece G, placed at the same distance from the rest bar F, as the line of the cutting action of the rotating planes, to act on the face of the plank which has been planed, and ensure the contact of the opposite and unplaned face with the rest bar F.

Norcross says, what I claim as my invention is, the combination of the rotatory planing cylinder E, and the rest F, with mechanism, by which the two can be freely moved up or down, simultaneously and independently of the bed, or platform B B, or any analogous device, substantially in the manner and for the purpose of reducing a board to an equal thickness throughout its length, all as hereinbefore specified."

"I also claim the above-described improvement of making the underside of the rest concave, in combination with so extending the part B, under the rest F, and applying it to the concave part thereof, as to cause the board, as it passes across the rest, to be bent, and presented with a concave surface to the operation of the rotatory cutter planing cylinder, substantially as specified."

This organization of machinery seems to be the same in principle as that of Woodworth's, and produces the same result. If the concave surface of the board, on which the cutters operate, be an improvement, or any other slight change has been made, which may be an improvement on Woodworth's machine, that would give the defendants no right to use it without a license.

The difference between the machines appears to be this. The

rotating planes and the plate or bed of Woodworth's are stationary in the main frame, and the roller or analogous device on that face of the plank to be planed, is movable toward and from the plate or bed to suit the varying thickness of the plank. While in the Norcross machine, two bars are substituted for the pressure rollers; and instead of making the one which acts on the plank before it is planed, movable, to suit the varying thickness of the plank, it is fixed permanently in the main frame; and the rotating planes and the plate or bed, termed by him the rest bar, F, are connected together in a separate frame, and together move up and down, to adapt themselves to the inequalities in the thickness of the plank.

Norcross has made that part of his machinery movable, which in the Woodworth machine is fixed; and that which is movable in the Woodworth machine, he has made permanent. These changes, and the reversal of Woodworth's machine, is the difference in their structure. A cast of the eye on the models, will satisfy a machinist of the truth of this representation.

Whether the cutting cylinder operates above or below the bench on which the plank is laid, can be of no importance; nor is the difference material whether a pressure roller varies to suit the variable thickness of the plank, or the planing cylinder, connected permanently with the bench, shall be elevated or depressed to accomplish the same object. These devices, though different in form, are the same in principle, and produce the same effect.

I think there is an infringement, and that the decree of the Circuit Court should be reversed.

Order.

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

THE NORTHERN INDIANA RAILROAD COMPANY, AND THE BOARD OF COMMISSIONERS FOR THE WESTERN DIVISION OF THE BUFFALO AND MISSISSIPPI RAILROAD, APPELLANTS, v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter.

Another company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States, for the District of Michigan, against the Michigan company, praying an injunction to prevent the construction of the road under the above agreement.

The Circuit Court had no jurisdiction over such a case.

The subject-matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo*.

Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present.

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

The appellants were complainants below. They were corporations created by, and doing business in, the State of Indiana, claiming a prior right to make and use a railroad running from east to west across the northern part of Indiana. The defendants were a company incorporated by Michigan, and had made a road from Detroit to Michigan City. Being desirous to continue the road round the southern end of Lake Michigan, they entered into an agreement, for this purpose, with a company, incorporated by Indiana, called the New Albany and Salem Railroad Company. The appellants filed a bill in Michigan, the domicil of the Michigan Central Railroad Company, praying for an injunction to prevent them from entering upon or using the said lands of said complainants, and from grading and excavating upon the same, and from hindering the complainants from completing their road and using the same exclusively, and from constructing and using the railroad which the defendants have laid out, or any railroad upon or near the line where the same is located, and from doing any thing in violation of the exclusive rights of the complainants.

To this bill the defendants demurred, and the Circuit Court dismissed the bill, with costs.

The complainants appealed to this court.

It was argued by *Mr. Bronson*, for the appellants, and by *Mr. Pruyn* and *Mr. Jay*, for the appellees.

The arguments branched out into several heads, but it is only necessary to notice those bearing upon the question of jurisdiction, arising from locality and the want of proper parties.

Mr. Bronson, for appellants.

Sixth Point. The New Albany and Salem Company is not a necessary party.

First. The defendants have done, and threaten to do, the wrong of which we complain. It is a tort or trespass upon our rights, for which the wrongdoers are answerable, whoever may stand behind them. No one standing behind a trespasser, whatever may be the relation between them, has a right to say that he must be made a party, when the person injured seeks redress against the transgressor. We demand nothing as against the New Albany and Salem Company. Kerr *v.* Watts, 6 Wheat. 550.

If the New Albany and Salem Company was made a party, the rights existing between that company and the defendants, whatever those rights may be, could not be adjusted in this suit.

Second. The relation between the New Albany and Salem Company and the defendants is that of grantor and grantee; and it is never necessary to make the grantor a party to a suit against the grantee, except in real actions, where the grantee vouches the grantor to warranty.

The New Albany and Salem Company has sold its franchise, so far as relates to the road in question, to the defendants, and the pretended right to repurchase is only colorable.

(1.) There is no mortgage, because there is no debt or obligation to pay. Conway *v.* Alexander, 7 Cranch, 218, 237; Almy *v.* Wilber, 2 Wood. & Minot, 371; Glover *v.* Payn, 19 Wend. 518.

(2.) There is nothing like the relation of principal and agent. The defendants are doing work for themselves only.

Third. If the relation between the two companies is that of mortgagor and mortgagee, or principal and agent, it is still enough that we bring into court the party who has done and is doing the wrong, when we ask no redress against the other.

The New Albany and Salem Company could not, by any form of contract with the defendants, entitle themselves to be made parties to assist against the defendants as tort-feasors.

Fourth. The New Albany and Salem Company is not a necessary party, because it cannot be joined without ousting the jurisdiction of the court.

(1.) The jurisdiction of the Circuit Court, as the suit now stands, cannot be questioned. The matter in dispute exceeds

five hundred dollars, (page 10.) The complainants are corporations created by, and doing business in, Indiana. The defendants are a corporation created by, and doing business in, Michigan. The suit is, therefore, between citizens of different States. Louisville R. R. Co. *v.* Letson, 2 Howard, 497. And the suit is brought in Michigan, where the defendants reside.

(2.) The New Albany and Salem Company is a corporation created by, and doing business in Indiana, page 6.

That company cannot be made a defendant in this suit, for the reasons,

1. It is a citizen of the same State with the complainants; and

2. It cannot be arrested or served with process in the District of Indiana, where it resides, for trial in the District of Michigan, where the suit is brought, and the trial is to be had. Judiciary Act, of 1789, § 11.

The courts of the United States have always been disposed to get rid of an objection for the non-joinder of a party who was beyond the jurisdiction of the court, or whose joinder would oust the court of jurisdiction.

And the case is now fully provided for by Congress, and the rules of the court.

Act of February 28, 1839.

Sect. 1. "That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or preclude other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

Rules of Practice for the Court of Equity of the United States, adopted January Term, 1842.

Rule 22. "If any person, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties." 1 Howard, 48.

The proper averment has been made in the bill, by showing that the New Albany and Salem Company is without the jurisdiction of the court, and cannot be joined without ousting the jurisdiction of the court. Ketchum *v.* Farmers Loan and Trust Company, 4 McLean, 1; Culbertson *v.* Wabash Navigation Company, Id. 544.

Rule 47. Union Bank of Louisiana *v.* Stafford, 12 Howard, 327, 341-3; New Orleans Canal and Banking Company *v.* Stafford, Id. 343, 346; McCoy *v.* Rhodes, 11 Id. 131, 141.

The counsel for the appellees made the following points:

As to want of jurisdiction from locality — The Circuit Court in Michigan had no jurisdiction in the case. Whether the defendants act under the authority of law or not, the alleged cause of complaint is local, and the bill can only be maintained in Indiana. 6 Cranch, 158; Chitty, Pl. 268; 1 Atk. 544; 3 Vesey, 183; 10 Vesey, 164; 3 Atk. 589; 1 Sumn. 504; 1 H. & J. 223; 1 Vesey, sen. 446; 1 Bibb, 409.

As to the want of proper parties — The defendants contend that the case cannot go on, even to a hearing, without the presence of the New Albany and Salem Railroad Company. The injustice of hearing and deciding the case without giving that company an opportunity to be heard, is manifest, and most clearly so. It claims the right and authority to construct a railroad from New Albany to the Illinois line, making Michigan City, at the head of Lake Michigan, the termination of the Michigan Central Road, a point, and to mortgage the whole or any part of the road constructed, or proposed to be constructed, to obtain money wherewith to build. It has entered into an arrangement with the Michigan Central Company to advance money enough to construct, and to construct, as the agent of that company, that part of the road west of Michigan City, and to take in addition thereto $500,000 of stock, which said money is to be expended, one fifth south and four fifths north of Lafayette and south of Michigan City, and for the punctual payment of the subscriptions of stock it holds as absolute security all the road from Michigan City to the Illinois line complete and running; with the right to declare forfeited and null all the rights of the Michigan Central Company, in case of its default in paying its subscriptions of stock. It has mortgaged its entire line of road from New Albany to Michigan City, and upon the credit thereof, has obtained loans to large amounts, which are rapidly completing the road through its entire distance. It is still in the money market to dispose of about a million and a half of unsold mortgage bonds to complete entirely the work, the most important, by far, in the State of Indiana. The

farmer, merchant, and mechanic, from one end of the State to the other, are its stockholders.

Now, upon all these vast interests, the decree of this court, if it can make one against these defendants, must act directly. It is the charter of the New Albany and Salem Company which is in controversy. The powers claimed by it will be struck out of existence. Its arrangements with the Michigan Company will be declared null and void. Its road west of Michigan City will be struck out of legal existence. Its security for $500,000 of stock destroyed. Its road south of Michigan City towards Lafayette complete more than half, and nearly complete the whole distance, blotted out. Its credit in the money market, its stock and its bonds sold, will be ruined, and all this in a suit where that company cannot be heard. Is this possible in a court of equity? And yet this suit cannot go on, and the complainants succeed, without all these disastrous results. They are the direct results of the decree sought, and of the allegations in the bill; and the rights of the New Albany and Salem Company are all the rights in controversy, the Michigan Central Company claim none of themselves, and exercise none except as the New Albany and Salem Company are empowered to grant them.

That the welfare, nay, the fate, of the New Albany Company, of its stocks, bonds, its entire interests, depends upon this question, there can be no doubt. Can this case go on without making that company a party? Shall a decision be had which may destroy it, when, if here, it might make a showing and a defence which the present defendants know nothing of? There needs nothing to show the injustice of thus acting.

"But the rule of law here runs with equity and justice. All persons interested, either legally or beneficially, in the subject-matter of the suit, are to be made parties to it, either as plaintiffs or defendants, so that a complete decree shall be made, which shall bind them all. By this means the court will make a complete decree to prevent future litigation, and to make it perfectly certain that no injustice is done either to the parties before it or to others who are interested in the subject-matter by decree, which might otherwise be grounded upon a partial view only of the real merits. When all parties are before the court the whole case may be seen, but it may not where all the conflicting interests are not brought out by the pleadings by the parties thereto." Story's Pleadings, p. 74, sections 72 and 75.

"If the proper parties are not made to a bill, even though there be a decree, yet it will bind none but the parties to a suit, so that all the evils of fruitless or inadequate litigation may be visited upon the successful party to the original suit, by leaving

his title still open to future question and controversy." Story, § 75.

Here the New Albany Company would not be bound. It would, in its own courts, seek to enforce its rights under the contracts with the defendants. The State courts would not be bound even by a decree of this court construing the statutes of the State, and this court might be compelled to reverse its own decisions on such a question. What would be the position of the two companies in such a case?

This question is fully discussed also in the following cases: Platt and Oliver, 2 McLean, 305; 4 Peters, 202.

We are aware that there are exceptions to this rule, but they are all cases where complete justice can be done between the parties before the court, without prejudice to the rights and interests of parties not before it. Story's Pleadings, sections 77, 81, 83, 89, 94, 96, 154, 191, 192, 193.

Agents are not proper parties to a bill, because they have no interest in the subject-matter. There is one instance, however, and that is where a discovery may be sought from a corporation in which officers may be joined, though Judge Story evidently did not think this exception founded upon principle. Story's Pleadings, 204, § 235.

We are not unaware of the remarks which fell from Mr. Justice Baldwin, in the case Bonaparte *v.* The Camden and Amboy Railroad Company. He there seems to think that because an agent can be sued for a trespass, he can be impleaded in the Court of Chancery, and the principles upon which the two courts act in allowing suits against agents are the same, and he reasons from cases at law to cases in equity. There may be no doubt that an agent may be, in a multitude of cases, sued at law, when the rights of his principal could not be determined and settled in a suit in equity against him alone. The case of Osborne against the United States bears no analogy to this. There was in that case no possibility that the decree of the court could operate injuriously to any other parties; and in the case of Bonaparte, the railroad company was made a party, and could be heard.

That case also differs from this in many respects. There were no such relations there subsisting between the railroad company and its agents, as subsist between the defendants and the New Albany and Salem Company. The decree for an injunction would not cut through such vast interests, and work such wide, sweeping destruction to manifold interests as would an adverse decree in this case. That case differs from this also in this: that was a bill to enjoin against committing a trespass which would be the cause of an irreparable injury, and imme-

diate and decisive action was necessary to avert the ruin. Here is no such thing. Here the bill is merely to test the legal right, which in truth should be tried in an action of ejectment. It is not to prevent a trespass, but to procure a decision whether the New Albany and Salem Railroad Company have the legal right to maintain a railroad where it has constructed and laid it down, and is now operating it. It sufficiently appears from the bill that the road had been constructed before the bill was filed. It had, in fact, been constructed for some months, and passenger trains had been run over it for a long period of time. The controversy is, then, not to prevent an irreparable trespass, but to dispute the right of the New Albany and Salem Company to maintain its road where it has long been built and in operation, and was so before the road of the complainants was built; to dispute its right to mortgage it to the defendants, and to procure a decree that its asserted rights are null and void, and securities held by it and mortgages made by it are all null and void; and to enjoin against the maintaining and using its road; and all this without giving it a chance to be heard. It would seem as if there could be no need of argument in such a case in a court of equity.

It is no answer to these questions to say that the jurisdiction of this court will be ousted if the New Albany and Salem Company is made a party. The court cannot go on and do justice unless that company is a party, and that is always a reason why the suit should be dismissed. 3 Sumner, 426; 3 Russell & Mylne, 83; 2 Mason, 181; 3 Swanston, 140-5.

The act of Congress of 1839 cannot aid the complainants in this case. That act did not intend to overthrow the fundamental principles upon which a court of chancery acts, and determine the rights of one party in a suit against another. That act simply provides that the court shall go on with the suit against the party who shall appear; but the decree shall not affect the rights of the party who does not appear; that is, that the court shall exercise its jurisdiction where it may do so without prejudice to the rights of parties in interest who do not appear, or have not been made parties. Act of Feb. 28, 1839, sec. 1.

This does not at all change the principles which are fundamental with courts of equity upon questions of jurisdiction. See 14 Peters, 66.

In order to change the universal rule of the court, and alter its practice in fundamental points, the act of Congress should be express, and its intention to do so expressed with irresistible clearness and force. 1 Peters's Cond. Rep. 425.

Mr. Justice M'LEAN delivered the opinion of the court.

This is an appeal in chancery, from the Circuit Court of the District of Michigan.

The Northern Indiana Railroad Company, and the Board of Commissioners for the Western Division of the Buffalo and Mississippi Railroad, corporations created by, and doing business in, the State of Indiana, filed their bill in the Circuit Court, stating that an act of the legislature of Indiana, dated February 6th, 1835, incorporated the Buffalo and Mississipi Railroad Company. That by a subsequent act of the legislature, of February 6th, 1837, the name of the corporation was changed to that of the "Northern Indiana Railroad Company;" that by an act of the 8th of February, 1848, the "Board of Commissioners for the Western Division of the Buffalo and Mississippi Railroad," were incorporated. That several acts of the legislature of Indiana were passed, confirming, amending, and enlarging the charters and franchises of the same corporations; that by virtue of said laws the complainants are severally entitled to do and perform business in the State of India, as authorized by their said charters.

That the Northern Indiana Railroad Company, after being duly organized, examined, surveyed, marked, and located the route of their railroad, and by the means specified in the aforesaid acts, procured the right of way for said railroad, as the same has been constructed, and become seised in fee of the right to the lands acquired for that purpose, with all the privileges and franchises in relation thereto, confirmed and declared by the said acts; and that the route of that part of the western division of said railroad, lying between Michigan City, in the county of Laporte, and the western line of the State of Indiana, was duly surveyed and located, and the right of way duly acquired. That a part included in said location consists of a strip of ground eighty feet in width, extending from Michigan City to the west line of the State of Indiana, and that the railroad has been constructed and is in operation, from Elkhart to Laporte, and from Michigan City to the west line of the State of Indiana.

And the complainants say that they have purchased, and now own in fee-simple, certain other lands situated on or near the line of said railroad, which is deemed necessary for the business and purposes of said railroad. And they aver that they commenced their road within the time required, and have prosecuted the same, as by the several acts above referred to, they were required to do. That among the rights and privileges under their charters, is the sole and exclusive right and privilege of building, maintaining, and using a railroad along

the general route of the road. And they insist that no charter can be lawfully granted to any other company to construct any other road or roads, in the vicinity of said railroad, which would materially interfere, injuriously, with the profits of said road, without the consent of the complainants, which has not been given. That the legislature of Indiana has no power to establish such a road, there being no such power reserved in the original charter.

And the complainants allege the Michigan Central Railroad, a corporation created by, and doing business in, the State of Michigan, were incorporated for the purpose of constructing and using a railroad from Detroit, in the State of Michigan, to some point in the same State upon Lake Michigan, accessible to steamboats navigating said lake; and with authority to extend their road to the southern boundary of the State of Michigan; that said company have constructed and now keep in use, a railroad from Detroit to New Buffalo, and thence to the southern line of the State of Michigan in the direction towards Michigan City, in the State of Indiana; and that by an arrangement with the Commissioners of the Western Division of the Buffalo and Mississippi Railroad Company, the road has been extended and is now in use to Michigan City.

And the complainants further allege, that the New Albany and Salem Railroad Company is a corporation created by and under certain acts of the legislature of the State of Indiana, and, doing business therein, has no power or franchise to construct, or to authorize the construction, of any railroad whatsoever, except what is contained in certain statutes referred to in the bill. That said company, and the defendants, the Michigan Central Railroad Company, on or about the 24th of April, 1851, entered into a contract with each other, which contract is in the possession of the defendants, and a discovery of the same is prayed, and that it may be produced. That by color of said contract the defendants claim the right to construct and use a railroad from Michigan City to the western line of the State of Indiana, by a route nearly parallel with the complainants' railroad, and in its immediate vicinity, and several times crossing the same; and also the right and power to locate, construct, and use such railroad, over and across the complainants' road, with the exclusive franchises and privileges aforesaid, as they, the defendants, shall see fit.

That the defendants have so laid out the route of their road from Michigan City to the western line of the State of Indiana, as to cross the complainants' railroad upon lands, the title of which was acquired by, and is now held by the complainants, and upon which their railroad has been constructed, with the

purpose and intent of obstructing and unlawfully interfering with the possession, occupancy, and use of the complainants' lands, and with the intent to hinder and molest them, in the enjoyment and use of the rights and franchises granted to them by the legislative acts stated, and to defeat the exclusive right to have and use a railroad within that vicinity.

And after stating many other facts having a bearing upon the New Albany and Salem Railroad Company; and, as they allege, conducing to show a want of right in that company to extend their road to Michigan City, and from thence to the western line of the State of Indiana, near to and parallel with the complainants' road, as above stated, they pray that the defendants may be enjoined from the construction of their road, &c.

The defendants filed a general demurrer to the bill, and a decree was entered in the Circuit Court, sustaining the demurrer and dismissing the bill.

At the threshold of this case, the question of jurisdiction arises. It is not controverted, that the road of the defendants, against which the injunction is prayed, has been constructed, not only from Michigan City to the Western line of the State of Indiana, but to Chicago, in the State of Illinois. The demurrer admits the facts charged in the bill, and they are also established in part by surveys of both roads.

The jurisdiction of the Circuit Court of the United States, is limited to controversies between citizens of different States, except in certain cases, and to the district in which it sits. In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the Circuit Court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject-matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court, sitting within it. An action of ejectment cannot be maintained in the district of Michigan, for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted, where the act complained of was not done in the district.

Both of these actions are local in their character, and must be prosecuted, where the process of the court can reach the *locus in quo*.

The complainants allege that the defendants have built a railroad, crossing their road several times; have entered upon their grounds, and, by building a parallel road so near as to carry the

same line of passengers and freight, their franchise has been impaired. That they have an exclusive right to run a railroad on the route stated, and that they have been seriously injured by the defendants' road.

This remedy by injunction is given to prevent a wrong, for which an action at law can give no adequate redress. In its nature it is preventive justice. Where the wrong has been inflicted before an injunction was applied for, it may be a matter of doubt, in most cases, whether an action at law would not be, at first, the appropriate remedy. But whether the relief sought be at law or in chancery, the question of jurisdiction equally applies.

In his conflict of laws, Mr. Justice Story says, (sec. 463,) not only real but mixed actions, such as trespass upon real property, are properly referable to the *forum rei sitæ*. Skinner *v.* East India Company, Law Rep. 168; Doulson *v.* Matthews, 4 Term R. 503; Watts *v.* Kinney, 6 Hill, N. Y. Rep. 82. But he says a court of chancery, having authority to act *in personam* will act indirectly, and under qualifications, upon real estate situate in a foreign country by reason of this authority over the person, and it will compel him to give effect to its decree, by a conveyance, release, or otherwise, respecting such property." Foster *v.* Vassall, 3 Atk. 589; 1 Equity Cases, Abr. 133; Penn *v.* Lord Baltimore, 1 Ves. 444; Lord Cranstown *v.* Johnson, 3 Ves. 182, 183; White *v.* Hall, 12 Ves. 323; Lord Portarlington *v.* Soulby, 3 Mylne & Keen, 104; Massie *v.* Watts, 6 Cranch, 148, 160. In this last case the Chief Justice says, "Upon the authority of these cases, (cited,) and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." In another part of the opinion he says, "Was this, therefore, to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained."

If the court had acquired jurisdiction of the person by his being within the State, they will compel him, by attachment, to do his duty under his contract or trust, and enforce the decree *in rem*, by his executing and conveying or otherwise, as justice may require, in respect to lands abroad. White *v.* White, 7 Gill & Johnson, 208; Vaughan *v.* Barclay, 6 Wharton, 392; Watkins *v.* Holman, 16 Peters, 25.

The controversy before us does not arise out of a contract, nor is it connected with a trust expressed or implied. An exclusive right is claimed by the complainants, under their char-

ters, and the legislative acts of Indiana connected therewith, to construct and use a railroad, as they have done, from the city of Michigan, to the western line of the State. And they complain that the defendants have unlawfully entered upon their grounds, constructed a road crossing the complainants' road several times, and materially injuring it, by constructing a road parallel to it. Relief is prayed for an injury threatened or done to their real estate in Indiana, and to their franchise, which is inseparably connected with the realty in that State.

In the investigation of this case, rights to real estate must be examined, which have been acquired by purchase, or by a summary proceeding under the laws of Indiana. This applies, especially, to the ground on which the complainants' road is constructed, and to other lands which have been obtained, for the erection of facilities connected with their road. And, in addition to this, the chartered rights claimed by the defendants, and the right asserted by them to construct their road as they have done, crossing the complainants' road and running parallel to it, must also be investigated. Locality is connected with every claim set up by the complainants, and with every wrong charged against the defendants. In the course of such an investigation, it may be necessary to direct an issue to try the title of the parties, or to assess the damages complained of in the bill.

It will readily be admitted, that no action at law could be sustained in the district of Michigan, on such ground, for injuries done in Indiana. No action of ejectment, or for trespass on real property, could have a more decidedly local character than the appropriate remedy for the injuries complained of. And is this character changed by a bill in chancery? By such a procedure, we acquire jurisdiction of the defendants, but the subject-matter being local, it cannot be reached by a chancery jurisdiction, exercised in the State of Michigan. A State court of Michigan, having chancery powers, may take the same jurisdiction, in relation to this matter, which belongs to the Circuit Court of the United States, sitting in the district of Michigan. And it is supposed that no court in that state, could assume such a jurisdiction.

But there remains another ground of objection to the jurisdiction in this case. The New Albany and Salem Railroad Company is not made a party to this suit. As an excuse for this omission, it is alleged, in the bill, that this company being a corporation by the laws of the State of Indiana, of the same State as the complainants, it cannot be made a party without ousting the jurisdiction of the court. This is true; and if the relief prayed for by the complainants can be given without impairing the rights of this company, under the act of 1839, the jurisdiction may be exercised.

The complainants contend that this company is not a necessary party, and that no decree is asked against it.

The right claimed by defendants to construct their road as stated in the bill, was derived solely from the New Albany and Salem Company. The contract under which this claim is made, is referred to in the bill, and is, consequently, a part of it. It is stated in the contract that this company, "both for the public good and their own interest, deemed it important to extend its road to Michigan City, and thence westward by the State line of Illinois, &c. And it is also stated that the Michigan Central Railroad Company were willing to subscribe for five hundred thousand dollars of the stock of the New Albany and Salem Railroad Company upon certain conditions, as well as to build the entire line of railroad from Michigan City to the Illinois State line, provided they can have the use and control of the same, until the costs of the same shall be reimbursed to it, &c. The payment of the stock to the New Albany road, as one of the conditions, was to be made by instalments stipulated, a large part of which are yet unpaid. And to reimburse the Michigan Company a million of dollars were assumed as the cost of the road, from Michigan City to the western line of the State, which sum, if paid in forty years, with interest at five per cent. per annum, the railroad to be constructed by the Michigan Company, with all its equipments, shall become the property of the New Salem Company, and the mortgage or pledge of the contract shall cease.

In the argument it was contended by the complainants, that under no act or acts of the Indiana legislature have the New Albany and Salem Company, a right to construct a railroad further north than Crawfordsville. That certain words used in the act of February 11th, 1848, giving the company power to "extend their road to any other point or points than those indicated by the location heretofore made by the authority of the State," were necessarily limited to the points named in previous acts, New Albany, Salem, and Crawfordsville. And that in extending the road from Crawfordsville north to Michigan City, and thence west parallel with the complainants' road to the western line of the State of Indiana, it was located without any legal authority.

From the above it appears that the validity of the New Albany and Salem charter is involved in this case, for between two and three hundred miles, from Crawfordsville to Michigan City, and thence to the western line of the State of Indiana. The construction of that road has been nearly, if not entirely completed, at an expenditure of between two and three millions of dollars. And in addition to this, it appears from the con-

tract made between this company and the Michigan company that, as one of the conditions of the contract, the latter company subscribed in stock to the New Albany and Salem road, half a million of dollars, a part of which sum only has been paid.

Now, if this court, in giving the relief prayed for by the complainants, should find it necessary to declare that the above charter gave no authority to the New Albany Company to locate and construct their road north of Crawfordsville, it would be ruinous to that company. And it is clear, that any decision which shall declare the road from Michigan City to the western line of the State of Indiana, without the protection of law; must equally apply to the road from Michigan City to Crawfordsville, as they were located and built under the same authority. This question is, therefore, vitally interesting to the New Albany Company; and by the bill we are called to decide that question, although that company is not made a party to the suit. It is impossible to grant the relief prayed, without deeply affecting the New Albany Company. If their charter should be held good, as claimed by that company, an injunction against the defendants would materially injure the New Albany Company, as it would not only impair the contract made with the defendants, in regard to the road from Michigan City westward to the State line, but it would, probably, release the defendants from a subscription of half a million to the stock of the Crawfordsville road, or at least from the payment of the part of that subscription which has not been paid.

The act of 1839 provides, that "where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district, jurisdiction may be entertained, but the judgment or decree shall not conclude or preclude other parties. And the non-joinder of parties who are not inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit."

The provision of this act is positive, and in ordinary cases no difficulty could arise in giving effect to it; but in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice. In such an alternative we are bound to say, that this case is not within the statute. On both the grounds above stated we think that the Circuit Court has no jurisdiction. The judgment of that court, in dismissing the bill, is therefore affirmed.

Mr. Justice CATRON and Mr. Justice CAMPBELL delivered separate opinions. Mr. Justice DANIEL dissented.

Mr. Justice CATRON.

The Northern Indiana Railroad Company and the Railroad Commissioners for the Western Division of the Buffalo and Mississippi Railroad Company, filed their bill against the Michigan Central Railroad Company, in the Circuit Court of the United States in the District of Michigan, seeking an injunction against the defendant to prevent the Michigan company from laying down and using a railroad around the southern end of Lake Michigan, and within the State of Indiana; which road crosses the road of the complainants, and runs near to, and parallel with it, and, as the complainants allege, will materially withdraw their profits. And the complainants insist that they have a monopoly by their charter to construct the only road near to and around the southern end of the lake, and that the defendant has violated the chartered rights secured to the complainants.

The bill was demurred to, and the demurrer was sustained by the Circuit Court. The first cause of demurrer set forth is, that the complainants have not, by their bill, made such case as entitles them to any discovery or relief against the defendant as to the matters contained in the bill, or any of them; and the judgment of the court is prayed whether the defendant shall be compelled to make further answer; and, on this state of pleadings, the question standing in advance of all others is, whether the Circuit Court had jurisdiction to entertain the bill, as between these parties, independent of the merits of the case set forth. The bill alleges that the Northern Indiana Railroad Company, and the Commissioners of the Buffalo company were, severally, corporations created by the State of Indiana, and were doing business in said State according to their charters; "and are, in meaning and contemplation of the Constitution and laws of the United States, citizens of the State of Indiana, and entitled to be deemed and taken as such citizens for all the purposes of suing and being sued, and for the purposes of this bill of complaint."

A corporation is composed of many individual members, having a joint interest, and a joint right to sue in their corporate name; and the consideration here presented is, whether a State law, creating the corporation, makes such corporation "a citizen," according to the Constitution, regardless of the fact where its members reside. If the corporation be such citizen, then every member of the corporate body might reside in Michigan, and yet have the right to sue citizens of Michigan there in the United States court.

The Constitution gives jurisdiction to the courts of the Union, "between citizens of different States." Now, if it be true, that corporations — such as for making roads, &c. — be citizens in the established sense of the Constitution, it must have been thus settled in the case of the Louisville Railroad Company *v.* Letson, 2 How. 497; as, previous to that decision, (made in 1844,) this court did not suppose that a corporation was a citizen. Nor was any such question presented in Letson's case; far from it.

Letson sued the railroad company in covenant, by their corporate name, distinctly averring that the members of the company were citizens of South Carolina, and that the plaintiff was a citizen of New York.

The defendant pleaded in abatement, that Rutherford and Baring, two of the stockholders, were citizens of North Carolina; and that the State of South Carolina was also a stockholder. To this plea there was a demurrer, which was sustained in the Circuit Court and in this court.

It was held, 1. That the State could not object, as she stood on the foot of every other individual stockholder and need not be sued; and,

2. That fugitive stockholders, who were changing every day, and quite too numerous to be included in a suit, need not be made parties of record.

This, from the report of the case, seems to have been the unanimous opinion of the members of this court, who were present at the time; certainly it was my opinion.

The president and directors of the railroad company were alleged to be, and admitted to be by their plea, citizens of South Carolina; they represented the stockholders, and were their trustees, and whose acts were binding on the stockholders. This state of parties conformed to the act of Congress of 1839, and the spirit of the 47th, 48th, 49th, and 50th rules for the government of chancery practice in the federal courts, adopted in 1842.

It is now assumed, that Letson's case overruled the decision in Strawbridge *v.* Curtis, 3 Cranch, 276. That decision undoubtedly proceeded on the true rule.

There were various complainants to a bill in equity; and the bill alleged that some of the complainants were citizens of Massachusetts, where the suit was brought; and that the defendants were also citizens of Massachusetts, except Curtis, who was stated to be of Vermont, and a subpœna was served on him in that State. There, it was held, "that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts." A bill thus framed could not at this day be treated seriously.

The next case supposed to be in conflict with Letson's case is that of the United States Bank *v.* Devereux, 5 Cranch, 61. The old Bank of the United States sued Devereux and Robertson, in the Circuit Court of Georgia, alleging that it was a corporation established under an act of Congress of 1791; and alleging, further, that the petitioners, the President, Directors, and Company of the Bank of the United States, were citizens of the State of Pennsylvania; and that Devereux and Robertson, the defendants, were citizens of Georgia; and this averment was held sufficient by the court.

That Letson's case overruled that of the R. R. Bank of Vicksburg *v.* Slocum and others, is true; and it was justly overruled, as I think. Slocum, Richards, & Company sued the Bank, alleging that they were citizens of Louisiana, and that the President, Directors, and Company of the Bank were citizens of Mississippi. The Bank pleaded in abatement, that Lambeth and Thompson, two of the stockholders, were citizens of Louisiana. And this court sustained that plea; whereas, according to Letson's case, it was quite immaterial where the stockholders resided, so that the president and directors were citizens of the State where the suit was brought.

What a corporation is, was very fully discussed in Devereux's case (5 Cranch); nor will I discuss it further here, as I do not feel called on to prove, to the legal profession of this country, that a corporation is not a citizen. And as no averment is made in the bill before us, that the president and directors of the corporations suing, are citizens of different States from the president and directors of the corporation sued, I think the demurrer ought to be sustained, and the court below instructed to dismiss the bill.

I view this assumption of citizenship for a corporation as a mere evasion of the limits prescribed to the United States courts by the Constitution. The profitable corporations are owned in a great degree in the cities; there the president and directors often reside; whilst the charter was granted in another State, and there the owners keep an agency, the business being in fact conducted in the city.

Now these owners and directors may sue their next neighbors of their own State and city, in the United States courts, according to the rule that the corporation is a citizen of the State where is was created, and that jurisdiction depends on this sole fact.

Could I consent to pronounce from this bench an opinion deemed by myself extrajudicial, and, therefore, without authority, I might attempt an argument to expose the irregularity and impotence of an adjudication confined, by law, within

Mr. Justice Daniel said;

prescribed geographical limits, with respect to subjects purely local, whenever it should be attempted to extend the operation of such adjudication beyond the *locus* to which the law has allotted it. For of this character has been the action of the Circuit Court upon the controversy of these two corporations now before us. The Northern Indiana Railroad Company, incorporated by the State of Indiana, have complained of an invasion of their local rights, a tort to real property situated within the territory of Indiana, by a company incorporated by, and situated within, the State of Michigan; and the Circuit Court for the State of Michigan, limited in its cognizance of local matters to the territory of that State, has undertaken to adjudicate upon the merits of this complaint. But irregular and futile as is the action of the Circuit Court of Michigan, and as it is by all here admitted to have been, can it have been more irregular than is the undertaking, on the part of this tribunal, to pronounce authoritatively upon the character of the acts, or the relative rights and powers of the parties, over which the Circuit Court of Michigan has claimed cognizance? Is not the warrant for cognizance by the Circuit Court and by this tribunal essentially, nay, precisely, the same? Are they not both to be found, if existing at all, in the Constitution of the United States? And is it not indispensable that such cognizance should be regularly and certainly vested in the Circuit Court, before this court can sanction its validity? If it be asked, by what provision of the Constitution the Circuit Court could assume jurisdiction of the present controversy, it must, of necessity, be referred to that (2d sec. 3d Art.) provision which extends the judicial power to controversies between citizens of different States. This, indeed, is admitted; and the admission carries with it inevitably the implication that a corporation can and must, for certain purposes, become a citizen, and must, *ex necessitate*, possess the attributes of citizenship in order to obtain access to a court of the United States. Having, on a former occasion, (*vide* the case of Rundle et al. *v.* The Delaware and Raritan Canal Company, 14 Howard, 95,) endeavored to expose the incongruities involved in, and incident to, this anomalous conception, I will not now attempt a further enumeration of them beyond this obvious remark,—that citizenship and corporate existence, created by State authority, being decreed by this court to be, to some extent at least, identical, as must be the case to authorize this court to call the parties before them, it must follow that, to the same extent, a corporation can be a citizen, and a citizen can become a corporation. The process by which the latter transformation may be accomplished has not yet been pointed out. We are told,

by the English jurists, and by the decisions of the English courts, and so, too, in the case of the Bank of the United States *v.* Devereux, it is laid down by Marshall, C. J., that a corporation is an invisible, intangible, artificial creature. In one sense, at least, the citizen may render himself invisible and intangible—he may abscond. In what signification he must become artificial, amongst the infinite varieties which may be imagined, will present a question more difficult to be determined. But in the possession of a portion even of his corporate attributes, the citizen may be deemed a *quasi* corporation, when it shall be thought convenient; and will, doubtless, in that chrysalis condition, furnish as just a representation of the integral legal entity, as the latter, in the shape of *quasi* citizen, can ever supply of the real, material, and social being with whom it is sought to identify it.

Powerless and vain as probably ever will be the "still small voice" of an humble individual, in opposition to the united declaration of those justly considered the learned and the wise, still, under the most solemn conviction of duty, the effort can never be forborne to raise that humble voice in accents of alarm at whatever is believed to threaten even the sacred bark in which the safety both of the States and of the United States is freighted. I hold that, beyond the Constitution of the United States, there is no federal government, either in the mass or in the detail. That beyond the pale and limits prescribed by that instrument, to be interpreted, not by indirect or ingenious or forced constructions, or by remote implications, but by the plain and common-sense import of its language, a language familiar to the common and general understanding, all is unwarranted assumption and wrong—a termination of all legitimate federal power. Whilst therefore I profess, as I really feel, my belief in the wisdom and purity of those who think themselves justified in what I regard as an infringement upon the terms and objects of our only charter, I am constrained to record my solemn protest against their doctrine and their act.

On these grounds I dissent from the opinion just pronounced, and think that this cause should have been remanded to the Circuit Court, with directions to dismiss it, as one over which the courts of the United States can have no jurisdiction with respect to the parties.

Mr. Justice CAMPBELL.

I concur fully in the opinion of the court denying jurisdiction to the Circuit Court to entertain this bill. The objection made in the opinion to the exercise of jurisdiction, and which is fairly presented by the record, is sufficient to dispose of the case. The

court has declined to determine any question upon the averments of the bill, in regard to the citizenship of the parties. The question is left exactly where it was when this case was presented. I state these facts, that no inference may be drawn to the contrary, and that the decision of the court may not be misunderstood.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the Circuit Court had no jurisdiction of the case, and on that ground the bill was properly dismissed; there was, therefore, no error in the decree of said court. Whereupon it is now here ordered, adjudged, and decreed, by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

ERASTUS CORNING AND JOHN F. WINSLOW, PLAINTIFFS IN ERROR, v. PETER A. BURDEN.

In a suit brought for an infringement of a patent-right, the defendant ought to be allowed to give in evidence the patent under which he claims, although junior to the plaintiff's patent.

Burden's patent for "a new and useful machine for rolling puddler's balls and other masses of iron, in the manufacture of iron," was a patent for a machine, and not a process, although the language of the claim was equivocal.

The difference explained between a process and a machine.

Hence, it was erroneous for the Circuit Court to exclude evidence offered to show that the practical manner of giving effect to the principle embodied in the machine of the defendants was different from that of Burden, the plaintiff; that the machine of the defendants produced a different mechanical result from the other; and that the mechanical structure and mechanical action of the two machines were different.

Evidence offered as to the opinion of the witness upon the construction of the patent, whether it was for a process or a machine, was properly rejected.

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

Peter A. Burden, as assignee of Henry Burden, brought his action against Corning and Winslow, for a violation of a patent granted to Henry, as the original and first inventor and discoverer of a new and useful machine for rolling puddle balls or other masses of iron, in the manufacture of iron.

What took place at the trial is set forth in the opinion of the court. Under the instructions of the Circuit Court, the jury

found a verdict for the plaintiffs, with one hundred dollars damages; upon which the defendants brought the case up to this court by a writ of error.

It was argued by *Mr. Seymour* and *Mr. Keller*, for the plaintiffs in error, and by *Mr. Fitzgerald* and *Mr. Stevens*, for the defendants in error.

Each one of the four counsel filed a separate brief. The points presented on the part of the plaintiffs in error are taken from the brief of Mr. Seymour, and those on the part of the defendant in error from the brief of Mr. Stevens.

Points and Authorities submitted on the part of the Plaintiffs in Error.

First exception to the charge.—The court erred in charging the jury that "the letters-patent which have been given in evidence by the plaintiff are for a new process, mode, or method of converting puddlers' balls into blooms by continuous pressure and rotation of the balls between converging surfaces, thereby dispensing with the hammer, alligator jaws, and rollers, accompanied by manual labor, previously in use to accomplish the same purpose; and the said letters-patent secure to the patentee the exclusive right to construct, use, and vend any machine adapted to accomplish the objects of his invention, as above specified, by the process, mode, or method above-mentioned."

I. The court erred in charging the jury that Burden's patent was for a new process, mode, or method.

A process or mode may be patented. Curtis, p. 65, 66, 67, 68, 69, 70, 71, 73, and cases there cited, from § 77 to § 83.

1. Burden did not patent a process, but a machine.

What he designed to cover by his patent is to be gathered from the patent itself, the specification, and its summing up. Webster on Subject-Matter, p. 18, and note Z; Davoll *v.* Brown, 1 Woodbury & Minot, 59; Russell *v.* Crowley *et al.* 1 Cromp. Meeson & Roscoe, 864; Moody *v.* Fiske, 2 Mason, 112; Rex *v.* Cutler, 1 Starkie's Rep. 283; Leroy *v.* Tatham, 14 Howard, 156, 171; Wyeth *v.* Stone, 1 Story's Rep. 285; Gray *v.* James, Peters's C. C. R. 394, 400; Mr. Justice Nelson's Opinion, in Appendix A, annexed.

2. Burden's patent claims that he has invented a new and useful machine, &c., not a process.

3. The specification, which purports to be a part of the letters-patent, states the invention to consist in a "machine," not in a process.

4. The summing up of the specification, or the claim, is substantially for a "machine."

And he specifies three modes of applying the principle of his invention; thus complying with the requisition of the sixth section of the act of 1836, in reference to all patents for machines, and for machines only.

The preparing of puddlers' balls is not claimed as an invention, nor could it be, for it is as old as the art of making iron by the process of puddling. See Encyclopædia Americana, Vol. 7, Art. Iron, p. 72. The preparing puddlers' balls by pressure is not claimed, for that, too, is old. *Ib.* But the claim is for the invention of the new mechanism for preparing puddlers' balls.

II. An invention, such as Burden's is described to be in the patent and specification, is, upon the authority of elementary works, and the decisions of our courts, a machine, and not a process.

The distinction between a patent for a machine and a patent for a process is well known.

1. A patent for a machine is defined by Curtis, § 93, as follows: "If the subject of the invention or discovery is not a mere function, but a function embodied in some particular mechanism, whose mode of operation and general structure are pointed out, and which is designed to accomplish a particular purpose, function, or effect, it will be a machine in the sense of the patent law."

If the specification describes "not a mere function, but a machine of a particular structure, whose modes of operation are pointed out to accomplish a particular purpose or end, the patent is for a machine, and not for a principle or function detached from machinery." Blanchard *v.* Sprague, 3 Sumner, 540.

A method or process may be the subject of a patent. See Phillips, pp. 93, 94; Curtis, § 80, 81.

Among the cases cited (see Curtis, § 79) of patents for a method, or, as the writer expresses it, "for the practical application of a known thing to produce a particular effect," are

Hartley's invention to protect buildings from fire by the application of plates of metal. See also Webster's Patent Cases, pp. 54, 55, 56; and note, pp. 55 and 56.

Forsyth's patent for the application of detonating powder, which he did not invent, to the discharge of artillery, mines, &c.

In this case the patentee succeeded in an action against the party using a lock of different construction from any shown in the drawing annexed to his specification, and, as Curtis says, "thus established his right to the exclusive use and application of detonating powder as priming, whatever the construction of the lock by which it was discharged." Webster's Patent Cases, pp. 95, 97, note.

Hall's patent for the application of the flame of gas to singe off the superfluous fibres of lace, and other goods, is another of this class. Web. Pat. Cases, p. 99.

The plaintiff had a verdict founded on his sole right to use gas-flame for the clearing of fibres from lace. Curtis, p. 67, n. 1; Web. Pat. Cases, pp. 100, 103; Neilson *v.* Harford, Web. Pat. Cases, 191, &c.; Neilson *v.* Thompson, Web. Pat. Cases, 275; The Househill Co. *v.* Neilson, Web. Pat. Cases, 673; Boulton *v.* Bull, 2 H. Blackstone, 492; Clegg's Patent, Web. Pat. Cases, 103; Morse's Patents; McClurg *v.* Kingsland, 1 Howard, 202; Russell *v.* Cowley, Web. Pat. Cases, 459.

2. The preparing a puddler's ball is reducing and compacting it by pressure into the form of a bloom. See Encyclopædia Americana, vol. 7, article Iron, p. 72; Nicholson's Op. Mechanic, pp. 334–5; Ure's Dic. of Arts and Manufactures, p. 703.

If Burden's claim, then, is for the reducing and compacting the ball by pressure into the form of a bloom, it is a claim for a process long before known in the manufacture of iron, and would therefore be void for want of novelty.

To avoid this difficulty, the statement of the claim goes on to say that he claims the preparing these balls by causing them to pass between curved or plane surfaces, in the manner described in his drawings and in the specification of the several parts of the machine.

If the words "the particular method of the application" were correctly held in Wyeth *v.* Stone, before cited, to mean the particular apparatus and machinery described in the specification, is not the claim for preparing puddlers' balls, by causing them to pass through a certain machine, as clearly a claim for the invention of the machine?

Wyeth claimed not only the art or principle of cutting ice of a uniform size, but "the particular method of the application of the principle;" and this last part of the claim was held to be the only valid part of it, and to be a claim of the particular apparatus and machinery, described in the specification to effect the purpose of cutting ice.

So Burden's patent, if it be sustained at all, must be held to be a patent for the particular apparatus and machinery, described in the specification to effect the "preparing the puddlers' balls." See also the case of Blanchard *v.* Sprague, 3 Sumner, 535.

It was objected, on the trial in this last case, "that the plaintiff's specification was defective; that he claimed the functions of the machine, and not the machine itself."

Mr. Justice Story, at p. 540, says: "Looking at the present specification, and construing all its terms together, I am clearly

of opinion that it is not a patent claimed for a function, but it is claimed for the machine specially described in the specification; that it is not for a mere function, but for a function as embodied in a particular machine, whose mode of operation and general structure are pointed out."

If to claim a "method" or mode of operation in the abstract, explained in the description of certain machinery, be a claim for a machine, as was adjudged in Blanchard *v.* Sprague, is not the claim of preparing puddlers' balls, by the operation of certain machinery, much more a claim of a machine? In other words, is the claim of a particular result before known, from the operation of a machine claimed to be new, any thing else than a claim for the peculiar construction of the machine itself, by which that result is effected?

3. Again, the result claimed by Burden is to produce a bloom from a puddle ball by pressure, welding together the particles of iron, and expressing in part the impurities, and partly shaping the mass for the after operation of converting it into bars, also by pressure.

It cannot be pretended that Burden invented this, or any part of it. This was all done before his invention, under the hammer and the alligator jaws. But it may be said that he invented an improvement in this process. This cannot be; for he only compresses the mass to cement the particles, express the impurities, and give shape; all this was done before by the hammer and the jaws, and, in the opinion of many, better done than he does it.

4. Again, it may be said that he made an improvement in the operation by making it continuous. This brings the matter to a true test, and shows that it is the invention of a machine to render the operation continuous which before had been intermittent.

5. It may be claimed that he has invented or introduced the element of self-action. This establishes the defendant's proposition that Burden's patent is only for a machine. For the meaning of this is, as the term self-action must be predicated of material substances, that he has substituted an organization of machinery to perform automatically what was before performed partly by hand and partly by machinery. Machines for nail-cutting, making hook-head spikes, carding and spinning, weaving, felting, are self-acting machines, which have been invented to carry on known processes; all have the element of self-action, and yet all of them have been recognized as machines, and not processes.

III. The plaintiff in his declaration counts upon his patent as a patent for a machine only, and not for a process.

He ought to be permitted to recover only ***secundum allegata et probata.***

IV. But suppose the patent be for a process, and not for a machine; then we submit that the court erred in sustaining the patent as a patent for a new process of preparing puddlers' balls, by continuous pressure and rotation of the balls between converging surfaces.

1. For this process itself is a well known and common process in the arts, and therefore could not be patented at the time of the alleged invention.

The operation to which the puddlers' ball is subjected, that is, the process, produces common results necessarily arising from pressure on all soft and porous substances, to wit: condensation, expression of matter, and change of form.

2. All the experts testify that Burden's invention consists in carrying on the old process of reducing a puddler's ball to a bloom, by pressure created and continued by his machinery.

That the machinery by which such pressure may be applied is patentable, is obvious. But aside from the peculiar construction of Burden's machinery, there is nothing new in its application. It is merely the application of a known mode of operation in the arts, to produce a known result, that is, mechanical pressure, to produce a bloom out of a puddler's ball. See Curtis, p. 78, sec. 88.

That this form of applying mechanical pressure is not new, was proved by, &c. &c.

3. Notwithstanding the condition embodied in the second proposition contained in the charge of the court, as follows: "The machines for milling buttons, milling coin, and rolling shot, which have been given in evidence by the defendants, do not show a want of novelty in the invention of the said patentee, as already described, if the processes used in them, the purposes for which they were used, and the objects accomplished by them, were substantially different from those of the said letters-patent;" yet taken in connection with the construction given by the court to the patent, in the first proposition contained in the charge, the defendants were deprived of the defence to which they were entitled, to wit: That the reducing puddlers' ball to blooms, by their rotation and pressure between converging and continually approximating surfaces, was but a double use of a process or machine, long before used in milling buttons, milling coins, and rolling shot.

For the court had decided, in the first proposition of the charge, that Burden's patent was "for a new process of converting puddlers' balls into blooms, by continuous pressure and rotation of the ball between converging surfaces."

In other words, that the application by the plaintiff's machine to the puddler's ball, of the old method of reducing and compacting metals by the continuous pressure of converging surfaces, constituted such a novel process in the manufacture of iron, that (its utility not being questioned) the plaintiff's patent was good, notwithstanding the previous use of the milling machine on copper, silver, and gold, and of the shot machine on lead, in compacting and reducing those metals by the rotation of the metals and the continuous pressure of converging surfaces.

4. Burden's patent is clearly a case of double use. See Curtis on Patents, sec. 85 to 89, and notes and cases therein cited; Losh *v.* Hague, Webster's Patent Cases, 207; Howe *v.* Abbott, 2 Story, R. 190-193.

To this defence the defendants were clearly entitled. The processes of milling the coin, finishing the edges of the buttons, making the shot or balls, and making the blooms, are strictly identical.

V. The court erred in charging the jury as they did in the latter clause of the first proposition contained in the charge, to wit: "And the said letters-patent secure to the patentee the exclusive right to construct, use, and vend any machine adapted to accomplish the objects of his invention as above specified, by the process, mode, or method above mentioned."

Also in laying down the third proposition in his charge, to wit: "That the machine used by the defendants is an infringement of the said letters-patent, if it converts puddlers' balls into blooms by the continuous pressure and rotation of the balls between converging surfaces, although its mechanical construction and action may be different from that of the machines described in the said letters-patent."

Also in excluding the testimony offered by the following question, to wit: by changing the form of the rolling surfaces in Mr. Winslow's machine, can it be made to roll a sphere?

Also the testimony offered as follows: "The counsel for the defendants then offered to prove by this witness that the machine used by the defendants differed, in point of mechanical construction and mechanical action, from the machines described in Burden's specification."

All these propositions were thus erroneously adjudged against the defendants, as a sequence or corollary following from the first main proposition which the court had laid down against the defendants, to wit, that the plaintiff's patent was for a process and not for a machine. The court in substance held, that although the mechanical construction and action of the defendants' machine might be different from that of the plain-

tiff's, it was still an infringement if it reduced the balls to blooms by continuous pressure and rotation.

This was an erroneous position. For one thing was certain. We had the right to reduce puddlers' balls to blooms by any machine having a different action from that of the plaintiff. Curtis, sec. 96, n. 2; Whittemore *v.* Cutter, 1 Gallison, 478-491; Barrett *v.* Hall, 1 Mason, 470.

In the light of these authorities, proof of different mechanical construction and different action was competent and highly pertinent to establish "a peculiar structure," and the production of a new effect.

VI. The court erred in excluding the evidence offered to be given by the witness, Hibbard, to wit: "That the practical manner of giving effect to the principle embodied in the machine used by the defendants was entirely different from the practical manner of giving effect to the principle embodied in Mr. Burden's machine — that the principle of the two machines, as well as the practical manner of carrying out those principles, was different; and that the machine used by the defendant produced by its action on the iron a different mechanical result, on a different mechanical principle, from that produced in Burden's machine."

The witness was an *expert*, and no objection was urged on that score, or to the form of the question. Silsby *v.* Foote, 14 Howard, 218, 225.

This offer embraced legitimate proof tending to establish a general proposition material to the issue, to wit:

That the defendant's machine was constructed on a different principle, or had a different mode of operation from the plaintiff's.

Proof that the principle of one machine was different from that of the other, was tantamount to proof that their mode of operation was different; for two machines, different in principle, cannot well have the same mode of operation, although they may produce the same result.

But the defendant not only offered to prove that the machines were different, but also that they produced on the iron a different mechanical result. See Curtis on Pat. p. 264, § 222; also p. 285; also p. 286, § 241.

In conclusion, the court in this case should have held that the plaintiff's patent was for a machine. And on the question of novelty the court should have left it to the jury as a question of fact, to find upon the testimony whether the plaintiff's machine was the same in its principle or *modus operandi* as the milling, button, or shot machines. And on the question of infringement, the court should have left it to the jury, upon the

testimony, to find whether the defendants' machine was the same in its distinctive character or principle as the plaintiff's.

Brief on the part of defendant in error.

First. The whole question in this cause depends upon the correctness of the construction contended for by the counsel for the defendant in error, and which the judge gave to the patent on the trial. If this construction be correct, the other two instructions given by the learned judge to the jury are also correct and follow as necessary corollaries. Curtis on Patents, § 146-7-8.

Second. The construction of the patent given by the court on the trial, by the first instruction to the jury, was correct.

I. The *patent* (that is the parchment) made out at the patent office, by the proper officer in that department, does not in any case, according to the patent law of this country, describe the thing patented. To ascertain the thing patented, the specification, which is filed before the patent is issued, is the test in all cases, as to what the patent secures to the patentee; and to ascertain that, the whole specification must be consulted; and the modern decisions have declared, that a liberal construction must be given to it in favor of the patentee. Patent Act of 1836, § 5; Curtis on Patents, § 122, 123, 126, 127; Ames *v.* Howard, 1 Sumner, 482, 485; Hogg *v.* Emerson, 6 Howard, 437, 482; Davoll *v.* Brown, 1 Wood. & Min. 53, 57.

It is undoubtedly true, if the description or title of the invention, as stated in the patent, is irreconcilably repugnant to the description of the invention contained in the specification, as if the description in the patent be a machine for making nails, and the invention described in the specification is of a machine for carding wool, the patent would be void, upon the ground that the government had not given to the patentee a legal exclusive title to his invention. But nothing can be deduced from this principle of law to sustain the position that the invention is only what it is stated to be in the title stated in the patent, but on the contrary, the very reverse of that position is what renders the patent void in such cases.

In this case there is no such repugnancy. True, the patent states the invention to be of a new and useful machine for rolling puddle balls, &c., but this is not so repugnant to the description of the invention contained in the specification, as would preclude the court from adjudging that the government intended to and did grant the patent, for the invention described in the specification, to wit,—for an improvement in the process, &c. Unless the title of the invention described in the patent is clearly repugnant to the description of the invention in the

specification, the patent will be deemed to be a grant of the exclusive right to the invention described in the specification, but it cannot diminish the extent of the invention described, and claimed in the specification.

In short, the description of the invention in the specification is the act of the inventor, for which, if it be new and useful, the government is bound to grant him a patent. The granting of the patent is the act of the government, and if the description in that grant be not clearly repugnant to that which the inventor claimed and was entitled to, it will be deemed to be a grant of the thing to which he was entitled.

II. By any just or legal construction of the specification forming a part of the patent in question, and giving the only description of the invention for which the patent issued, said patent is for a new process, mode, or method, of converting puddlers' balls into blooms, by continuous pressure and rotation of the ball between converging surfaces; thereby dispensing with the hammer, alligator jaws, and rollers accompanied with manual labor, previously in use to accomplish the same purpose, and is not confined to the particular machines described in the specifications and drawings.

The specification commences in these words: "To all whom it may concern, be it known, that I, Henry Burden, of the city of Troy, in the county of Rensselaer, and State of New York, have invented an improvement in the process of manufacturing iron." Now let us here pause, for an instant, to inquire if the patentee really intended to represent his invention as one consisting in a new or improved machine, to be used in the manufacture of iron; why, with his thoughts upon the subject, did he not say so, instead of calling it an "improvement in the process of manufacturing iron?" I confess my utter inability to divine any reasonable answer to this question. The improbability of such a wilful misnomer, is greatly enhanced by the conceded and well-known fact, that a new or improved process is patentable, no less than a new or improved machine: process or method, which, in the patent law, are said to be synonymous, are among the few words in familiar use, machine being another of these words, expressive of the few proper subjects of a patent; so that to hold this to be a patent for a machine, is to impute to the patentee the absurdity not only of omitting to call his invention by its proper name, but of substituting, at the outset, another name of well-known signification in law, expressly appropriated to another and widely different subject of a patent.

But the specifications contain other expressions which are in strict accordance with the language already quoted, and require the same interpretation. After particularly and clearly describ-

ing the process in question, and the means by which it is accomplished, the patentee proceeds as follows: "It will be readily perceived also, by the skilful machinist, that the principle upon which I proceed may be carried out under various modifications, of which I have given two examples; and these might be easily multiplied, but this is not necessary, as I believe that those which have been given must suffice to show, in the clearest manner, the nature of my invention, and point out fully what I desire to have secured to me under letters-patent of the United States." Does this look like only claiming to be the inventor of a specific machine? On the contrary, the patentee refers to the descriptions he has given of the mechanical contrivances by which his process may be carried on, as illustrative only of the "principle" on which he "proceeds;" and, referring to the two machines thus described, he adds, "and these might be easily multiplied." Does this language import an intention to limit his claim to them? But an equally decisive test of the patentee's claim remains yet to be considered. His specification concludes with a summary. "In order to ascertain the true construction of the specification in this respect, we must look to the summing up of the invention, and the claim thereof asserted in the specification; for it is the duty of the patentee to sum up his invention, in clear and determinate terms; and his summing up is conclusive upon his right and title." Wyeth v. Stone, 1 Story's R. 278, 285.

The patentee's summary is as follows: "Having thus fully made known the nature of my said improvement, and explained and exemplified the manner in which I construct the machinery for carrying the same into operation, what I claim as constituting my invention, and desire to secure by letters-patent, is the preparing of the puddlers' balls as they are delivered from the puddling furnace, or of other similar masses of iron, by causing them to pass between a revolving cylinder and a curved segmental trough adapted thereto, constructed and operating substantially in the manner of that herein described and represented in figures 2 and 3, of the accompanying drawings, or by causing the said balls to pass between vibratory or reciprocating curved surfaces, operating upon the same principle, and producing a like result by analogous means."

Now by his "improvement," mentioned at the commencement of this summary, it is indisputable that the patentee means his invention; and this he describes as being carried into operation by means of machinery constructed for the purpose. With what propriety, then, can it be said that the invention claimed is of the machinery itself? "What I claim," he adds, as "constituting my invention, is the preparing of the puddlers'

balls," &c. Is the process of preparing puddler's balls a machine? If not, is it not a flat contradiction of the language of the patentee to say that he claims to be the inventor of a machine and not of a process? And what is there in the other parts of the specification to neutralize this explicit and unequivocal language? It is said that the patentee describes and has furnished drawings representing two several machines used by him, the one in his first essays and the other subsequently. This is true, and it is also true, that the two are wholly different, not only in form, but in mechanical construction, having, in fact, nothing in common except their mutual adaptation to a like process and effect.

Besides, the court will please to observe that the specification claims no particular form of apparatus for carrying his mode or method of converting puddlers' balls into blooms, into effect. The patent cannot, therefore, be construed as confining the invention to the two particular machines which he has described, that would accomplish that mode, method, or process. Curtis on Patents, § 80, 81; Minter *v.* Wells, Webs. Pat. Cases, 130.

The specification should be so construed as to make the claim coextensive with the actual discovery, if the fair import of the language used will admit of it. Curtis on Patents, § 132.

III. The patent is not for a principle merely, but for a mode, method, or process, giving two practical means for accomplishing it.

The patentee shows, by his specification, that he had succeeded in embodying the principle by inventing some mode of carrying it into effect, and thus converting it into a process. "You cannot," said Alderson, B., in Jupe *v.* Pratt, Webs. Pat. Cases, 146, "you cannot take out a patent for a principle; you may take out a patent for a principle coupled with a mode of carrying the principle into effect. If you have done that, you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as a piracy of your original invention."

"A mere principle," says Mr. Curtis, "is an abstract discovery; but a principle, so far embodied and connected with corporeal substances as to be in a condition to act and produce effects in any art, trade, mystery, or manual occupation, becomes the practical manner of doing a practical thing. It is no longer a principle, but a process." Curtis on Patents, § 72; see also § 77, 78, and notes, p. 59, 66.

With the requirements of the law in this respect, the patentee has complied in a manner perfectly unexceptionable, and perfectly consistent with the construction of his patent, insisted on by the plaintiff. There is not, in the specification, a single

expression indicative of an intention to limit his claim as an inventor to one or both of the machines described by him, while, on the contrary, the language plainly infers a fixed purpose to guard against such an interpretation. Curtis on Patents, § 148, and note 1.

IV. If this construction of the patent is correct, it necessarily follows, that the patent protects the patentee from all other modes of carrying the same mode, process, or method into effect, which is in substance and effect the principle held by the judge in the last clause of his first instruction to the jury. Jupe *v.* Pratt, Webs. Pat. Cases, 146; Curtis on Patents, § 148, and note 1.

Third. The rejection of the evidence offered on page 84 of the record, constitutes no ground of error.

I. The decision, if wrong, was cured by the evidence of the same facts afterwards elicited from the witnesses.

II. If the construction of the patent contended for by plaintiff below, and held by the court, is correct, the testimony was properly excluded. Jupe *v.* Pratt, Webs. Pat. Cases, 146, *supra;* Curtis on Patents, § 148, and note 1.

Fourth. The decision, excluding the evidence of Winslow's patents, was clearly right.

If the machine used by defendant was an infringement of plaintiff's patent, the fact that Winslow had obtained a patent for it would be no defence, and if it was not an infringement of plaintiff's patent, it was not material in this suit whether it had or had not been patented.

Fifth. In the argument in the court below, on the motion for a new trial on this bill of exceptions, the counsel for the defendants objected that there was a variance between the declaration and the patent given in evidence, unless the court held the patent was for a particular machine or machines. That objection was, however, justly and legally disregarded by both members of the court in their decision of the motion.

The objection is technical, and it is entirely settled by the practice of the State of New York, that such objection cannot avail the party unless taken when the evidence is offered.

No such objection was taken on the trial of this cause, nor was there any decision of the court, or any exception on any such question raised on the trial. Watson's Executors *v.* McLarien, 19 Wend. Rep. 563.

Many other authorities might be cited, but it is unnecessary. The member of this court from the State of New York knows this to be the rule, and both the judges of the court below disregarded the objection.

Besides, if the objection had been made at the trial, that the

patent given in evidence varied from that des the three fol-
'eclaration, the court would have directed the decla el declined
amended by substituting the word process in the pla ns.
chine. The defendants could not have been misled or pre en
diced by such inaccuracy of description. 2d Revised Statutes of New York, 3d ed. p. 504, § 98, p. 520, § 7, subdivision 14, and § 8; 2d Revised Statutes of New York, 4th ed. p. 510, § 169, 170.

Sixth. No question as to the novelty of the invention for which this patent was issued, is presented by the record in this cause, except that contained in the 2d instruction of the judge to the jury. That instruction was right in point of law, and the jury found the fact with the plaintiff below, (defendant in error.)

Mr. Justice GRIER delivered the opinion of the court.

Peter A. Burden, who is assignee of a patent granted to Henry Burden, brought this suit against the plaintiffs in error for infringement of his patent. The declaration avers that Henry Burden was "the first inventor of a new and useful machine for rolling puddle balls," for which a patent was granted to him in 1840, and that the defendants, Corning and Winslow, "made, used, &c., this said new and useful machine in violation and infringement of the exclusive right so secured to plaintiff."

The defendants below, under plea of the general issue, gave notice that they would prove, on the trial, that Henry Burden "was not the first and original inventor of the supposed new and useful machine for rolling puddle balls, &c.;" that the machine of the plaintiff, and the principle of its operation was not new, and that the common and well-known machines called nobbling rolls, which were in use long before the application of Burden for a patent, embraced the same invention and improvements used for substantially the same purpose. And after setting forth many other matters to be given in evidence, affecting the novelty of plaintiff's machine, the notice denies that the machine used by the defendant was an infringement of that patented by plaintiff, and avers that the machine used by them was described in a patent issued to the defendant, Winslow, in December, 1847, "for rolling and compressing puddlers' balls," differing in principle and mode of operation from that described in the plaintiff's patent.

To support the issue, in his behalf, the plaintiff gave in evidence a patent to Henry Burden, dated 10th of December, 1840, for "a new and useful machine for rolling puddlers' balls and other masses of iron in the manufacture of iron;" and followed it by testimony tending to show the novelty and utility of his

expression in that the machine used by t
inventor to on the same principles, and then
on the defendants then offered to read in evid
...usiow for his "new and useful improvemen
compressing puddlers' balls." The plaintiff objec
dence as irrelevant, and the court sustained the ob
overruled the evidence. This ruling of the court for
ject of defendant's first bill of exceptions.

The defendants then proceeded to introduce testim
ing to show want of originality in the plaintiff's machin
also that the principle and mode of operation of the defend
machine was different from that described in the plaintiff's patent; and finally called a witness named Hibbard. This witness gave a history of the various processes and machines used in the art of converting cast iron into blooms or malleable iron. He spoke of the processes of puddling, shingling, and rolling, and attempted to define the difference between a process and a machine. The introduction of this philological discussion seems at once to have changed the whole course of investigation, to the entire neglect of the allegations of the declaration and of the issues set forth in the pleadings, in support of which all the previous testimony had been submitted to the jury. The defendant's counsel then proposed the following question to the witness: "Do you consider the invention of Mr. Burden, as set forth in his specification, to be for a process or a machine?" This question was objected to, overruled by the court, and a bill of exceptions sealed.

The counsel for the defendants then offered to prove, by this witness, "that the practical manner of giving effect to the principle embodied in the machine used by the defendants, was entirely different from the practical manner of giving effect to the principle embodied in Mr. Burden's machine; that the principles of the two machines, as well as the practical manner of carrying out those principles, were different; and that the machine used by the defendants produced, by its action on the iron, a different mechanical result on a different mechanical principle from that produced in Mr. Burden's machine." To the introduction of this testimony the plaintiff's counsel objected, and it was overruled by the court, and, at the defendant's instance, a bill of exceptions sealed.

The defendant's counsel then proposed to prove "that the machine used by the defendants differed in point of mechanical structure and mechanical action from the machines described in the plaintiff's specification." This testimony was also overruled and exceptions taken.

After some further examination of witnesses, the learned judge

announced his intention of instructing the jury, in the three following propositions, upon which the defendant's counsel declined to give further testimony, and excepted to his instructions.

"1. The letters-patent to Henry Burden, which have been given in evidence by the plaintiff, are for a new process, mode, or method of converting puddler's balls into blooms, by continuous pressure and rotation of the ball between converging surfaces; thereby dispensing with the hammer, alligator jaws, and rollers accompanied with manual labor, previously in use to accomplish the same purpose. And the said letters patent-secure to the patentee the exclusive right to construct, use, and vend any machine adapted to accomplish the objects of his invention as above specified, by the process, mode, or method above mentioned."

"2. The machines for milling buttons, milling coin, and rolling shot, which have been given in evidence by the defendants, do not show a want of novelty in the invention of the said patentee, as already described, if the processes used in them, the purposes for which they were used, and the objects accomplished by them, were substantially different from those of the said letters-patent."

"3. That the machine used by the defendants is an infringement of the said letters-patent, if it converts puddlers' balls into blooms by the continuous pressure and rotation of the balls between converging surfaces, although its mechanical construction and action may be different from those of the machines described in the said letters-patent."

As the first instruction of the court contains the most important point in the case, and a decision of it will dispose of most of the others, we shall consider it first in order.

Is the plaintiff's patent for a process or a machine?

A process, *eo nomine*, is not made the subject of a patent in our act of Congress. It is included under the general term "useful art." An art may require one or more processes or machines in order to produce a certain result or manufacture. The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations, are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores, and numerous others, are usually carried on by processes, as distinguished from machines. One may discover a new and useful

improvement in the process of tanning, dyeing, &c., irrespective of any particular form of machinery or mechanical device. And another may invent a labor-saving machine by which this operation or process may be performed, and each may be entitled to his patent. As, for instance, A has discovered that by exposing India rubber to a certain degree of heat, in mixture or connection with certain metallic salts, he can produce a valuable product, or manufacture; he is entitled to a patent for his discovery, as a process or improvement in the art, irrespective of any machine or mechanical device. B, on the contrary, may invent a new furnace or stove, or steam apparatus, by which this process may be carried on with much saving of labor, and expense of fuel; and he will be entitled to a patent for his machine, as an improvement in the art. Yet A could not have a patent for a machine, or B for a process; but each would have a patent for the means or method of producing a certain result, or effect, and not for the result or effect produced. It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect, that a patent is granted, and not for the result or effect itself. It is when the term process is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical comnations.

But the term process is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered, or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process.

In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it.

It is by not distinguishing between the primary and secondary sense of the term "process," that the learned judge below appears to have fallen into an error. It is clear that Burden does not pretend to have discovered any new process by which cast iron is converted into malleable iron, but a new machine or combination of mechanical devices by which the slag or impurities of the cast iron may be expelled or pressed out of the metal, when reduced to the shape of puddlers' balls. The machines used before to effect this compression, were tilt hammers

and alligator's jaws, acting by percussion and pressure, and by nobbling rolls with eccentric grooves, which compressed the metal by use of the inclined plane in the shape of a cyclovolute or snail cam. In subjecting the metal to this operation, by the action of these machines, more time and manual labor is required than when the same function is performed by the machine of Burden. It saved labor, and thus produced the result in a cheaper, if not a better manner, and was, therefore, the proper subject of a patent.

In either case the iron may be said, in the secondary sense of the term, to undergo a process in order to change its qualities by pressing out its impurities, but the agent which effects the pressure is a machine or combination of mechanical devices.

The patent of Burden alleges no discovery of a new process, but only that he has invented a machine, and, therefore, correctly states the nature of his invention.

The patent law requires that "every patent shall contain a short description or title of the invention or discovery, indicating its nature and design," &c. The patent in question recites that,

"Whereas Henry Burden, of Troy, New York, has alleged that he has invented a new and useful machine for rolling puddle balls, or other masses of iron, in the manufacture of iron, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said machine, &c."

The specification declares that his improvement consists in "the employment of a new and useful machine for rolling of puddlers' balls;" again he calls it "my rolling machine," and describes his "machine as consisting of a cast iron cylinder," &c. In fine, his specification sets forth the "particulars" of his invention, in exact accordance with its title in the patent, and in clear, distinct, unequivocal, and proper phraseology.

It is true that the patentee, after describing his machine, has set forth his claim in rather ambiguous and equivocal terms, which might be construed to mean either a process or machine. In such case the construction should be that which is most favorable to the patentee, "*ut res magis valeat quam pereat.*" His patent having a title which claims a machine, and his specification describing a machine, to construe his claim as for the function, effect, or result of his machine, would certainly endanger, if not destroy, its validity. His claim cannot change or nullify his previous specification with safety to his patent. He cannot describe a machine which will perform a certain function, and then claim the function itself, and all other machines that may be invented to perform the same function.

We are of opinion, therefore, that the learned judge of the court below erred in the construction of the patent, and in his first proposition or instruction to the jury. And as the second and third instructions are based on the first, they must fall with it. Taking the bills of exception to rejection of evidence in the inverse order, it is clear that the last two rulings being founded on the erroneous construction of the patent, are, of course, erroneous. The testimony offered was directly relevant to the issues trying, and should have been received.

The refusal of the court to hear the opinion of experts, as to the construction of the patent, was proper. Experts may be examined as to the meaning of terms of art on the principle of, "*cuique in sua arte credendum*," but not as to the construction of written instruments.

It remains only to notice the first bill of exceptions, which was to the rejection of the defendant's patent.

This is a question on which there may be some difference of opinion. In some circuits it has been the practice, when the defendant has a patent for his invention, to read it to the jury without objection; in others, it is not received, on the ground that it is irrelevant to the issue, which is a contest between the machine of the defendant and the patent of the plaintiff, and that a posterior patent could not justify an infringement of a prior one for the same invention.

By the patent act of 1793, any person desirous of obtaining a patent for an alleged invention, made application to the Secretary of State, and received his patent on payment of the fees, and on a certificate of the Attorney-General that his application "was conformable to the act." No examination was made by persons qualified to judge whether the alleged invention was new or useful, or had been patented before. That rested wholly on the oath of the applicant. The patent act of 1790 had made a patent *primâ facie* evidence; but this act was repealed by that of 1793, and this provision was not reënacted in it. Hence a patent was not received in courts of justice as even *primâ facie* evidence that the invention patented was new or useful, and the plaintiff was bound to prove these facts in order to make out his case. But the act of 4th of July, 1836, introduced a new system, and an entire change in the mode of granting patents. It provided for a new officer, styled a commissioner of patents, to "superintend, execute, and perform all acts and things touching and respecting the granting and issuing of patents, &c." The commissioner was authorized to appoint a chief clerk, and three examining clerks, machinist, and other officers.

On the filing of an application the commissioner is required

to make, or cause to be made, an examination of the alleged invention, in order to ascertain whether the same had been invented or discovered by any other person in this country, prior to the application; or whether it had been patented in this or any foreign country, or had been on public use or sale, with the applicant's consent, prior to his application; and if the commissioner shall find that the invention is new and useful, or important, he is authorized to grant a patent for the same. In case the decision of the commissioner and his examiner is against the applicant, and he shall persist in his claim, he may have an appeal to a board of examiners, to consist of three persons, appointed for that purpose by the Secretary of State, who, after a hearing, may reverse the decision of the commissioner in whole or in part. By the act of 1839, the Chief Justice of the District of Columbia, was substituted to the board of examiners.

It is evident that a patent, thus issued after an inquisition or examination, made by skilful and sworn public officers, appointed for the purpose of protecting the public against false claims or useless inventions, is entitled to much more respect, as evidence of novelty and utility, than those formerly issued without any such investigation. Consequently such a patent may be, and generally is, received as *primâ facie* evidence of the truth of the facts asserted in it. And in cases where the evidence is nicely balanced, it may have weight with a jury in making up their decision as to the plaintiff's right; and if so, it is not easy to perceive why the defendant who uses a patented machine should not have the benefit of a like presumption in his favor, arising from a like investigation of the originality of his invention, and the judgment of the public officers, that his machine is new, and not an infringement of the patent previously granted to the plaintiff. It shows, at least, that the defendant has acted in good faith, and is not a wanton infringer of the plaintiff's rights, and ought not, therefore, to be subjected to the same stringent and harsh rule of damages which might be justly inflicted on a mere pirate. It is true the mere question of originality or infringement generally turns on the testimony of the witnesses produced on the trial; but if the plaintiff's patent in a doubtful case may have some weight in turning the scale in his favor, it is but just that the defendant should have the same benefit from his; *valeat quantum valeat.* The parties should contend on an equal field, and be allowed to use the same weapons.

We are of opinion, therefore, that the court erred in refusing to permit the defendants' patent to be read to the jury.

The judgment of the Circuit Court is, therefore, reversed, and a *venire de novo* awarded.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

JOHN GARROW, THOMAS Y. HOW, JR., JAMES SEYMOUR, AND GEORGE MILLER, APPELLANTS, v. AMOS DAVIS, GEORGE M. PICKERING, WILLIAM MCCRILLIS, AND EPHRAIM PAULK.

Black, as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee, until it came, through mesne assignments, into the hands of Miller and others.

Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract, and by virtue of a clause contained in it, the contract became void.

In this state of things, Miller employed one Paulk to ascertain from Black the lowest price that he would take for the land, and then to sell to others for the highest price that he could get.

Paulk sold and assigned the contract to Davis for $1,050.

Upon the theory that Paulk and Davis entered into a fraudulent combination, still, Miller and others are not entitled to demand that a court of equity should consider Davis as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor any thing but a good will, which alone was the subject-matter of the fraud, if there was any.

But the evidence shows that this good will did not exist; for Black was not willing to sell to Miller and others for a less price than to any other person.

Although Paulk represented himself to be acting for Miller and others, when in reality he was representing Davis, yet he did not obtain the land at a reduced price thereby; but, on the contrary, at its fair market value.

The charges of fraud in the bill are denied in the answers, and the evidence is not sufficient to sustain the allegations.

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

The appellants were complainants below, whose bill was dismissed under the circumstances stated in the opinion of the court.

The cause was argued by *Mr. Seward*, for the appellants, and by *Mr. Shepley* and *Mr. Rowe*, for the appellees.

Complainants' Points.

Point I. The complainants, assignees of the contracts of February 17, 1835, for 28,804 acres of pine lands, had an interest in those contracts and lands, which subsisted until they were surrendered by Davis to Black, in November, 1844; and this interest was, if not a legal chose in action, at least a chose in equity of some, and even considerable value. These instruments were executory contracts for the purchase of land, of a value, variously estimated at different times, of from $86,000 to $172,000.

Point II. The complainants are proper parties, and are entitled to maintain their suit against the defendants.

Point III. The defendant Paulk, while acting as agent of the complainants, in procuring possession of the contracts and the power to assign them, and in conducting the negotiations in their behalf with Colonel Black, on the one side, and with the defendants and others, as purchasers, on the other side, committed the frauds charged in the complainants' bill. The allegations of the bill on this important issue are sustained.

Point IV. The defendants, Davis, Pickering, and McCrillis, by means of frauds committed by Paulk with their knowledge, had, by colluding with him in the perpetration of these frauds against the complainants, acquired from Colonel Black, at the cost of the complainants, and under false representations to him that they were the assignees of the complainants, and that the complainants were the real beneficiaries, the contracts for the 28,804 acres of pine land in Maine, which was of very considerable value.

Point V. The defendants' excuses and attempts to explain are unavailing.

Point VI. The complainants are entitled to a decree, according to the prayer of their bill. The account to be decreed is an account of future as well as past profits; and the defendants ought to be decreed to assign the contract of Black to the complainants upon just terms, so as to secure the defendants their advances, and to the complainants their profits.

Defendants' Points.

1. None of the parties plaintiff had any interest in or under the Black contract at the time of the alleged fraud.

2. The claim, if any, is stale, and is lost by laches of the plaintiffs.

They have never refunded to Davis the money he paid; nor offered to do so.

They never offered to repay the cash payment of $7,500; or to take up, or to indemnify Davis and Paulk against the notes given for the land; but waited till September, 1847, till the result of the operations on the township showed the speculation to be a good one; and then they filed their bill claiming the benefit of it.

No court can allow one party to hold himself prepared to take advantage of all favorable contingencies, without being affected by those which are unfavorable. Marshall, C. J., in Brashier v. Gratz, 6 Wheat. 528; 13 Ves. 238; 4 Dall. 345; 14 Pet. 170; Benedict v. Lynch, 1 Johns. Ch. R. 370.

3. The plaintiffs had not the means nor the intention of purchasing the lands at such a price as they would fetch in the market. They were embarrassed in their finances, disgusted with speculations in Eastern lands, and "in ignorance, doubt, and uncertainty, as to the real value of said lands, and the true quantity of pine timber thereon;" their only intention being to sell the contracts. Paulk was directed to ascertain the final and lowest price that Black would take for the lands of the persons holding the contracts, for the purpose of aiding him in the sale of the contracts, and not for the purpose of enabling his principals to decide whether they would or not become purchasers of the lands.

Years after, when the price had been quite or nearly repaid, by the proceeds of the timber, plaintiffs claim to be the equitable owners, without having advanced, or offered to advance, a single dollar.

That of which the bill charges that the defendants defrauded the plaintiffs — that is, the difference between the price at which Black would sell the lands to the plaintiffs, and the price at which he would sell to others; or, "so much as the said John Black, by compromise, should agree to take less than the fair value of the lands" — did not exist.

4. There was no fraud on the part of either of the defendants.

Each denies all combination, fraud, &c., on his own part; and knowledge, or belief, of any, on the part of his co-defendants, &c.

As each stands, in relation to this question of fraud, in a position different from the others, it will be necessary to consider their position separately.

Paulk was the agent of Miller alone of plaintiffs, p. 43; and of Norton. The case shows no precedent authority, or subsequent ratification, from the others.

By his answer, it appears that the only instructions he had from Norton were to sell, for $1,000; and if he could not get

that, to take less, and "to close the matter in the shortest possible time."

That Miller's instructions were, to endeavor to find some one who would buy the lands, and give the holders of the bonds some portion of the lands, or of the profits (if any) of the speculation; and, "if he could not make such an arrangement, to sell the contracts for the most he could get, as the holders had neither the intention nor the means of buying themselves."

He attempted to make such an arrangement with Pickering, and failed. Any further attempt would have been useless, as Black asked him more for the land than it would fetch in the market.

He then sold the contracts for the highest sum offered.

Upon these points, the answer is responsive and uncontradicted.

There is no evidence that he could have got any more for the contracts; there is no evidence that they were worth any more.

The answer denies that he was bound by his instructions to ascertain Black's lowest price before selling; and is not contradicted.

He did, however, first ascertain all that was material on this point, namely, that Black would make no reduction in favor of his principals; nor sell the lands for less than the full market value.

The answer denies all improper disclosures to the defendants.

The answer denies that any false statement was made to Miller or Norton; and sets out the statements which were made.

There is no evidence which contradicts it, in this respect, in any material point.

The agreement, that he should continue the negotiation with Black for Davis's benefit, was not a provision for his own private benefit, but a necessary consequence of the idea of reduction in price, which he held out as inducement to Davis.

The answer denies that he had any interest in the purchase from Black, and that he received any money, property, or securities from any of the defendants, for any thing done before the assignment to Davis.

The payment of $1,500 was for honest and proper services rendered to Davis afterwards.

The answer on this point is responsive, and not contradicted, —that he acted with fidelity to his principals, to the extent even of wronging Davis, by suppressing facts which he should have disclosed to him.

(Then followed an analysis of all the answers.)

Mr. Justice CURTIS 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 Maine, dismissing the complainants' bill. The substance of the bill is, that John Black, as agent for the trustees under the will of William Bingham, on the 17th of February, 1835, contracted, in writing, with Charles Ramsdale to sell to him a township and adjacent tracts of land in that State, containing twenty thousand eight hundred and four acres, for the price of three dollars per acre, payable one fifth in sixty days, and the residue in four equal annual payments—the contract of sale expressly providing that, in case of failure to make either of these payments, the contract was to be void. That, on the 1st day of April, 1835, Ramsdale assigned these contracts to Nathaniel Norton and Jairus Keith, in consideration of their agreement to pay to him the sum of two dollars for each acre of the said lands; and that, at a still further advance of one dollar on an acre, the contracts of Black came to the complainants and one Herman Norton, by assignment, in November, 1835.

That Ramsdale made the first, and the complainants some other payments, amounting in the whole to about forty thousand dollars, but failed to pay the residue. That subsequent to the year 1840, nothing was done by them concerning the lands until after July, 1844, when one of the complainants received from Black a letter stating that, though all their rights were terminated many years since, he desired to know whether they wished to do any thing respecting the payments for the lands. That, thereupon, Miller, one of the complainants, employed Ephraim Paulk, one of the defendants, to negotiate with Black, and finally instructed him to ascertain from Black the lowest price at which he would let the complainants have the land, and then to sell the complainants' rights and interests under the contracts for the highest price he could obtain—the supposition of the complainants being, that Black would sell the lands to them for much less than he could obtain from others, by reason of their having already paid a large sum towards the purchase-money, under the contracts above mentioned. The bill further states, that Paulk sold and assigned the contracts to Davis for the sum of $1,050; and it charges that, before doing so, he entered into a fraudulent combination with Davis and the other defendants to obtain from the complainants an assignment of these contracts for a trifling sum, and then to negotiate with Black as if for the complainants, and thus defraud the complainants of what Black should be willing to discount from the fair value of the lands, on account of their peculiar equities; that he, in combination

with the other defendants, actually executed this scheme, and obtained the lands from Black for a much less price than could have been got from others, by reason of Black's belief that he was abating the price for the benefit of the complainants. And the bill prays that the defendants may be treated as trustees of the complainants, in respect to these lands, and for an account, and for other relief.

So far as respects the title to these lands, or any claim of the complainants to have them charged with a trust in their favor, we think the complainants, upon the statements in their bill, and upon the proofs, have made no case. They had no legal or equitable title under their contracts with Black. Being in default for more than seven years, and about four years having elapsed since any thing had been done by them under these expired contracts, they were not in a condition to insist on any rights or claims to the land; and, as will be presently more fully stated, Black did not treat with them or their agent upon the basis of any legal or equitable right, nor is it alleged that they had any intention or took any measures to acquire the lands. In consequence chiefly of Black's letter, of the 22d of July, 1844, inquiring what they wished to do about the payments, they conceived that Black might be willing to sell the lands to them for less than he would sell them to others, and that this good will might be a valuable subject of sale. To dispose of it, they employed the defendant, Paulk. If they have been defrauded, in its sale, by the defendants, they are entitled to relief; but in the lands themselves they had no interest, and did not intend, by Paulk's agency, to acquire any; and if all the fraud charged in the bill was perpetrated, it affected not any title of theirs to the land, or any negotiation for its acquisition, but solely the compensation which they might otherwise have obtained for Black's good will towards them, as the holders of the expired contracts. This was the only subject-matter upon which the alleged fraud could operate.

To this subject-matter our inquiries must be limited. To entitle themselves to relief, the complainants must prove fraud and damage; or, to state the principle less abstractly, they must show that their agent disposed of what he was employed to sell, for less than its value, and that he did this fraudulently.

The value of the complainants' interest is alleged by the bill to have consisted in the intention of Black to sell the lands to the complainants for less than their fair value; and this intention is alleged to have been actually executed by Black, by a sale to the defendants at a price far less than he could have obtained from others, under the belief that this abatement of price was for the benefit of the complainants. If this were so,

it could not be doubted that the complainants' interest was a valuable one, and that its value was capable of being precisely ascertained; for it would then amount to the sum which Black thus abated from the market price of the lands.

But the proofs not only fail to show that Black intended to abate any thing from the price, but they leave no doubt that he actually sold the lands for their fair market value, without any abatement whatever. The complainants have taken his testimony, and he declares, that he did not consider the complainants had any legal or equitable claims originating from the contracts; that he never intended to make them any allowance or consideration on the renewal of the bonds or contracts; that when he sold the lands, he did not consider that he had made any deduction on account of any claims of the complainants; that if any other person had offered him more for the lands than Paulk did, he should have sold them to such other person; and if Paulk had not taken the lands at $30,000, he should have sold at that price to any one who offered it. So far, therefore, as respects the motives of Black, and his own views of the nature of the transaction, his testimony is in direct conflict with the allegations in the bill. And so far as it tends to prove that he did not sell the lands for less than he could have obtained from others, but demanded and received the fair market price for them, it is corroborated by every witness who has been examined concerning its value. Dwinal and George N. Black, two of the complainants' witnesses, say $30,000 was a fair price for the lands; and Addison Dodge, who is proved to be a person of uncommon experience and judgment concerning the timber lands of that country, and whose testimony was taken by the defendants, explored these lands in 1843 for Black, and reported to him that $30,000 was all they were worth; and he testifies that this was his opinion, formed from a careful examination. Though Black does not so state, there can be no doubt that he fixed this price in consequence of Dodge's report to him; for he employed Dodge to make the examination, and he expresses, in his deposition, entire confidence in his skill and integrity. It follows from this, as well as from what Black directly testifies to, that the price at which the lands were actually sold, was fixed as the fair market value of the lands, for which Black, as an agent to sell, was willing to sell them to any one, though he preferred to sell to the complainants, if no one should offer more.

It is true Black at first demanded of Paulk $43,206 for these lands. This was before the sale by Paulk to Davis, of the complainants' interests; and it has been argued that as the lands were actually obtained for $30,000, this proves that Davis was

benefited by the acquisition of the complainants' interest to the extent of $13,000. If Davis, when he purchased the complainants' interests had been aware that Black asked $43,000 for the lands, and had been willing to acquire the complainants' interest to endeavor thereby to get them for a less sum, this would have a tendency to prove that he was willing to give somewhere about $43,000, and that any reduction, below that sum, might be treated as the value of the complainants' interests. But it is explicitly denied by the answers of Paulk and Davis, and there is nothing in the case to control that denial, that Davis knew when he negotiated with Paulk that Black asked $43,000 for the lands.

We think the fair result of the evidence is that Paulk concealed this fact from Davis, and that Davis believed he could get the lands for one dollar per acre. So that he actually paid the fair value and something more than he expected to pay.

Upon these facts we are unable to come to the conclusion that when the complainants parted with this expectancy of good will from Black for $1,050, they received less than they could have justly obtained; or that when Davis purchased, he got any appreciable pecuniary advantage from representing the complainants.

Upon this ground, therefore, the case fails.

But inasmuch as there are charges of fraud contained in the bill we think it proper briefly to examine them.

As respects the two defendants, McCrillis and Pickering, they were not connected with the purchase from Paulk by Davis. They came into the purchase subsequently, in the manner stated in their answers, which it is unnecessary to detail, and there is no evidence which tends to show that they were guilty of any fraud.

In reference to Paulk and Davis, there are circumstances which, if unexplained, would certainly be fraught with much suspicion, to say the least.

After the sale by Paulk to Davis of the complainants' interests, Paulk continued to act in the negotiation with Black, and it is admitted that he received $1,500 from Davis. But the explanation offered is that, from the necessity of the case, Paulk must continue to negotiate with Black as if for the complainants; that they understood he was to do so; that only in this way could their expectancy of favor from Black be sold; and that no contract was made or understanding had with Davis by Paulk, save what appears on the face of the papers, that Davis was to pay him for his services subsequent to the assignment. That when Davis gave his notes to Black, the latter required a surety, and the parties being at Ellsworth,

Davis for the first time requested Paulk to sign the notes. That Paulk at first declined, saying he was insolvent, but at last consented on being assured that Davis would pay him what Pickering, a mutual friend, should say was proper, and Pickering afterwards fixed the sum at $1,500 for all his services. The answers of both Davis and Paulk, deny, with clearness and precision, every charge of fraud, and especially negative the fact that this payment of $1,500 had any connection with or influence upon the sale by Paulk to Davis of the complainants' interest. Their account of the matter may be true. There is no evidence to prove it is not so, and, grave as the causes of suspicion may be, they are not sufficient to overcome these precise and clear statements in the answers.

The letters of Paulk to the complainant Miller and his failure to give him notice of an inquiry by Black what was the most they could afford to pay, are relied on to show that Paulk kept Miller in ignorance of the material facts, and pressed him to a sale in undue and unnecessary haste and with unfair intentions.

In his note of the 24th of October, 1844, Paulk tells Miller, that "what is done with Col. Black must be done this week." It does not appear affirmatively that Black had said so, and he does not remember saying so. But after the lapse of six years he might have forgotten it, if he did say so, and he testifies that he does not recollect the particulars of the different conversations with Paulk. But however this may be, the negotiations actually went on until the 16th of November, before a sale was made by Paulk, and upon learning from Miller that he thought he could effect something by personally visiting Black, he wrote to Miller informing him he had sold the bonds for $1,050, but that he had obtained the consent of the purchasers to suspend the transfer until the 25th of November; that they were not willing to wait longer, because they desired to operate on the lands the coming winter, and in order to do so the matter must be decided on immediately; and he then strongly urges Miller to come at once to Bangor, in season to avail himself of the contract he had made, if he should find that to be most for his interest. This letter he sent to him by express to ensure its reception in season.

This can hardly be reconciled with the charges in the bill, or the deductions made by the complainants from some of the circumstances, that Paulk had unduly hastened the transfer, and intended to keep Miller in the dark and to sell to Davis for less than he might have obtained from another.

Upon consideration of the charges of fraud in the bill, and the answers denying those charges, and the proofs in the case, we are of opinion that the complainants have failed to make

out the fraudulent combination between Paulk and Davis which they have alleged, and that upon this ground also the bill must be dismissed.

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

Order.

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

HOLLINGSWORTH MAGNIAC, DANIEL SMITH MAGNIAC, AND WILLIAM JARDINE, LATE TRADING UNDER THE FIRM OF MAGNIAC & COMPANY, APPELLANTS, *v.* JOHN R. THOMSON.

A plaintiff in a judgment having the defendant in execution under a *ca. sa.*, entered into an agreement with him that the plaintiff should, without prejudice to his rights and remedies against the defendant, permit him to be forthwith discharged from custody under the process, and that the defendant should go to the next session of the Circuit Court of the United States and on the law side of that court make up an issue with the plaintiff, to try the question whether the defendant was possessed of the means, in or out of a certain marriage settlement, of satisfying the judgment against him.

The debtor was released; the issue made up; the cause tried in the Circuit Court; brought to this court, and reported in 7 Peters, 348.

By suing out the *ca. sa.*, taking the defendant into custody, entering into the arrangement above mentioned, and discharging the defendant from custody, the plaintiff, in all legal intendment, admitted satisfaction of his demand, released the defendant from all liability therefor, and destroyed every effect of his judgment as the foundation of legal rights.

In such a state of things a court of equity will not interfere at the instance of the plaintiff.

The allegation of fraud in the marriage contract is not sustained by the evidence; nor was the refusal of the defendant to apply the property which accrued to him upon the death of his wife, to the discharge of the debt, a violation of the agreement under which he was released.

The averment in the bill that the rights of the plaintiff under the judgment, remained unimpaired, is incompatible with a right to resort to a court of equity.

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

Magniac & Company, being English subjects, had two judgments against Thomson, one in the Circuit Court of the United States for Pennsylvania, in 1827, and the other in the Circuit Court for New Jersey, in 1829.

On the 1st April, 1829, the appellants sued out a writ of *capias ad satisfaciendum* on the judgment in the Circuit Court of the United States for the Eastern District of Pennsylvania to April session, 1829, to which the marshal, on the 8th April, 1830, returned *non est inventus*, and on the same day an *alias capias ad satisfaciendum* was sued out to April session, 1830, Number 9, to which on the 12th April, 1830, the marshal made return of "C. C. and enlarged by agreement of plaintiff's attorney."

The appellee was discharged out of custody by the consent of the plaintiffs in the judgment, under the following agreement, viz.

Magniac v. *Thomson*. *No.* 18, *Circuit Court of the United States, Pennsylvania District, October*, 1826.

Defendant having been taken by *ca. sa.* in this suit, at his instance it is agreed that he be set at liberty on giving security to abide the event of an issue to be formed for ascertaining, by judicial decision, whether he has the means, by the property in his marriage settlement or otherwise, of satisfying the judgment, which issue is to be formed by plaintiff's affirmance and defendant's denial of such means; both parties hereby consenting to try such issue at the ensuing session of the Circuit Court of the United States for this district, on the merits, without regard to form or to the time when the jury may be summoned; it being expressly acknowledged by defendant that this agreement is made for his accommodation, without any prejudice whatever to arise to the plaintiff's rights by the defendant's enlargement on security as aforesaid or otherwise howsoever.

April 8th, 1830. John R. Thomson.

I hereby become answerable for the performance of the terms above stated, which I guarantee. R. F. Stockton.

Witness, J. P. Norris, Jr.

On the part of the plaintiffs in this case, I hereby consent to the defendant's enlargement on the terms stated in his within proposition and agreement of this date.

9th April, 1830. C. J. Ingersoll, *Attorney*.

In pursuance of this agreement, a new suit was entered by agreement on the 3d June, 1830, in the Circuit Court of the United States for the Eastern District of Pennsylvania, in the third circuit, by these appellants against the appellee, to try the issue to be formed under the above agreement of the 9th April, 1830.

The case was tried and is reported in Baldwin's Reports, 344. It resulted in a verdict for the defendant. Being brought to this court upon a bill of exceptions, the judgment of the Circuit Court was affirmed, as reported in 7 Peters, 348.

The death of Mr. Thomson's wife being supposed to place at his disposal certain property which might be properly applied to the payment of the judgment, Magniac & Co. applied for a rule to show cause why a *scire facias* should not issue to revive the judgment. Thomson set up his arrest and discharge under the *ca. sa.* as a legal satisfaction of the judgment. Magniac & Co. then withdrew the rule and filed the present bill.

The substance of the bill is very fully stated in the opinion of the court, and need not be repeated. The bill was demurred to, and, upon argument, the Circuit Court sustained the demurrer and dismissed the bill.

The complainants appealed to this court.

The cause was argued here by *Mr. E. Ingersoll* and *Mr. C. Ingersoll*, for the appellants, and by *Mr. John M. Read* and *Mr. Cadwallader*, for the appellee.

Only such of the points will be mentioned as are involved in the opinion of the court.

Appellants' Points.

Construction of the Agreement of 8th of April, 1830. If the meaning of this paper were less than is insisted by the plaintiff, its last sentence, beginning "it being expressly acknowledged," would have been omitted altogether. That sentence is not merely without purpose or sense, but is directly in the teeth of the meaning of the parties to the contract, if not intended to bind the defendant by a promise to stand by the judgment after the discharge as much as before. The words "or otherwise howsoever," which the defendant supposes we rely upon, may be rejected without injury to the plaintiffs. Such general words, in the case of extremely formal papers, in which the meaning of the parties is expressed at great length, might perhaps have little force, but in a brief stipulation, such as this, drawn up in haste, probably, and in order to an immediate and pressing object, they ought to have their full force and popular construction. They should be interpreted to signify that if by the words which precede them the plaintiff's interests under the judgment are not fully guarded, the defendant shall give them protection "otherwise howsoever." They amount to a covenant for further assurance.

The agreement, interpreted in any other way, leads to this absurd conclusion, namely, that the plaintiff perilled his whole debt without a motive, while the defendant obtained his enlargement from custody, giving no equivalent therefor.

If the plaintiff had refused all arrangement, and simply per-

mitted the defendant to remain in custody, he would have resorted to the insolvent law of Pennsylvania, or of the United States. In the former case he must have given fuller security than he gave under the agreement of 8th of April, 1830, and there would have been a trial of the question whether the defendant was possessed of property, more advantageous to the plaintiff than the trial in the federal court. In the latter case, of an application by the defendant under the United States insolvent law of 1800, the plaintiff, had he succeeded in breaking the trust, would have got the whole trust property, and, whether he failed or succeeded, would have had security of the most binding sort in the custody of the defendant's person. The plaintiff therefore gained nothing by the agreement, for it is not pretended, on the other side, that he got any thing by it if he did not get security of a superior character for his debt, or a better trial of the question upon which it turned. He simply, as expressed by the agreement, set the defendant at liberty at the defendant's instance. He did an act of kindness, upon the defendant's agreement that it should be without prejudice.

The defendant, on the other hand, acquired, first, his immediate liberty, which he could get only by agreement, and, second, a trial of the question of property in the federal court; a better trial for him than one in the Common Pleas, and much better than under the insolvent law of 1800, because that would have detained him in custody during the time the cause was pending, which was about three years.

It is submitted, that to give any other interpretation to the agreement would be to stultify the plaintiff, who dealt with the defendant liberally enough, but did not go the length of giving away his debt.

The question whether, under this agreement, the plaintiff was entitled to a second *ca. sa.*, is one which is without difficulty, the fact once established that the defendant has evaded by fraud, or violated the agreement; for Baker *v.* Ridgway, (2 Bing. 41,) and other cases, are precedents for a second *ca. sa.*, when the plaintiff has been fraudulently induced to discharge from the first.

In Baker *v.* Ridgway, a commission of bankruptcy having been sued out against a defendant in custody, under a *ca. sa.*, the plaintiff, in order to prove his debt, discharged defendant from the execution. The commission having afterwards been superseded, plaintiff took defendant in execution again. Defendant moved for his discharge, but the plaintiff alleging that the commission had been fraudulently procured to induce him to discharge the defendant from the original *ca. sa.*, the court refused the motion, referring it to a jury to try the question of fraud,

holding that if there were fraud in defendant's procurement of discharge from the first *ca. sa.*, the second was well issued.

Best, C. J., says: "If there has been no fraud in the transaction, I am of opinion the defendant is entitled to his discharge; if there has been fraud, we are all of opinion he is not so entitled. I have looked through all the cases on execution against the person, from the earliest period down to the present time, and I am aware of the great jealousy of the law on the subject of personal restraint. I am aware that where a party had been discharged on account of privilege of parliament, it was doubted whether he could be retaken after that privilege expired, and the interference of the legislature became necessary to sanction such a proceeding; so, when he died in confinement, it was doubted whether the creditor, having resorted to the highest remedy the law afforded, could have any further means for the recovery of his debt, though the debtor left property behind him: that doubt was also set at rest by the authority of the legislature. I am therefore clear, that where a commission of bankrupt is sued out against a party in execution, he not being privy thereto, if the plaintiff abandons his execution and proceeds against the effects of the party, by proving his debt under the commission, he has taken his chance, and though there should be no assets forthcoming, the defendant is secure in his discharge. (However, I consider myself no more bound by an opinion delivered in the present summary mode of treating the question than I should be by an opinion delivered at *nisi prius*;) but if the debtor, in concert with others, procures a commission of bankrupt to be sued out against him, or it is procured with his approbation and consent, in order to entrap the plaintiff to come in and prove his debt, and is then superseded for some latent defect unknown to the plaintiff, that does not entitle the debtor to his discharge; and if we were to hold otherwise, we should violate a principle of law which has never been broken in upon, namely, that a party shall not be allowed to take advantage of his own wrong. I say this, because in Jacques *v.* Withey, though Ashhurst, J., says, 'I know of only one case where a debtor in execution, who obtains his liberty, may afterwards be taken again for the same debt, and that is when he has escaped, and the reason of that is, because he was not legally out of custody, yet Buller, J., did not assent to the generality of the proposition thus laid down by Ashhurst, J., and wished to introduce qualifications. Indeed, even according to the proposition laid down by Ashhurst, J., if this discharge has been obtained by a fraudulent commission, and the plaintiff has afterwards been cheated by a *supersedeas* out of the benefit sought by the proof of his debt, the defendant may be taken again,

because the fraud has avoided the whole transaction, and the defendant has never been legally out of custody."

That it may be seen that under the insolvent laws of Pennsylvania a second *ca. sa.* would have issued against the defendant had he been defeated in the Insolvent Court upon the question of the validity of the marriage settlement, the following extract is given from Ingraham on Insolvency, pp. 28, 29.

"Where, from any cause, the petitioner is refused the benefit of a discharge, he must surrender himself to prison."

"Where a party gives bond and fails to comply with the condition, either by not attending, in consequence of which his petition is dismissed, or by not surrendering himself if the prayer of his petition be not granted, another execution may be issued against him; and if he neglect to file his petition within the time prescribed by law, the creditor is not obliged to wait for the day of hearing, but may issue another execution the moment he can legally ascertain the fact. The surety in the bond would be liable, in such a case, notwithstanding the second execution, which would be no discharge of his responsibility, being for his benefit."

Also, with the same object, is quoted part of the syllabus of Palethorpe v. Lesher, 2 Rawle, 272:

"Where a defendant in custody gives bond with surety to take the benefit of the insolvent laws and forfeits his bond, a second execution may be issued against him."

Section 1 of the United States insolvent law of the 6th of January, 1800, (2 Stat. at Large, 4, 5, 6,) shows that the debtor remains in custody until his right to discharge is finally decreed; and therefore that, had the defendant applied for the benefit of this act, he must have lain in prison pending the question of the validity of the settlement.

Assuming, then, our construction of the agreement to be the true one, the next question is,

Whether the case is one for relief. On the part of the plaintiff, the defendant's reasoning is not appreciated, whereby he denies the plaintiff's right to relief under the head of fraud and mistake. It is submitted, however, that, whatever may be the appropriate term for his title to relief, the principles and cases found under these two heads of equity are directly applicable to the facts before the court. And, knowing no other names under which to classify those facts, the question of relief will be considered under the two titles of fraud and mistake.

Fraud. If it were a case of mere breach of contract, as alleged by defendant, it would not be cognizable in equity. Nor would it be cognizable in equity if it were a case of fraudulent breach of contract, and not more, for even fraud is cognizable

at law unless there be in the case something to oust the jurisdiction.

If A purchase commodities of B, and do not pay for them, this is a breach of contract cognizable at law. If A purchase commodities of B, with the preconceived design not to pay for them, afterwards carried into effect, this is a fraud as well as a breach of contract, but does not entitle the party to relief in equity.

But here is a case where there can be no relief at law, because (we assume for the sake of argument) the courts of law have declared that a judgment is paid when the defendant is taken under a *ca. sa.*, and that even the defendant's own agreement to the contrary shall not change the rule. That a defendant's conduct, in entering into such an agreement and then violating it, is "scandalous," as the courts have termed it, but that there is no remedy at law.

The fraud is palpable. The defendant is in custody. He says to the plaintiff, the rule of law is, that if you discharge me the judgment is satisfied; but I pledge myself that, as between you and me, there shall be no such rule, and that if you will let me go your judgment shall stand exactly as it did before your *ca. sa.* was issued. This solemn agreement the defendant, having had the benefit of it, utterly violates. He declares the judgment to be good for nothing, and the agreement good for nothing, and when the plaintiff takes proceedings at law he sets them at defiance. That is, having trepanned the plaintiff into the bargain by means of a promise that he will not exact the penalty of the position, he turns round and insists upon it.

The plaintiff then comes into equity. This case is like that of a man who, holding a note five years and eleven months old, is told by the drawer to wait six weeks longer before he sues, and that the note shall be as good at six years old as it was before, and then, being refused payment, and having gone into court, the defendant pleads the statute of limitation against him. The case is like that of a plaintiff, in a judgment, who enters satisfaction in order that the defendant may be able to make title to a certain portion of the real estate bound by the judgment, the defendant having agreed in writing that the satisfaction should be cancelled, and the lien of the judgment restored, as to the rest of his real estate, immediately after his sale was effected, and then is told by the defendant, your judgment is gone, and you will never get another. Like the case of one who, having given his receipt in full, but without value, to a debtor, in order that he might settle with a third person, is turned upon by the debtor, and told that his debt is paid, and here is the receipt for it. Like the case of an obligee who,

having released one of two co-obligors, for the mutual purposes of obligee and obligors, and, with the agreement that the discharge should be without prejudice as to the remaining obligor, is informed by him, after the object of the discharge has been accomplished and the advantages from it attained, that he does not mean to hold himself liable after the release of his co-obligor.

These are cases not distinguishable from that before the court, and they are obviously for relief in equity. They are all cases in which a party has gained a fraudulent advantage of another, which, not being relievable at law, will be relieved in equity, unless something can be shown to the contrary.

It is pretended by the defendant here, to the contrary, that to relieve under this agreement, of 8th April, 1830, would be to run counter to that policy which, favoring liberty of the person, has refused to permit a second *ca. sa.* for the same debt. To this the answers are:

1. The whole question of the liberty of the person, so far as *ca. sas* affect it, is now at rest, for they have been abolished by statute, and, though not abolished when this agreement was entered into, they were when the violation of it took place, and the present question arose.

2. There are two cases to the point, that this rule concerning the liberty of the person yields before proof of the defendant's fraud in procuring his discharge. Baker *v.* Ridgway. 2 Bing. 41; 9 Moore, 114; Holbrook *v.* Champlin, 1 Hoff. C. R. 148.

3. On principle it would be strange, indeed, if that policy of law and equity, and of all society which sets its face against fraud, should give way before the so-called policy here invoked, which amounts to nothing at all since arrest for debt has been abolished, and which never did amount to more than a train of unfortunate decisions, which, if they could be recalled, would never be made again.

It is also pretended by the defendant, that to relieve the plaintiff would be to favor a stale claim.

(The counsel then proceeded to examine this branch of the subject.)

Points for Appellee.

On the principal question of law involved in the case, the position of the appellee is that, by his release from imprisonment, on the 8th of April, 1830, the execution and judgment against him were satisfied, and the original debt wholly extinguished.

This position is the necessary result of the fundamental principles of English law on the subject of executions, their various

sorts and relative effects. The whole doctrine of the common law, as understood both in England and America, and as applicable to the present case, may be stated thus: The creditor, by issuing a *capias ad satisfaciendum*, chooses the body of the debtor in preference to his lands or goods, as the source of his satisfaction. By making an arrest, he secures to himself the satisfaction he has chosen, and is thereby estopped from resorting to any other mode of execution. As long as he holds the body in custody, he is in the possession and receipt of a continuing satisfaction; and when, with his consent, the body is released, he confesses that his satisfaction is complete, and the debt for which he demanded it thereby extinguished; and if the release is accompanied by any agreement with the debtor, or third parties acting for him, such agreement (whatever may be its terms) is a new and original contract, which can in no way affect the completeness of the satisfaction previously received.

From a series of decisions upon these points, covering full four centuries, it is believed that only a single case can be cited in conflict with the rule thus stated. As Blumfield's case, 5 Rep. 87, is much relied upon, it is proper to examine it at some length. The statement of facts by Lord Coke is simply this: "Two men were bound jointly and severally in a bond — one was sued, condemned, and taken in execution, and afterwards the other was sued, condemned, and taken in execution, and afterwards the first escaped and thereupon the other brought *audita querela*." Judgment was given against the prayer, and the decision is undoubtedly clear law, and is perfectly in harmony with the principles above laid down. Lord Coke, however, in his annotation, cites the case of Jones and Williams, (elsewhere unreported,) "where two men were condemned in debt, and one was taken and died in execution, yet the taking of the other was lawful." This case may also be very good law, but makes nothing against the present appellee. Lord Coke proceeds, "and then" (in Jones *v.* Williams) "it was resolved by the whole court, that, if the defendant in debt dies in execution, the plaintiff may have a new execution by *elegit* or *fi. fa.* for divers reasons," which he goes on to enumerate. It is for this passage that the case has been often heretofore and is now cited, the value of the authority being merely this: that Lord Coke, in reporting a principal case, which is entirely with us, refers to an unreported case, which is also with us, but in which there is a *dictum* against us of which he appears to approve. But, whatever may have been its original authority, this *dictum* has been repeatedly declared not to be law. Blumfield's case was argued in 39 Eliz., and published

in 3 James, and must consequently have been well known in 4 James, when the case of Williams v. Cutteris, also cited as Cutter v. Lamb, was decided. Croke Jac. 136. Yet, in the last-mentioned case, the defendant having died in execution, the court held, that the plaintiff had no further remedy. In Foster v. Jackson, (Hobart, 52, 57,) where the same point arose, Hobart, C. J., makes the same decision, and, in the course of an elaborate opinion, approves the cases of Blumfield, and Jones v. Williams, but condemns the *dictum* which accompanies them. Since then, in Sir Edward Coke's case, and in Cave v. Fleetwood, it was pronounced "not to be law;" and in Taylor v. Waters, where a similar point arose, and counsel urged its authority, it was wholly disregarded by the court. Godbolt, 294; Littleton, 325; 5 Maule & S. 103. From that time up to the present, though similar questions have frequently risen, it is believed that this citation has never been offered to the consideration of an English tribunal.

Having disposed of this *dictum*, we will proceed to examine, in the first place, those cases in which it has been held, that the release of a debtor in execution, by the plaintiff's consent, is a satisfaction of the judgment and execution, and also an extinguishment of the debt.

The counsel then cited and commented upon the following cases: Cro. Car. 75; Styles, 117, 387; 2 Mod. 136; Barnes's Notes, 205; 4 Burr. 2482; 1 T. R. 557; 1 Bos. & Pul. 242; 6 T. R. 525; 7 Id. 420; 2 East, 243; 1 Barn. & Ald. 303; 2 Moore, 235; 6 Man. & Gr. 755; 4 Jur. 600; 11 Id. 800; Law Com. Rep. 48; 15 Law Magazine, 132 – 3.

In all the above cases, the discharge was by the plaintiff's consent, and it is believed that they establish incontrovertibly the position assumed, that every such discharge operates to satisfy the judgment, the execution, and the original debt. It remains, in the second place, to examine into the effect of an arrest and imprisonment upon a *ca. sa.* generally; the position of the defendant being, that such an arrest and imprisonment, if regular, constitute a perfect satisfaction, so long as the imprisonment continues, and that the nature of the satisfaction can only be impaired by an interruption of the imprisonment through the tortious act of the defendant himself, or the operation of the law *in invitum*, as against the plaintiff.

In Year Book, 33 Hen. VI., it is said by Davers, "Suppose a man recover against me, and take my body in execution, he shall have neither *elegit* nor *fi. fa.*, nor any other execution, because this amounts in law to satisfaction." Page 48, 1455. So, in 13 Hen. VII., it is said by Keble, "If, on a *ca. sa.*, the sheriff return *cepi corpus*, the plaintiff shall never have another

ca. sa., for he learns, from the return of the sheriff, that he was in execution, and then he had the object of his suit." Page 1.

But perhaps the most carefully considered case on this whole subject is that of Foster *v.* Jackson, where the defendant died in execution, and the plaintiff brought *scire facias* against his executors. After examining Blumfield's case, and reviewing the whole subject at length, C. J. Hobart says, "But now singly out of the very point, I hold that a *capias ad satisfaciendum* is against that party as not only an execution, but a full satisfaction by force and act and judgment of law, so as against him he can have no other, nor against his heirs or executors, for these make but one person at law." And, in concluding, he lays down the broad principle on which many of the decisions already referred to are based, especially those where an agreement to surrender has been held to be void, "that the body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment." Hobart, 52.

The law, as laid down in Foster *v.* Jackson, governed all subsequent cases of death in execution, until parliament interfered, and, by the statute of 21 Jac. 1, c. 24, gave the creditor a further remedy against the estate of the deceased. 1 Strange, 653; 8 T. R. 123; Ambler, 79; 5 Maule & S. 73; 13 Ves. 193; 3 Mer. 224, 233–4–5; 20 L. J. Ch. 174; 15 Jur. 49; 13 Beav. 229; 1 Eng. L. & E. R. 146; 8 Dow. & Ry. 42.

The above cases not only sustain the position to which they are cited, but they also prove that it is not merely a sharp point of law, adhered to out of respect for ancient authority, but that it has been treated at all times, both by judges and chancellors, as a well-founded principle, to which a controlling force should be given, in every case where it is either directly or collaterally involved. The original debt has uniformly, and for all purposes for which it has ever been attempted to be used, whether as a set-off, the foundation of an *assumpsit*, or of a claim in bankruptcy, been held to be satisfied, and the judgment to be valueless.

It only remains, in the third place, to examine some particular cases, which are considered by the plaintiffs as exceptions to the general rule, but which in reality go far to illustrate and strengthen it.

1. Cases of escape. By the oldest authorities an escape was considered as effectual a discharge of the debt as a release, and Blumfield's case is the first decision to the contrary. Y. B. 33 Hen. VI. p. 47. The opposite doctrine was finally established in Whiteacres *v.* Hamkinson, and the reason of it was given by Ashhurst, J., in Jacques *v.* Withey: "I know of only one case where a debtor in execution, who obtains his liberty,

may afterwards be taken again for the same debt, and that is where he has escaped; and the reason of that is, because he was not legally out of custody." Sup. p. 11, 12. The result of these cases then is, that where the prisoner has escaped of his own wrong, although the satisfaction which the plaintiff was receiving is temporarily interrupted in fact, yet, in intendment of law, the defendant is still in custody, and may be retaken.

2. Cases of rescue, which depend upon the same principle as those of an escape. The defendant was never, in contemplation of law, out of custody. Jacques *v.* Withey, *ut sup.*

3. Arrest of privileged defendants. The arrest of a member of parliament has, from the earliest times, been held irregular; and it was occasionally doubted whether such an arrest, followed, as it necessarily was, by a discharge, either upon writ of privilege, or without it, did not operate, like a release by consent, as a total discharge of the debt. 1 Hatsell, 48; May's Practice of Parliament, 107, 113, 114; 2 Man. & Gr. 437, 471; 1 Cr. M. & R. 525; 5 Tyrrwhitt, 147; 10 Ad. & Ellis, 225; 1 Ad. & El. N. S. 525; 2 Gale & Dav. 473; Godbolt, 327.

4. Cases of discharge from imprisonment by the lord's act, &c. The discharge in these cases has always been held to be the act of the law, and not to imply any consent on the part of the plaintiff. In compliance, therefore, with the old maxim, the courts have taken care that this act of law shall in no way injuriously affect the plaintiff's rights. Thus, in Nadin *v.* Battie et al. 5 East, 147, where two were in prison, and one was discharged because of the plaintiff's refusal to pay the prison charges, Lord Ellenborough, on an application to discharge the other, decided that "the discharge cannot be said to have been with the plaintiff's assent, because he did not choose to detain the party in prison at his own expense. Nor can the law, which works detriment to no man, in consequence of having directed the discharge of one defendant, so far implicate the plaintiff's consent against the fact, as to operate as a discharge of the other."

The same, as will be seen hereafter, has been the ruling of the American courts, and for the same reasons here assigned.

5. Cases of debts payable by instalments. Where the judgment is to be satisfied by instalments, and execution is to issue upon non-payment of any of the instalments, it is held that a release from imprisonment upon one instalment with the plaintiff's consent, will not affect the remedy, or bar the execution upon a second instalment. Davis *v.* Gompertz, 2 Nev. & Man. 607. This is expressly upon the ground that the two executions are not for the same debt. Such was the principle

that governed the case of Atkinson *v.* Bayntun, which has been relied upon as an authority against the appellee. 1 Bing. N. C. 444.

6. It may be proper, in this connection, to notice the case of Baker *v.* Ridgway, which has also been cited against the appellee. 3 Bing. 41; S. C. 9 Moore, 114.

There, the defendant was in custody under a *ca. sa.;* a commission of bankruptcy was issued against him; the plaintiffs were compelled, by the statute 49 Geo. III., c. 121, to discharge him out of custody, before they could be admitted to prove their debt under the commission; the commission was afterwards superseded on the ground of irregularity; and the defendant was again arrested. Affidavits were submitted by the plaintiffs, and relied on by the court, tending to prove that the irregularity, by which the commission had been avoided, was the result of fraudulent collusion between the debtor and a portion of his creditors. This was a motion to discharge the defendant, and enter satisfaction upon the judgment. The rule was discharged.

Such being the facts, it does not seem that the case differs materially from that of an escape. It was, in reality, an escape effected by an abuse of the forms of law, and the same may be said of it, as Ashhurst, J., said of Jacques *v.* Withey, "The defendant was never legally out of custody." At any rate, he was never discharged by the consent of the plaintiff. That these were the grounds of the court's opinion, may be seen from many of the remarks reported by Bingham. Thus Best, C. J.: "If this discharge has been obtained by a fraudulent commission, and the plaintiff has afterwards been cheated by a *supersedeas* out of the benefit sought by the proof of his debt, the defendant may be taken again, because the fraud has avoided the whole transaction, and the defendant has never been legally out of custody."

From all the cases, then, we draw the conclusion that the English law is, and has been for more than four centuries, that the writ of *ca. sa.* is the highest sort of execution known; that it is capable of affording the plaintiff complete and absolute satisfaction; and that its execution will satisfy the judgment and extinguish the debt, unless this its regular legal effect be avoided by some after contingency. The only after contingencies, whether existing at common law, or provided for by statute, which are allowed to have this effect are, an escape by the defendant's own wrong, or effected by his actual fraud; a rescue; an avoidance of the writ for irregularity; an enlargement of the prisoner by act of law; or (since the 21st Jac. 1) his death in execution. Upon the happening of any of these con-

tingencies, the plaintiff having been deprived, without his own default, of the complete satisfaction to which his writ entitled him, the law will supply him with other means of enforcing it. If, however, after the execution of the writ, the plaintiff voluntarily consent to the discharge of the defendant from custody, while by such execution and discharge the judgment is satisfied and the debt extinguished at law, so the plaintiff's consent operates further as a confession of such satisfaction, and if properly presented to the court, will be entered of record on the roll. The policy of the law, moreover, prohibits the defendant from entering into any agreement by which the judgment or debt, upon which he is in custody, shall, for any purpose whatever, be made to survive his release, and pronounces all such agreements null and void. Nevertheless, the discharge of the defendant shall be a good consideration for an original and independent contract, which, if afterwards violated, may be enforced by new proceedings. This last rule avoids the hardship to which creditors might otherwise, even against their inclination, be compelled to subject their imprisoned debtors, who are unable to liquidate their debt by actual payment, but can give satisfactory security in consideration of a discharge. Archbold's New Com. Law Pr. p. 257, Ed. 1853; Sewell on Sheriffs, 198.

We have next to ascertain whether the American courts have adhered to the doctrines of the common law as expounded in England.

The precise question as to the effect of the voluntary discharge of the debtor from custody, has, it is believed, never been decided by this court. But, in two cases, the nature of the writ of *ca. sa.* has been incidentally discussed, so far as it bore collaterally upon points then before the court. It was only necessary, therefore, to enter into the subject, and to press the conclusions far enough to meet the particular question presented. Thus, in the United States *v.* Stansbury, 1 Peters, 573, the question before C. J. Marshall was, whether the rights of a particular debtor were to be governed by the common law or by an act of Congress. Having decided in favor of the latter position, he waives all argument upon the common law, and introduces his opinion by stating it in a form that was unquestioned on either side. "It is not denied, that at common law, the release of a debtor whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. The release of the judgment is therefore

the legal consequence of the voluntary discharge of the person by the creditor."

So, in the case of Snead *v.* M'Coull, 12 How. 407, the question was, whether a creditor's lien upon the lands of his debtor could survive the execution of a *ca. sa.* upon his person. Judge Daniel, delivering the opinion of the court, after showing that no lien on lands can be of superior binding force to that of an *elegit*, the capacity to issue which never survives a fully executed *ca. sa.*, incidentally alludes to the nature of this latter writ, and the effect of a plaintiff's voluntary releasing a defendant who is in custody under it. In so doing, he cites at length the strong language of the Lord Chancellor in *Ex parte* Knowell, sup. 23, and refers to the leading cases of Vigers *v.* Aldrich, Tanner *v.* Hague, and Blackburn *v.* Stupart.

But, in the United States *v.* Watkins, 4 Cranch. C. C. R. 271, the whole subject was fairly brought before the Circuit Court of the United States for the District of Columbia, and C. J. Cranch, in the course of a most learned opinion, in which almost every English authority is examined, fully sustains all the positions taken by the appellee as to the English law, recognizes them as forming part of the law of Maryland, and therefore binding in the District of Columbia.

Since this decision, the case of Harden *v.* Campbell, 4 Gill, 29, has been adjudicated in Maryland, and C. J. Martin fully sustains the conclusions arrived at by C. J. Cranch.

The counsel then commented upon the following American cases:—2 Leigh, 361–7; 5 Leigh, 186; 6 Mass. 58; 16 Mass. 63; 3 Cush. 463; 16 Law Reporter, 629; 1 Chipman, 151; 1 R. I. Rep. 143; 5 Johns. 364; 1 Cowen, 56; 8 Cowen, 171; 9 Cowen 128; 2 South. 508, 799; 2 Green, 102; 10 Ohio, 362; 6 Blackf. 36; 3 M'Cord, 165; 4 Dallas, 214; 3 Serg. & R. 463.

In Pennsylvania the statute of 21 James 1, ch. 24, for the relief of creditors against such persons as die in execution, was reported by the Judges to be in force, but not the statute of 1 James 1, ch. 13, relative to privilege of parliament, nor that of 8 & 9 William 3, ch. 27, s. 7, where in case a prisoner escapes, it is provided he may be retaken on a new capias.

This law was altered by the 31st section of the act of 16th June, 1836, which enacted that "a judgment shall not be deemed to be satisfied by the arrest or imprisonment of the defendant upon a *capias ad satisfaciendum*, if such defendant die in prison, or escape, or be discharged therefrom by reason of any privilege, "*or at his own request;*" but the party entitled to the benefit of the judgment may have such remedies at law for the recovery thereof as he would have been entitled to if such *capias ad satisfaciendum* had not been issued: saving nevertheless all

rights and interests which may have accrued to any other person between the execution of such writ and the death or escape of such party."

This section was taken from the 32d section of the bill reported by the revisers of the civil code on the 4th of January, 1836, but the words in italics, "or at his own request," were inserted by the legislature.

The section as reported by the revisers, is stated by them to be "derived from the statutes 1 Jac. 1, c. 13; 21 Jac. 1, c. 24; and 8 & 9 William 3, c. 27, sect. 7."

The case of Jackson *v.* Knight, 4 Watts & S. 412, decided in 1842, occurred after the passage of the act of Assembly, and was governed by the 31st section of the act of 16th June, 1836. The agreement to discharge the defendant from imprisonment was dated 10th October, 1840, and on the argument the counsel for the plaintiff in error cited the said 31st section.

Mr. Justice DANIEL 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 Pennsylvania.

The appellants, by their bill in the Circuit Court, alleged that, being creditors of the appellee in a very large amount of money previously lent and advanced to him, they, in the year 1828, instituted their action for its recovery on the law side of the court, when it was agreed, by writing filed of record, that a judgment should be entered against the appellee as of the 26th of November, 1827, in favor of the appellants, for the sum of $22,191.71. That this judgment, with a large accumulation of interest, remained unappealed from and unsatisfied, either in whole or in part. That the appellants, after obtaining this judgment, believing that the appellee was possessed of concealed means of satisfying it, and especially that when in a state of insolvency, and with a view of defeating his creditors, he had settled upon his wife a large amount of property, and, as afterwards appeared, made transfers of property to her between the date of the judgment and of the execution thereon, they sued out upon the said judgment a writ of *capias ad satisfaciendum*, returnable to the April term of the court, 1830, and in virtue of that process caused to be taken into actual custody the body of the appellee. That under the exigency of this process and arrest, the appellee would have been compelled to continue in close confinement, or could have obtained his release therefrom solely by the laws of Pennsylvania passed for the relief of insolvent debtors, which laws would have exacted of the appellee an assignment to his creditors of all estate, property, or interests whatsoever, held by himself or by others for him, or unlawfully settled upon his

wife; and would have conferred upon him only an immunity against further bodily restraint by reason of the non-payment of such debts as were due and owing from him at the date of such proceedings in insolvency; but that the appellee, being at the time of his arrest a citizen of the State of New Jersey, could not have been admitted to the benefits of the insolvent laws of Pennsylvania until after remaining three months in actual confinement under the writ of *capias ad satisfaciendum.*

That on the 19th of November, 1825, a marriage contract was executed between the appellee and Annis Stockton, his intended wife, and Richard Stockton, the father of said Annis, by which agreement the said Richard Stockton was invested with a large amount of real and personal property in trust for the benefit of the appellee and his intended wife during their joint lives, and if the said appellee should survive his intended wife and have issue by her, in trust for his benefit and for the maintenance and support of his family, and if there should be no child or children of the said marriage, then after the death of the husband or wife, in trust to convey the property to the survivor in fee-simple.

That the appellee being arrested and in actual custody under the *capias ad satisfaciendum,* sued out as aforesaid, it was then and there agreed in writing between the appellants and the appellee, that the former should, without prejudice to their rights and remedies against the latter, permit him to be forthwith discharged from custody under the said process, and that the appellee should go to the next session of the Circuit Court of the United States for the Eastern District of Pennsylvania, and on the law side of that court make up an issue with the appellants, to try the question whether the appellee was possessed of the means, either in or out of the marriage settlement, of satisfying the judgment against him; the said issue to be tried without regard to form, or to the time when the jury for the trial thereof should be summoned, the appellee also giving security to abide the result of the trial of said issue. That upon the execution of this agreement, the appellee was released from custody, and the marshal for the Eastern District of Pennsylvania, to whom the writ of *capias ad respondendum* was directed, made a return upon the writ that he had taken the body of the appellee into custody, and that he had been discharged by the consent and direction of the appellants. That the trial of the issue, which was provided for in the said agreement, actually took place, and resulted in a verdict by which, so far as concerned the purposes of the said trial, it was found that the appellee had not the means, either in or out of the said marriage settlement, of satisfying the judgment of the appellants.

The bill alleges that by the force and effect of the agreement in writing and of the proceedings in pursuance thereof, the appellee obtained no farther or other right or advantage, than a present discharge from close custody, and the judgment of a court of competent jurisdiction that he was then possessed of no means, whether in or out of the said marriage settlement, wherewith to satisfy the judgment of the appellants. It farther states, that since the judgment upon the issue made up and tried as aforesaid, the wife of the appellee had died without issue, and in consequence of that fact, all estate and property vested in the trustee by the marriage settlement, and found by the issue tried as aforesaid to be then protected thereby from the creditors of the appellee, had become the absolute property and estate of the appellee, and had either by the original trustee in the marriage settlement or by his successor, been conveyed and delivered over to the appellee as his own estate and property, free and clear of any trust whatsoever.

That the trust created by the marriage settlement, and by which the above property comprised therein was adjudged to be protected against creditors, having expired by its own limitation, that property had become liable to the creditors of the appellee, who was bound to a full account of the value thereof and for the satisfaction of the rights and demands of the appellants out of the same. That the appellants had accordingly applied to the appellee for payment of their judgment, to be made out of the property comprised in and protected by the marriage settlement or out of any other resources at his command, but had been met by a refusal on the part of the appellee, founded not upon his inability to satisfy the just claim of the appellants for money actually loaned, but upon an alleged exemption from all liability resulting from the facts of his having been once arrested under a *capias ad satisfaciendum*, and subsequently released from custody by consent of the appellants. The bill alleges this refusal, and the foundation on which it is placed, to be in direct violation of the written agreement, which explicitly declared that it was made for the accommodation of the appellee, and without any prejudice whatever to arise to the plaintiffs' (the appellants') rights, by the defendant's (the appellee's) enlargement. It charges the refusal and objection now interposed to be fraudulent, and made in bad faith, and as such, though it might avail at law to embarrass or prevent the enforcement of the judgment of the appellants, yet that a court of equity should prohibit a resort thereto on account of its unconscientious and fraudulent character. The bill concludes with a prayer, that the appellee may be enjoined from setting up, as a discharge from the judgment against him, his release from custody under

the circumstances of the case set forth; that an account may be taken of the several subjects of property comprised in the marriage settlement, and of the rents, profits, interest, and dividends accruing therefrom, since the death of the wife of the appellee; that satisfaction out of those subjects, of the judgment and claim of the appellants may be decreed: the bill seeks also for general relief.

To this bill the appellee (the defendant in the Circuit Court) demurred, assigning, for causes of demurrer, that if the taking into custody of the body of the defendant under the *capias ad satisfaciendum* was a legal discharge of the alleged debt, the complainants are not relievable in equity from the effect thereof for or by reason of any act, matter, or thing in the bill alleged; and if the taking into custody was not such a legal discharge, then the complainants have full, adequate, and complete remedy at law; and farther that the taking into custody under the said writ was and is to be deemed to have been a discharge and extinction of the judgment of the plaintiffs at law, and a discharge and extinction as well at law as in equity of the debt for which the same was obtained; and the cause coming on to be heard upon the demurrer, the court by its decree sustained the demurrer and dismissed the complainants' bill with costs.

The correctness, or incorrectness of the decree thus pronounced, are now the subjects of our consideration.

Extensive or varied as may be the range of inquiry presented by the bill with respect to what is therein averred to appertain to the merits of this controversy, or to the character of the acts of the parties thereto, the view and the action of this court in relation to that cause must be narrowed necessarily to the questions of law arising upon the demurrer. In approaching these questions there may be propounded as postulates or legal truisms, admitting of no dispute, the following propositions:

1. That wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable. 2. That wherever there exists at law a complete and adequate power, either for the prosecution of a right or the redressing of a wrong, courts of equity, with the exception of a few cases of concurrent authority, have no jurisdiction or power to act.

To the test of these rules the case before us, in common with every appeal to equity, should be brought, and if the effect of such test should prove to be adverse, that effect should be sought in the character of the appeal itself, and not in objections to maxims which judicial experience and wisdom have long established. Recurring now to the history of this cause, let us in-

quire what was the precise situation of the parties, what their legal rights and responsibilities at the date of the judgment and arising therefrom, what have been their acts and proceedings subsequently to that judgment, and the consequences flowing from their acts to their previous relative position. Upon the recovery of their judgments the appellants had their election of any of the modes of final process known to the courts of law, or they might in equity have impeached the marriage settlement for any vice inherent in its consideration, or for an attempt fraudulently to interpose that settlement between the appellants' judgment and its legal satisfaction. But in their election of any of the forms of final process, the appellants must be held to have known the nature of that process, and the consequences incident to its choice and consummation. To permit an ignorance of these, or in other words an ignorance of the law, to be alleged as the foundation of rights, or in excuse for omissions of duty, or for the privation of rights in others, would lead to the most serious mischief, and would disturb the entire fabric of social order. In choosing the writ of *capias ad satisfaciendum*, therefore, for the enforcement of their judgment, the appellants can derive no benefit from a presumption of ignorance or misapprehension as to the effects of calling into activity this severest and sternest attribute of the law. Such a presumption is wholly inadmissible. They must be affected with knowledge of whatever has been settled as to the nature of this writ, and of whatever regularly follows a resort to its use. They were bound to know, 1st, that the service of a *capias ad satisfaciendum*, by taking into custody the body of the debtor, operates a satisfaction of the debt; and for that reason deprives the creditor of all recourse to the lands, or chattels, or property of any description belonging to his debtor. For a doctrine well settled and familiar as is that, it may appear superfluous to cite authorities; but we may refer to some of these, commencing with the early cases of Foster v. Jackson, Hob. 52; Williams and Criteris, Cro. Jac. 136, and Rolle's Abr. 903; and coming down through the more modern authorities of Mr. Justice Blackstone's Commentaries, vol. 3, p. 415; 4 Burrow, 2482; 1 T. R. 557; 2 East, 243, and 13 Ves. 193. To these cases might be added many decisions in the courts both of England and in the different States of this country; and, as conclusive of the same doctrine, in this court the case of Snead v. M'Coull, 12 Howard, 407. So unbending and stringent was the application of the doctrine maintained by the earlier cases, that prior to the statute of 21st Jac. 1, cap. 24, the death of a debtor whilst charged in execution, an event which rendered the process absolutely unvailable to the creditor, deprived the latter nevertheless of a right to a farther

execution; the jealousy of the common law denying to him any power beyond that he had exerted in the privation of the personal liberty of the debtor. The statute of James authorized the exception of the death of the debtor to this inhibition of the common law, and to this exception has been added the instances of escape or rescue, seemingly upon the ground that in these instances the debtor should not be regarded as legally out of custody. The taking of the body under a *capias ad satisfaciendum* being thus held the complete and highest satisfaction of the judgment, it would follow *ex consequenti*, that a discharge of the debtor by the creditor would imply an acknowledgment of such satisfaction, or at any rate would take from that judgment the character of a warrant for resorting to this highest satisfaction in repeated instances for the same demand. But the authorities have not stopped short at a mere technical restraint upon the creditor who may seek to repeat the arrest of the debtor whom he once had in confinement; they have gone the length of declaring, that if a person taken on a *capias ad respondendum* was discharged, the plaintiff had no farther remedy, because he had determined the choice by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law. See the cases from Hobart, Croke Jac. and Rolle's Abr. before cited. Again it has been ruled that if the plaintiff consent to the defendant being discharged out of execution, though upon an agreement, he cannot afterwards retake him although the security given by the defendant on his discharge should be set aside. 4 Burr. 2482; 1 T. R. 557; 2 East, 243; and the Lord Chancellor, in 13 Ves. 193, uses this explicit language, "It is clear, that by taking the body in execution, the debt is satisfied to all intents and purposes."

Many American cases may be avouched in support of the same doctrine. In the case of the United States *v.* Stansbury, 1 Peters, 573, Chief Justice Marshall says, "It is not denied that at common law the release of a debtor 'whose person is in execution,' is a release of the judgment itself. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary release of the person by the creditor."

In the case of Wendrum *v.* Parker, 2 Leigh, 361, it is said by Carr, J., that the "levy of a *ca. sa.* and the release of the debtor from execution by the plaintiff or his agent, is an extinguishment of the debt, I have considered as well settled as any point can be by an unbroken series of decisions." And in

the case of Noyes v. Cooper, 5 Leigh, 186, Brockenbrough, J., says, "It has been undoubtedly established by a series of decisions, that where a defendant in execution has been discharged from imprisonment by direction or with the consent of the plaintiff, no action will ever again lie on the judgment, nor can any new execution issue on that judgment, even though the defendant was discharged on an express understanding that he should be liable again to be taken in execution on his failure to comply with the terms on which the discharge took place."

Upon a collation of the authorities applicable to the acts and proceedings of the parties to this controversy at the time, and subsequently to the judgment in favor of the appellants against the appellee, we are led to the following conclusions, viz.: that by suing out a *capias ad satisfaciendum* upon their judgment, and by taking into actual custody the body of the appellee under this process, the appellants had obtained that complete and highest satisfaction of their demand, of which they could be deprived only by the act of God, by operation of law, or by their own voluntary acknowledgment, or by a release of their debtor; that by entering into the arrangement stated in the bill, and by discharging the appellee from custody, the appellants have, in all legal intendment, admitted satisfaction of their demand, released the appellee from all liability therefor, and destroyed every effect of their judgment as the foundation of legal rights. Such being our conclusions upon this branch of the case, and the same conclusions being implied in the application of the appellants for equitable interposition, the inquiry here presents itself, whether a court of equity can be called upon to abrogate or impair or in any manner or degree, to interfere with clear, ascertained, and perfect legal rights? The simple statement of such an inquiry suggests this ready and only correct reply:

Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage; but to abrogate or to assail a perfect and independent legal right, it can have no pretension. In all such instances, equity must follow, or in other words, be subordinate to the law. With the view doubtless of giving color to their application, the appellants have intimated (for they can hardly be said to have charged it positively and directly) that the marriage settlement of the appellee was made in fraud of his creditors, and they have directly averred that the refusal of the appellee after the death of his wife to apply the property comprised in that settlement, in satisfaction of the judgment of the appellants, was at once fraudulent, and in direct violation of the agreement in

pursuance of which the appellee was discharged from custody. With respect to each of these allegations, however, the appellants are entirely deficient in their proofs, and in the latter, the statement does not accord with the document, that is, the written agreement between the parties on which this averment is founded. No evidence seems to have been adduced upon the trial which took place in pursuance of the agreement, to impeach the fairness of the marriage contract; and the absence of any attempt to establish its unfairness, together with the charge of the court to the jury, would seem to exclude the existence, or at that time the belief of the existence, of fraud in the settlement. The agreement entered into at the time of the appellee's release from custody contains no stipulation that he would hold himself liable to another execution dependent on the event that the issue contemplated by that agreement, or that he would consider the judgment as still in full force against him. And if there had been a stipulation of the kind, we have seen that it could not have averted the consequences flowing from the discharge of the appellee from custody; but the only conditions for which the appellee covenanted were that he would make up and try the issue proposed and would abide the result of the trial; with both of which conditions the appellee has literally complied. This charge of fraud then, even if it could in any aspect of this question have been available, is entirely unsustained.

With regard to the question raised by the demurrer as to the obligation of the appellants to pursue their remedy at law, under the allegation in the bill, that such legal remedy had been reserved to them by the terms of the agreement, there can be no doubt, upon the supposition that this remedy remained unimpaired, that the appellants could not arbitrarily abandon it, and seek the interposition of equity in a matter purely legal. The averment therefore by the appellants of the continuation of their judgment, and of their right to enforce it by execution in all their original force and integrity, is wholly irreconcilable with any known head or principle of equity jurisdiction, and their bill is essentially obnoxious to objection on that account.

We are of the opinion that the decree of the Circuit Court, sustaining the demurrer to the bill of the appellants, (the complainants in the Circuit Court,) is correct, and ought to be, as it is, hereby affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On

consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JAMES N. CURRAN, PLAINTIFF IN ERROR, v. THE STATE OF ARKANSAS, THE BANK OF THE STATE OF ARKANSAS, JOHN M. ROSS, FINANCIAL RECEIVER, AND DAVID W. CARROL, BANK ATTORNEY.

In 1836, the Legislature of Arkansas incorporated a bank with the usual banking powers of discount, deposit, and circulation, the State being the sole stockholder.

The bank went into operation, and issued bills in the usual form, but in November, 1839, suspended specie payments.

Afterwards, the legislature passed several acts of the following description:

1843, January, continuing the corporate existence of the bank, and subjecting its affairs to the management of a financial receiver and an attorney, who were directed to cancel certain bonds of the State, held by the bank, for money borrowed by the State, and reduce the State's capital in the bank by an equal amount.

1843, February, directing the officers to transfer to the State a certain amount of specie, for the purpose of paying the members of the legislature.

1845, January, requiring the officers to receive the bonds of the State which had been issued as part of the capital of the bank in payment for debts due to the bank.

1845, January, another act, taking away certain specie and par funds for the purpose of paying members of the legislature, and placing other funds to the credit of the State, subject to be drawn out by appropriation.

1846, vesting in the State all titles to real estate or other property taken by the bank in payment for debts due to it.

1849, requiring the officers to receive, in payment of debts due to the bank, not only the bonds of the State, which had been issued to constitute the capital of the bank, but those also which had been issued to constitute the capital of other banking corporations which were then insolvent.

Upon general principles of law a creditor of an insolvent corporation can pursue its assets into the hands of all other persons except *bonâ fide* creditors or purchasers, and there is nothing in the character of the parties in the present case or in the laws transferring the property, to make it an exception to the general rule. For the Supreme court of Arkansas has decided that the State can be sued in this case.

The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, impaired the obligation of this contract.

Nor does the repeal or modification of the charter of the bank by the legislature prevent this conclusion from being drawn. But in this case the charter of the bank has never been repealed.

Besides the contract between the bill-holder and the bank, there was a contract between the bill-holder and the State, which had placed funds in the bank for the purpose of paying its debts, and which had no right to withdraw those funds after the right of a creditor to them had accrued.

The State had no right to pass these laws, under the circumstances, either as a creditor of the bank or as a trustee taking possession of the real estate for the benefit of all the creditors.

The several laws examined.

The Supreme Court of the State held these laws to be valid, and consequently the jurisdiction of this court attaches under the 25th section of the judiciary act.

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

It was argued by *Mr. Lawrence* and *Mr. Pike*, for the plaintiff in error, and by *Mr. Sebastian*, filing a brief prepared by *Mr. Hempstead*, for the defendants in error.

The arguments of counsel upon both sides were in such an unbroken train of reasoning, that the reporter cannot compress them into a mere report; and as, together, they made upwards of sixty pages of print, he cannot publish them entire. The reader who desires to examine into the case thoroughly, can consult the opinion of the Supreme Court of Arkansas, delivered in November, 1851. In that opinion the court maintains its doctrines with great earnestness.

Mr. Justice CURTIS delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Arkansas.

The plaintiff in error filed his bill in equity in the Circuit Court of that State for the county of Pulaski, against the State of Arkansas, the State Bank of Arkansas, and the financial receiver and the attorney of the bank; and the defendants having demurred thereto, the Circuit Court overruled the demurrers, and, as the defendants elected to rest thereon, the court made a decree in favor of the complainant. The defendants appealed to the Supreme Court, where the demurrers were sustained, and the bill ordered to be dismissed. This decree the plaintiff has brought here for reëxamination, under the 25th section of the judiciary act.

As the questions to be determined arise on a demurrer to the bill, the substance of the case, therein made and confessed by the demurrer, must be stated, to exhibit the grounds on which our decision rests.

The bill shows that the Bank of the State of Arkansas was incorporated by the legislature of that State in 1836, with the usual banking powers of discount, deposit, and circulation, and that the State in fact was, and was designed by the charter to be, its sole stockholder. That the capital stock of the bank consisted of $1,146,000, raised by the sale of bonds of the State, together with certain other sums paid in by the State as part of the capital stock, amounting in the aggregate to the sum of $350,753, being in the whole $1,496,753; all which was in specie, or specie funds. That the bank was required by its charter to have on hand at all times sufficient specie to pay its bills on demand. That the plaintiff, being the owner and bearer of bills of this bank, amounting to upwards of $9,000, which the bank had refused to pay, instituted suits and recovered judgments thereon at law, upon which executions, running against the goods, chattels, and lands of the bank, have been duly returned

wholly unsatisfied. The general scope of the bill, therefore, is to obtain the aid of a court of equity to reach such assets of the bank as ought to be appropriated to satisfy this judgment debt. The parties in whose hands it is alleged these assets are, are the State of Arkansas and two other defendants, who are alleged to have charge of certain effects of the bank, in behalf, and under the authority of the State.

To make a case against these parties, and show that they hold property, which in equity belongs to its creditors, and ought to be appropriated to pay their debts, the bill states, that the bank having gone into operation, and issued bills to a large amount, which were then in circulation, gave public notice, on the 7th day of November, 1839, that the payment of specie was definitely and finally suspended; and thenceforward, with some comparatively trifling exceptions, has refused to redeem any of its bills.

That in January, 1843, the bank still continuing insolvent, an act was passed by the legislature to liquidate and settle its affairs. That the assets of the bank then amounted to $1,832,120, of which the sum of $1,000,000, was good and collectible; and that it had then on hand the sum of $90,301 in specie. This act expressly continued the corporate existence of the bank; its affairs were subjected to the management of a financial receiver and an attorney, who were to apply the moneys collected by them to redeem the outstanding circulation of the bank; but, at the same time, bonds of the State, held by the bank, for money borrowed by the State, amounting to at least $200,000, were required by this act to be given up and cancelled, and their amount to be credited to the bank against a part of the capital stock put in by the State. The bill further shows, that by another act passed at the same February session, in 1843, the officers of the bank were required to transfer to the State the sum of $15,000 in specie, which was appropriated by the act to pay the members of that legislature. That on the 4th day of January, 1845, another act was passed, authorizing the officers of the bank to compromise its debts receivable, and take specific property in payment, and requiring those officers to receive in payment the bonds of the State, issued to raise capital stock for the bank, notwithstanding the bills of the bank might not have been taken up.

That on the 10th day of January, 1845, another act was passed, depriving the bank of all its specie and par funds, and appropriating the specie, first, to pay the members of that legislature, and declaring that certain funds which had been placed in the bank, and made by the charter to form a part of its capital stock, should be deemed to be deposited there to the credit of the State, subject to be drawn out by appropriations.

That by another act, passed on the 23d day of December, 1846, the title to all real estate and property of every kind, purchased by said bank, or taken in payment of debts due to it, was declared to be vested in the State, and titles to property received on account of debts due to the bank were required to be thereafter taken in the name of the State; and the bill avers, that many different parcels of land specifically mentioned and described, have been conveyed to the State, under this law, by debtors of the bank, in satisfaction of their indebtedness.

The bill further states, that, by another act, passed on the 9th day of January, 1849, the officers of the bank were required to receive in payment of its debts, bonds of the State, issued to raise capital for the Real Estate Bank of Arkansas, and other banking corporations theretofore chartered by the General Assembly, and then insolvent; which last-mentioned bonds amounted to at least $2,000,000.

The bill prays, among other things, for satisfaction of the plaintiff's judgment debt out of the assets of the bank thus shown to have come into the custody, or to stand in the name, or to have gone to the use of the State by force of the laws above-mentioned; and the jurisdiction of this court, under this writ of error, is invoked, upon the ground that these laws, or some of them, impair the obligation of a contract, and that the highest court of the State has held them valid, and by reason of such decision, dismissed the complainant's bill.

It follows, that there are three questions for our consideration.

1. What would have been the rights of the complainant under the contracts shown by his bill, if uncontrolled by the particular laws of which he complains?

2. Do those laws, or either of them, impair the obligation of any contract with the complainant?

3. Does it appear, by the record, that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof made a final decree against the complainant.

The first of these questions may be answered without much difficulty. The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of other than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts.

This has been often decided, and rests upon plain principles. In 2 Story's Eq. Jur. § 1252, it is said, "Perhaps, to this same head of implied trusts upon presumed intention, (although it might equally well be deemed to fall under the head of implied trusts by operation of law,) we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien, or right of priority of payment on it, in preference to any of the stockholders of the corporation. Thus, for example: "The capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation: and no stockholder can entitle himself to any dividend or share of such capital stock, until all the debts are paid, and if the capital stock should be divided, leaving any debts unpaid, every stockholder, receiving his share of the capital stock, would, in equity, be held liable *pro ratâ* to contribute to the discharge of such debts out of the fund in his own hands." In conformity with this is the doctrine held by this court in Mumma *v.* The Potomac Company, 8 Peters, 281.

The cases of Wood *v.* Dummer, 3 Mason, 308; Wright *v.* Petrie, 1 Smedes & Marsh. 319; Nevitt *v.* Bank of Port Gibson, 6 Id. 513; Hightower *v.* Thornton et al. 8 Georgia R. 493; Nathan *v.* Whitlock, 3 Edwards, C. R. 215, affirmed by the chancellor, (9 Paige, 152,) contain elaborate examinations of this doctrine, and it has been affirmed and applied in many other cases.

So far, therefore, as the property of this bank has become vested in the State or gone to its use, it is so vested and used, charged with a trust in favor of this complainant, as an unpaid creditor, unless there is something in the character of the parties, or the consideration upon which, or the operation of the laws by force of which, it has been transferred, taking the case out of the principles above laid down.

And, first, as to the character of the parties. By the charter of this bank, the State of Arkansas became its sole stockholder. But the bank was a distinct trading corporation, having a complete separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact, that a sovereign state paid in its capital, and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once with the trusts, and subject to the uses declared and fixed by the charter, to the same extent, and

for the same reasons, as it would have been if contributed by private persons.

That a State, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court, in the Bank of the United States *v.* The Planters Bank, 9 Wheat. 904; Bank of Kentucky *v.* Wistar et al. 3 Pet. 431; Briscoe *v.* The Bank of Kentucky, 11 Id. 324; Darrington et al. *v.* The Bank of Alabama, 13 How. 12. And our opinion is, that the fact that the capital stock of this corporation came from the State which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property; a right which, as we have seen, follows the fund into the hands of every person, save a *bonâ fide* creditor or purchaser, and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser capable by law of being brought within its jurisdiction.

That the State of Arkansas is capable of being thus sued, has been decided, after a careful examination, by the Supreme Court of that State, in this suit; and as this is purely a question of local law, depending on the constitution and statutes of the State, we follow that decision, and hold, in conformity therewith, that by its own consent the State has become liable to a decree in favor of the complainant in this suit, if the complainant has valid grounds entitling him to the relief prayed.

Whether there was any thing in the consideration or circumstances of the transfers of the property of the bank to the State, or to its use, which relieved that property from the trust in favor of creditors, may best be examined under the next question, which is, do the laws, by force of which these transfers were made, impair the obligation of any contract with the complainant.

This question can be answered only by ascertaining what contracts existed, and what obligations were attached to them, and then by examining the actual operation of those laws upon those contracts and their obligations.

The plaintiff was the bearer of bills of the bank, by each of which the bank promised to pay him, on demand, a certain sum of money. Of course these payments were to be made out of the property of the bank. By the laws of the State, existing when these contracts were made, their bearer had the right, by legal process, to compel their performance by the levy of an

execution on the goods, chattels, lands, and tenements of the bank, by garnisheeing its debtors, and by resorting to a court of equity to reach equitable assets, or property conveyed to others than creditors and *bonâ fide* purchasers.

Such were these contracts and their obligations; and it would seem to require no argument to prove that a law authorizing and requiring such a corporation to distribute its property among its stockholders, or transfer it to its sole stockholder, leaving its bills unredeemed, would impair the obligation of the contracts contained in those bills. The cases of Bronson *v.* Kinzie et al. 1 How. 311; and McCracken *v.* Hayward, 2 Id. 608, which will be more particularly adverted to hereafter, leave no doubt on that point. Indeed it has not been attempted to maintain, that such a law, operating on the property of a mere private corporation, whose charter the legislature could not repeal, would be valid. But it is argued that this is a different case. That the legislature has power to destroy this corporation and thereupon its contracts are no longer in existence, and cannot be enforced against the property of the corporation, which, upon the repeal of its charter, reverts to the grantors of its lands and escheats, so far as it is personalty, to the State, and that, if it be in the power of the State thus to destroy the remedies of creditors, by repealing the charter, their rights must be considered to be entirely subject to the will of the State, and no law can impair the obligation of their contracts, because subjection to any law which may be passed belongs to the very existence of such contracts. Or, to express the same ideas in different words, that the State created and can destroy the corporation and all its contracts, and, as it can thus destroy them by repealing the charter, it can modify, obstruct, and abridge the rights of creditors and the obligations of their contracts, without repealing the charter.

Neither these premises, nor the conclusion deduced from them, can be admitted.

This banking corporation, having no other stockholder than the State, it is not doubted that the State might repeal its charter; but that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation, and to withdraw its property from the just claims of its creditors, cannot be admitted. If such were the effect of a repeal of an act incorporating a bank containing no express power of repeal, it might be difficult to encounter the objection, that the repealing law was invalid, as conflicting with the Constitution of the United States. This argument was pressed on this court, in the case of Mumma *v.* The Potomac Company, (8 Pet.) and it was met by the following explicit language:

"We are of opinion, that the dissolution of the corporation, under the acts of Virginia and Maryland, cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bonâ fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

Indeed, if it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows, that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation, the legal title to its property had been changed. Mumma v. The Potomac Company, 8 Pet. 281; Wright v. Petrie, 1 S. &. M. Ch. R. 319; Nevitt v. The Bank of Port Gibson, 6 S. & M. 513; 1 Ed. Ch. R.; S. C. 9 Paige; Read v. Frankfort Bank, 23 Maine R. 318. And, in this point of view, the decision of this court, in Lennox et al. v. Roberts, (2 Wheat. 373,) is applicable.

It was a suit in equity, brought by persons to whom, at the expiration of the charter of the Bank of the United States, its effects were conveyed by deed, in trust for creditors and stockholders. Among these effects were certain promissory notes indorsed by the defendant, which the bill prayed he might be compelled to pay. The complainants had not the legal title transferred to them by indorsement upon the notes. This court held that the suit was maintainable. And this decision necessarily involves two points. First. That the expiration of the charter had not released the indorser. Second. That a court of equity would lend its aid to trustees for creditors of the bank, to enforce payment of the notes. We do not think that the omission of the bank to appoint a trustee, would vary the substantial rights of creditors in a court of equity.

Whatever technical difficulties exist in maintaining an action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity, there is no difficulty in a creditor following the property of the corporation into the hands of any one not a *bonâ fide* creditor or purchaser, and asserting his lien thereon, and obtaining satisfaction of his just debt out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for all

the creditors when in the hands of the corporation; which trust the repeal of the charter does not destroy. Chancellor Kent, in 2 Com. 307, n., says, "The rule of the common law has in fact become obsolete. It has never been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied. The case of Hightower *v.* Thornton, 8 Georgia R. 491, and other cases before referred to in this opinion, are in conformity with this doctrine; and, in our judgment, a law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the State, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts.

But if it could be maintained, that the repeal of the charter of this corporation would be operative to destroy the obligation of its contracts, it would not follow that any thing short of a repeal could have that effect. The only ground upon which such a power could be claimed is, that inasmuch as the power of repeal exists when the contract is made, and inasmuch as the necessary effect of a repeal is to put an end to the obligation of the contracts of the corporation, all its contracts are made subject to this contingency, and with an inherent liability to be thus destroyed. We have already said, that it is not the necessary effect of a repeal of the charter to destroy the obligations of contracts; but if it were, and they were entered into subject to this liability, upon what ground could it be maintained, that merely suspending certain powers of the corporation, its existence being preserved, can be followed by any such consequence? Surely it is not the necessary effect of a prohibition to transact new business, to destroy contracts already made; and if not, how can the right and power to destroy them be considered to grow out of a power to make such a prohibition? or how can it be fairly assumed, because the creditor knew when he received the contract of the bank that the legislature could at any time deprive it of power to enter into new engagements, and therefore must be taken to have assented to the exercise of that power at the discretion of the legislature, that he must also be considered as assenting to the exercise of a totally different power, viz. the power to destroy contracts already made? Legislative powers, over contracts lawfully existing when the con-

tracts are formed, affect the nature and enter into the obligations of those contracts. But such powers can be exerted only in the particular cases in reference to which they have been reserved; and they are inoperative in all other cases. And, until such a case arises, the obligation of such a contract can no more be impaired than if it were under no circumstances subject to legislative control. The assumption that, because the legislature may destroy a contract by repealing the charter of the corporation which made it, therefore such a contract may be impaired, or altered, or destroyed, in any manner the legislature may think fit, without repealing the charter, is wholly inadmissible.

Now the charter of this bank has never been repealed. On the contrary the 28th section of the act of the 31st day of January, 1843, expressly provided, "That nothing in this act shall be so construed as to impair or destroy the corporate existence of the said Bank of the State of Arkansas, but the charter of the said institution is only intended to be so limited and modified as that said bank shall collect in and pay off her debts, abstain from discounting notes, or loaning money, and liquidate and close up her business as is hereinafter provided." Subsequent laws have still further limited and modified the corporate powers, but the corporate existence has not been touched, and the corporation is made a party to this suit, and appears on the record.

We do not consider, therefore, that the power of the State to repeal this charter enables the State to pass a law impairing the obligation of its contracts.

We have thus far considered only the contracts between the complainant and the bank, arising out of the bills of the bank held by him, and some of the obligations of those contracts. But this is not the only contract with the complainant. It is true that, as the State was the sole stockholder in this bank, the charter cannot be deemed to be such a contract between the State and the corporation as is protected by the Constitution of the United States. But it is a very different question whether that charter does not contain provisions, which, when acted upon by the State and by third persons, constitute in law a binding contract with them, the obligation of which cannot be impaired.

If a person deposit his property in the hands of an agent, he may revoke the agency and withdraw his property at his pleasure. But if he should request third persons to accept the agent's bills, informing them, at the same time, that he had placed property in the hands of that agent to meet the bills at their maturity, and upon the faith of such assurance the agent's

bills are accepted, the principal cannot, by revoking the agency, acquire the right to withdraw his property from the hands of the agent.

It is no longer exclusively his. They who, on the faith of its deposit, have changed their condition, have acquired rights in it. The matter no longer rests in a mere delegation of a revocable authority to an agent, but a contract has arisen between the principal and the third persons from the representation made, and the acts done on the faith of it, and the property cannot be withdrawn without impairing the obligation of that contract.

Now the charter of this bank provides, (§ 1,) that it shall have a capital stock of one million of dollars, to be raised by the sale of the bonds of the State, and also, (§ 13,) that certain other funds, which are specifically described, shall be deposited therein by the State, and constitute a part of the capital of the bank, and the bill avers that the bonds of the State, amounting to one million of dollars, and also other bonds of the State amounting to one hundred and forty-six thousand dollars, authorized by a subsequent act of the Assembly, were sold, and their proceeds, together with the other funds mentioned, were paid into the bank to constitute its capital stock.

The bank received this money from the State as the fund to meet its engagements with third persons which the State, by the charter, expressly authorized it to make for the profit of the State. Having thus set apart this fund in the hands of the bank, and invited the public to give credit to it, under an assurance that it had been placed there for the purpose of paying the liabilities of the bank, whenever such credit was given, a contract between the State and the creditor not to withdraw that fund, to his injury, at once arose. That the charter, followed by the deposit of the capital stock, amounted to an assurance, held out to the public by the State, that any one who should trust the bank might rely on that capital for payment, we cannot doubt. And when a third person acted on this assurance, and parted with his property on the faith of it, the transaction had all the elements of a binding contract, and the State could not withdraw the fund, or any part of it, without impairing its obligation.

We proceed, therefore, to examine the laws complained of, to ascertain what is their operation upon the obligations of the several contracts with the State and with the bank, which are above declared to exist. The learned counsel for the State of Arkansas has, with great ability, presented a view of these laws which requires consideration. It is this. That so far as these laws withdraw specie and funds from the bank, and appropriate them to the uses of the State, the State acted in the character of a creditor, taking a preference over other creditors, and paying

itself a debt; and that the other laws, by force of which all the real property of the bank was vested in the State, are not to be deemed to have been passed in denial of the rights of creditors, but only the better to protect and give effect to those rights; that the trust in favor of creditors still subsists, to be worked out in such manner as the State shall deem proper.

To maintain the first proposition, it must appear that the State stood in such a relation to this bank and its creditors at the time these laws were passed; that it was a creditor, and could provide by law for the payment of its debt in preference to other creditors; and secondly, that these laws do not withdraw and apply to the use of the State any greater sum than the amount of such debt.

In our judgment, the State cannot be considered to have occupied this position. It had placed its bonds in the possession of the bank, with authority to sell them and hold their proceeds as capital. It had also paid over to the bank certain other funds, with an express declaration, contained in the thirteenth section of the charter, that these also were to be part of its capital, and were to have credited to them their proportion of dividend of the profits of the business. All these moneys were thus set apart, in the hands of the bank, as a fund, upon the credit of which it was to issue bills, and which was to be liable to answer the engagements of the bank contracted to its creditors, in the course of the business which it was authorized to transact for the profit of the State. Such is the necessary effect of the express declaration in the charter, that these funds constitute the capital of the bank.

When this bank became insolvent, and all its assets were insufficient to perform its engagements, it is manifest that every part of these assets stood bound by the contracts which had been made with the bank upon the faith of the funds thus set apart by the charter; and it is equally clear, that the bank no longer had in its possession any capital stock belonging to the State. Whatever losses a bank sustains, are losses of the capital paid in by its stockholders; that is the only fund it has to lose. When it has become insolvent, it has lost all that fund, and has nothing belonging to its stockholders. In some sense a bank may be said to be indebted to its stockholders for the capital they have paid in. With the leave of the State, they have a right to withdraw it, after all debts are paid, and, if the State is itself the sole stockholder, it may withdraw its capital while any of it shall remain. But, from the very nature of things, it cannot withdraw capital from an insolvent bank, because it has none of their capital remaining. When insolvent, its assets belong solely to its creditors.

It is unnecessary, therefore, to decide what were the rights and powers of the State, in respect to any portion of these funds, while the bank continued solvent. When it became insolvent, when its entire property was insufficient to pay its debts, it no longer had any capital stock belonging to the State, and, therefore, none could be withdrawn, without appropriating by law to the use of the State what by the charter stood pledged to creditors, and such a law impairs the obligations of the contracts of the bank, and also the obligation of the contract between the State and the creditors, arising from the provisions of the charter devoting these funds to the payment of the debts of the bank.

In addition to this, it must be observed that the averments of the bill, which are confessed by the demurrer, show that the whole amount of the funds mentioned in the thirteenth section of the charter, which it is claimed the State had the right to withdraw, was $350,753; and that the amount actually withdrawn and appropriated to the use of the State, was at least $400,000. On an investigation of the accounts, these averments might appear to be erroneous; but we are obliged to consider them to be true, as they are confessed on the record.

Our opinion is, that these laws, which withdraw from the bank the sum of $400,000, according to the averments in the bill, cannot be supported upon the ground that the State had the right, as a creditor of the bank, to appropriate these funds to its own use.

Nor can we find sufficient support for the other position, that the laws divesting the bank of its property and vesting it in the State, do not impair the obligations of the plaintiff's contracts, because they were not passed in denial, but in furtherance of the rights of creditors, and to afford them a remedy, and for the prevention of further loss.

Passing over the laws which, upon their face, not only withdrew funds from the bank, but appropriated those funds to the use of the State, and which, therefore, cannot be supposed to be in furtherance of the rights of creditors, or intended to protect them from loss, or not to be in denial of their rights, to so much the property of the bank as was thus withdrawn, there are four acts complained of by the bill, which require examination, with a view to see whether they can be considered as remedial only, and in that point of view consistent with the obligations of the contracts of the plaintiff. The first is the act of January 4, 1845. The seventeenth section of this act is as follows: "That said financial receivers be required to receive, in whole or in part payment of any debt due the bank, the bonds of the State which were sold in good faith to put said

bank and branches in operation, notwithstanding the outstanding circulation of said bank and its branches may not be taken up."

We cannot attribute to this provision of law any other meaning or effect than what is plainly apparent on its face. It authorizes and requires the assets of the bank to be appropriated to pay debts of the State; and we cannot conceive how this can be reconciled with the rights of creditors to those assets, or how it can consist with the execution of a trust in their favor, or how it differs from the other laws appropriating the property of this insolvent bank to the use and benefit of the State.

The circumstances that these bonds were sold by the State, through the agency of the bank, to obtain funds to constitute the capital of the bank, do not make them debts of the bank. They were bonds under the seal of the State, signed by the governor, and countersigned by the treasurer, containing an acknowledgment that the State of Arkansas stood indebted, and a promise by the State to pay. The president and cashier of the bank are empowered to transfer them by indorsement; but no liability, even of the conditional character which arises from the indorsement of negotiable paper by the law merchant, is attached by the charter to these indorsements, and, from the nature of the case, we do not see how any such could have been intended. We do not deem it necessary to determine, whether, under the fifteenth section of the charter, the bank was made liable for the accruing interest on the bonds. It would seem that this section is merely directory to the general board, and was intended to provide for the payment of interest out of expected profits; but however this may be, to suppose that the charter intended the fund raised by the sale of these bonds, and which it held out to creditors as capital of the bank, could, at any time, be appropriated to pay these bonds, leaving the creditors, who had dealt with the bank on the faith of that capital, wholly unpaid, would be to give it a construction not supported by any provision which we have been able to discover in it, and directly in conflict with its manifest purpose and meaning. For in no fair sense can the bank be considered to have had the proceeds of these bonds as so much capital, if it was liable, at the pleasure of the State, to be swept away at any moment to pay the debts which the State had contracted to borrow it. In such a condition of things, these proceeds would be nothing more than a deposit, payable on demand; and to call them capital, and allow the public to trust to them as such, would involve a plain contradiction.

Indeed, upon this construction of the charter, taken in connection with the alleged right to withdraw at pleasure all the other

funds deposited, the bank had no proper capital which was bound by its contracts; and this would render it extremely difficult to maintain the validity of the charter under the tenth section of the first article of the Constitution of the United States, prohibiting the States from emitting bills of credit. It is well known that the power of the several States to create corporations, to issue bills, and transact business for the sole benefit of the State which appointed the corporate officers, and was alone interested in the bank, has been from time to time seriously questioned. The cases of Briscoe *v.* The Bank of Kentucky, 11 Peters, 257, and Darrington et al. *v.* The Bank of Alabama, 13 Howard, 12, have settled this question, in reference to such banks as were involved in those cases. But the principal ground on which such bills were distinguished from bills of credit emitted by the State, was, that they do not rest on the credit of the State, but on the credit of the corporation derived from its capital stock.

But if the charter of the bank has not provided any fund, effectually chargeable with the redemption of its bills, if what is called its capital is liable to be withdrawn at the pleasure of the State, though no means of redeeming the bills should remain, then the bills rest wholly upon the faith of the State and not upon the credit of the corporation, founded on its property. We do not perceive, in the charter of the State Bank of Arkansas, an intention to create such a bank and emit such bills; on the contrary we think it plainly appears to have been intended to make a bank having a real capital, on the credit of which its business was to be transacted; and this intention is necessarily in conflict with the existence of the power anywhere to appropriate the funds of the bank, after it became insolvent, to pay debts of the State contracted to borrow the money which constituted that capital.

By the act of December 23, 1846, the financial receivers were authorized in certain cases to pay judgment creditors in notes of non-resident debtors, provided such judgment creditors would convey to the State all lands of the bank on which they had levied; and by another act, passed on the same day, all conveyances of real estate purchased for, or taken in payment of, any debt due to the bank, were required to be made to the State, and all such titles were declared to be vested in the State. The second section of this law is in the following words: "That the governor is hereby authorized to exchange any property, so taken by the said bank, for an equal amount of the bonds of the State executed for the benefit of said institution; provided that such property shall not be exchanged with the holders of such bonds at less prices than were allowed by the bank for the

same, and that the governor be authorized to make titles and give acquittances for the same; and this act shall take effect and be in force from and after its passage."

If this law had contained only the first section, vesting the real property of the bank in the State, and providing no remedy by which this complainant, as a creditor of the bank, could reach it, we think it would have impaired the obligation of his contracts. True, it does not touch the right of action against the bank; it only withdraws the real property from the reach of legal process, and thus affects the remedy. But it by no means follows, because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of performing it, which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.

This has been the doctrine of this court from a very early period. In Green *v.* Biddle, 8 Wheat. 1, Mr. Justice Washington, delivering the opinion of the court, said: "It is no answer that the acts of Kentucky now in question, are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." In Bronson *v.* Kinzie, 1 How. 311, Mr. Chief Justice Taney, delivering the opinion of the court, and speaking of the above rule, as laid down in Green *v.* Biddle, said: "We concur entirely in the correctness of the rule above stated. The remedy is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which this clause in the Constitution was mainly intended to secure."

The difficulty of determining, in some cases, whether the change in the remedy has materially impaired the rights and interest of the creditor, must be admitted. But we do not think any such difficulty exists in this case. The decision of this court in McCracken *v.* Hayward, 2 How. 608, must be considered as settling this question. In that case the law under consideration provided that a sale should not be made of property levied on under an execution, unless it would bring two thirds of its valuation by three householders. It was held that such a law, so obstructed the remedy as to impair the obligation of the contract. The law now in question certainly presents a far more serious obstruction, for it withdraws the real property of the bank altogether from the reach of legal process, provides no

substituted remedy, and leaves the creditor, as is truly said by the Supreme Court of Arkansas, in its opinion in this case, "in a condition in which his rights live but in grace, and his remedies in entreaty only."

But not only does this law withdraw the real property from the bank, and vest it in the State, but by the second section, the terms of which have been given, the property so withdrawn is expressly appropriated to pay the bonds of the State. An appropriation, which, as has been above stated, cannot be reconciled with the preservation of the rights of creditors, whether those rights are to be protected by existing legal remedies, or in any other manner.

The same observations apply to so much of the act of the 9th of January, 1849, as required the officers of the bank to receive in payment of debts due to the bank, bonds of the State issued to obtain capital to put in operation the Real Estate Bank of the State of Arkansas, which bonds are averred in the bill to have amounted to $2,000,000. If a law which withdrew assets of the bank to pay bonds sold to raise its capital, impaired the obligation of the complainant's contracts, it would probably not be supposed that a law applying such assets to pay bonds of the State sold to raise capital for another bank, could be free from that objection.

It only remains to consider the third question: whether it appears by the record that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof dismissed the complainant's bill.

Each of these laws is specifically referred to in the bill, and its operation upon the property of the bank averred, and made a subject of complaint. If a private person had received assets of the bank in the same manner they are alleged in the bill to have been received by the State, he must have been held amenable to the complainants as a creditor of the bank, in a court of equity. We have already stated that, by the local law of Arkansas, the State stands in the same predicament as a private person, in respect to being chargeable as a trustee, unless it is exempted by force of the laws in question. It necessarily follows, therefore, that the Supreme Court of the State held these laws valid, and that by force of them the State was not subject to the principles upon which it would otherwise have been chargeable.

It is sufficient, to give this court jurisdiction under the 25th section of the judiciary act, that it appears by the record that the question, whether a law of a State impaired the obligation of a contract, was necessarily involved in the decision, and that such law was held to be valid, and the decision made against

the plaintiff in error by reason of its supposed validity. Armstrong *v.* The Treasurer of Athens County, 16 Peters, 281; Crowell *v.* Randell, 10 Peters, 392; McKenney *v.* Carroll, 12 Peters, 66.

The result is, that so much of each of the said laws of the State of Arkansas, as authorized and required the cancellation of the bonds of the State, given for money borrowed of the Bank of the State of Arkansas, or authorized and required the withdrawal of any part of the specie or other property of that bank, and the appropriation thereof to the use of the State, or authorized and required the application of any part of the assets or property of that bank to pay bonds issued by the State and sold to raise capital for the Bank of the State of Arkansas, or for the Real Estate Bank of the State of Arkansas, or authorized and required real property purchased for the Bank of the State of Arkansas, or taken in payment of debts due to the Bank of the State of Arkansas to be conveyed to and the title thereof vested in the State of Arkansas, impaired the obligation of contracts made with the complainant as the lawful holder and bearer of bills of the Bank of the State of Arkansas, and so were inoperative and invalid. And, consequently, the judgment of the Supreme Court of that State must be reversed, and the cause remanded, that it may be proceeded in as the Constitution of the United States requires.

Mr. Justice CATRON, Mr. Justice DANIEL, and Mr. Justice NELSON, dissented.

Mr. Justice CATRON.

As this case comes up from a State court under the 25th section of the judiciary act, the first question presented is, whether we have jurisdiction to decide the merits; and I am of opinion, that no violation of any contract rendered, which the complainant sets up a right to recover, has occurred within the sense of the Constitution, by the laws passed by the State of Arkansas, and which laws are complained of in the bill.

On the merits, I have formed no opinion, not having authority to inquire into them, as I apprehend

Mr. Justice DANIEL.

From the decision of this court, just announced I am constrained to declare my dissent. According to my apprehension there is no legitimate ground of jurisdiction, and of course for the interference of this court in this case, within the just intent and objects of the 10th section of the 1st article of the Constitution. By the legislature of the State of Arkansas, which has

been assailed, the obligation of no contract is denied. The claims of every stockholder and every noteholder of the Bank of the State of Arkansas are, in reference to that corporation, fully recognized. The utmost that can be objected to the action of the State is, that in a contest amongst the creditors of a failing corporation, the State, as one of those creditors, and the largest creditor of the number, may have appropriated to herself a portion of the assets of that corporation greater than would have been warranted by perfect equity, or other equality, amongst all the creditors. But should this conclusion be conceded, the concession implies no attempt to deny or impair any obligation of the bank to satisfy every creditor. It might raise a question of fraud or unfairness in the action of the State in reference to the other creditors of the bank, but it carries with it no interference with the obligation or the sanctity of their contract with the corporation, whatever that might be. The mere question of fraud, in the execution or non-performance of contracts, surely the Constitution never intended to constitute as a means by which the federal authorities were to supervise the polity and acts of the State governments. Such a claim of power in the federal government would justify the interference with, and the supervision by this court of any act of the State legislatures, and of every transaction of private life, and in the necessarily imperfect attempts to exercise such a power, would encumber it with a mass of business, which would disappoint and entirely prevent the performance of its legitimate duties.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of Arkansas, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court, in order that such further proceedings may be had therein, in conformity to the opinion of this court, as to law and justice, and the Constitution of the United States, shall appertain.

REUBEN ANDERSON AND OTHERS, PLAINTIFFS IN ERROR, v. MICHAEL BOCK.

The city of New Orleans sold a lot in the city for a certain sum of money, the payment of which was not exacted, but the interest of it, payable quarterly, remained as a ground rent upon the lot. It was further stipulated, that if two of these payments should be in arrear, the city could proceed judicially for the recovery of possession, with damages, and the vendees were to forfeit their title.

Six years afterwards, the city conveyed the same lot to another person, who transferred it to an assignee.

The title of the first vendee could not be divested without some judicial proceeding, and the dissolution of the contract could not be inferred merely from the fact that the city had made a second conveyance.

Therefore, the deed to the second vendee, and from him to his assignee, were not, of themselves, evidence to support the plea of prescription. The city, not having resumed its title in the regular mode, could not transfer either a lawful title or possession to its second vendee.

The Circuit Court having instructed the jury that, in its opinion, under the written proofs and law of the case, the plea of prescription must prevail, and the written proofs not being in the record, this court cannot test the accuracy of its conclusion.

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

The facts in the case are set forth in the opinion of the court.

It was submitted, on printed briefs, by *Mr. Bemis*, for the plaintiff in error, with a brief by *Messrs. Stockton* and *Steele*, and by *Mr. Benjamin*, for the defendant in error.

Plaintiffs' Points.

I. The charge of the court was manifestly improper and illegal, as the judge stated to the jury, "it was his opinion, that under the written proofs and law of the case, the defence of prescription, set up by the defendant, must prevail."

This was not a deduction for him to draw, but it was peculiarly the province of the jury to decide on the evidence. The defence of prescription involves both matter of fact and law; of the former the jury are exclusive judges, and of the latter they are also judges, under the instruction of the court as to what the law is.

This expression of opinion by the judge, in delivering his charge, could form, legally, no part of the charge.

He does not tell the jury what the law is, but only that, as the law stands, the proofs in the cause make out the defence of prescription.

II. The court erred in charging the jury, that the act of sale from the city to John Clay, dated 18th November, 1816, and the act of sale from Clay to defendant, dated 30th January, 1823,

were of themselves evidence of possession in the defendant and his vendor, Clay, to support the plea of prescription.

Possession is a matter *in pais*, and it cannot be established by a mere paper conveyance of the property.

III. The court erred in refusing to instruct the jury, as required by the plaintiffs, "that by the acts of sale, dated 15th October, 1810, from the city of New Orleans to Sticher and Anderson, the said city transferred to Sticher and Anderson the title and possession of the property, and that neither the title nor possession thereof can be presumed to be afterwards in the city; but, on the contrary, the city must show, by proper evidence, that the title and possession again came lawfully into its hands.

This was simply a requirement, on the part of the plaintiffs, that the court should instruct the jury that the elder title, emanating from the city to Sticher and Anderson, must prevail over the younger title from the city to Clay.

The deeds to Sticher and Anderson were made on consideration of an annual ground rent, to be paid by them for a certain number of years, and the further consideration of a stipulated price, to be paid by them after the term for the continuance of the ground rent should have expired. This term for the continuance of the ground rent had expired many years before the institution of this suit. No complaint has been made that Sticher and Anderson did not pay the considerations stipulated in the deed to them. There can, then, be no good reason why their prior title shall not prevail over the junior title of the defendant.

Defendant's Points.

The first bill of exceptions complains, that "the judge refused to charge the jury, that, by the act of sale, dated 15th October, 1810, from the city of New Orleans, to Sticher and Anderson, the city transferred to them the title and possession of the property; that neither could afterwards be presumed to be in the city, but, on the contrary, the city must show, by proper evidence, that the title and possession came lawfully into its hands;" and further complains that the judge, on the contrary, charged the jury, "that the act of sale from the city of New Orleans to John Clay, dated the 18th November, 1816, and the act of sale from Clay to defendant, dated the 30th January, 1823, were of themselves evidence of possession in the defendant, Bock, and his vendor, Clay, to support the plea of prescription set up by the defendant."

The second bill of exceptions complains that "the judge stated to the jury, that it was his opinion, that, under the written

proofs and law of the case, the defence of prescription, set up by the defendant, must prevail."

Now, in relation to these bills of exceptions, it is to be observed that neither of them pretends on its face to set forth all the evidence offered in the cause, but only a part of the written evidence. As regards the second bill of exceptions, therefore, it is clear that this court is without the means of determining whether the charge of the judge was correct or not; and, in the absence of such means, the presumption of law is, that the judgment of the lower court was supported by the written proofs. For aught that appears in the record, there may have been offered in evidence a written admission by the plaintiffs that the defendant had been in possession, as is alleged in the answer, for a length of time sufficient to establish prescriptive right to the property; or written contracts, receipts, or other documents, proving him to have inclosed and built upon the property, or leased it to tenants, and collected rents. Without a statement showing what the written evidence was, it is impossible to say that there was error in the charge "that under the written proofs and law of the case, the defence of prescription must prevail."

In order to determine the propriety of the charge complained of in the first bill of exceptions, the issues presented by the pleadings must be taken into consideration.

The petition alleges possession by the defendant, but asserts the possession to be unlawful.

The answer admits the possession, and asserts it to have been lawful under just title for upwards of thirty years, and sets forth the deed under which the possession was acquired, to wit, the deed of 30th January, 1823.

The fact of possession being thus asserted by both parties, the only question was, whether the possession was lawful, or in good faith.

It appears, by the bill of exceptions, that the defendant showed, as the basis of his possession, the deed from Clay, of 30th January, 1823, being at a date twenty-seven years anterior to the institution of the suit.

By reference to the act of sale to defendant, it will appear, that when it was executed, "Michael Bock, being present, declared that he accepts this act of sale and conveyance, is in possession of the said property, and contented therewith." This deed was in evidence without objection, exception, or reservation.

Now the article 2455, of the Civil Code, provides that "the law considers the tradition or delivery of immovables as always accompanying the public act which transfers the property."

The judge, therefore, had before him,

1st. The admission by plaintiffs of the fact of defendant's possession.

2d. The proof that this possession had originated in 1823, and was held by virtue of the sale made in that year, as recited in the deed itself.

3d. The legal presumption established by article 2455 of the actual delivery of the immovable sold.

4th. The absence of any allegation or pretence by plaintiffs of adverse possession in themselves or any other person than the defendant between the year 1823 and the institution of the suit.

The article 3442 of the Civil Code provides that "he who acquires an immovable in good faith and by a just title, prescribes for it in ten years, if the real owner resides in the State, and after twenty years if the owner resides out of the State."

It is obvious, from these premises, that the sole question before the court and jury was, whether the defendant had acquired a good title by prescription, and that the court did not err in charging the jury that the defence had been established.

The prayer of the plaintiff that the judge should charge the jury in relation to the effect of the sale from the city to Sticher and Anderson, was properly refused, because wholly irrelevant. The question was not whether Sticher and Anderson had acquired a valid title in 1810, but whether the defendant had subsequently acquired a good title to the same property by prescription, and the judge properly confined his charge to the latter inquiry, the only one relevant to the issue.

The language of the charge is, that the acts of sale set up by defendants "were of themselves evidence of possession in the defendant, Bock, and his vendor, Clay, to support the plea of prescription."

The Judge did not charge that these acts were conclusive or sufficient proofs, but that they were evidence of possession; and that they were evidence is fully established by the terms of the article 2455, above quoted. See also articles 3405, 6, 7, 3414, 3450.

The point in dispute is fully settled in the jurisprudence of Louisiana.

In the case of Ellis *v.* Prevost et al., 13 La. Rep. 230, 235, the principle is thus stated: "No physical act, in taking possession under a sale by notarial act, is necessary. The intention of the purchaser, which the law presumes, coupled with the power which the act of sale gives, vests the possession in him. The right is taken for the fact, and he is seised of the thing corporally. Article 3405 goes on to provide that when a person has

once acquired corporal possession, the intention which he has of possessing suffices to preserve it in him, although he may have ceased to have the thing in actual custody."

It is, therefore, respectfully submitted that the plaintiffs have failed to show error as alleged, and that there is no legal ground for disturbing the verdict and judgment of the lower court.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiffs commenced a petitory action, as heirs at law of Thomas Anderson, to recover a lot of land in the city of New Orleans, of which they aver he died seised and that the defendant wrongfully detains.

The defendant denied their claim to the property, and pleaded prescription under a just and valid title, with undisputed possession for upwards of thirty years.

Upon the trial, the plaintiffs produced a conveyance of the lot by a notarial act from the city of New Orleans to Sticher and Anderson, dated in 1810, upon the consideration of fifteen hundred and eighty dollars. This sum was to remain a charge upon the lot, and the interest upon it, at the rate of six per cent. per annum, was to be paid in quarterly instalments. Upon a failure to pay two of these instalments, the city was authorized to proceed judicially for the recovery of possession, and for the damages arising from a deterioration of the property, and the vendees were to forfeit their title. The other stipulations in this conveyance are immaterial to the decision of the case.

The defendant relied upon a notarial act from the city of New Orleans, dated in 1816, conveying the property in the same lot to one Clay, upon a contract of sale, and an act dated in 1823 from Clay conveying the property to the defendant. In each of these the vendees acknowledge that possession of the lot had been delivered at the date of the deeds.

The plaintiffs requested the court to instruct the jury that the city of New Orleans, by the notarial act of 1810, had transferred to Sticher and Anderson the title and the possession of the property, and that neither the title nor the possession can be presumed to be afterwards in the city, but that the city should show that the title and possession came lawfully into its hands. This request was refused by the court, and the jury was instructed that the deeds from the city to Clay of 1816, and from Clay to the defendant in 1823, were of themselves evidence of possession in the defendant and his vendor to support the plea of prescription. The court further instructed the jury that, under the written proofs and law of the case, the plea of prescription must prevail. These instructions were excepted to, and are here assigned as error.

The conveyance from the city to Sticher and Anderson, of 1810, was upon a resolutory condition. The contract between the parties was not dissolved of right by the non-fulfilment of the condition, but the party complaining of the breach might have insisted upon its dissolution, with damages, or upon a specific performance. C. C. 2041, 2042.

The dissolution of the contract for the non-fulfilment of the conditions, could not be inferred merely from the fact of a subsequent conveyance by the city of the same property. The title of the city to the lot passed to Sticher and Anderson by the notarial act of 1810, and, to sustain a posterior conveyance of the city, it should have been shown, either that the first contract had been revoked, or that another title had been acquired. The court erred, therefore, in refusing the instruction requested by the plaintiffs.

2. To sustain a title by prescription to immovable property, according to either of the articles of the civil code, referred to in the pleas, the defendant was required to show "a public, unequivocal, continuous, and uninterrupted possession," "under the title of owner." "The possessor must have held the property in fact and in right as owner," "though a civil possession would suffice, if it had been preceded by the corporeal possession." C. C. 3466, 3467, 3453; Devall *v.* Choppin, 15 Lou. 566.

The court has been referred to the civil code, (C. C. 2455,) to prove that the claims of the articles of the code we have cited are fulfilled by the public acts produced by the defendants. This article is "that the law considers the tradition or delivery of immovables as always accompanying the public act which transfers the property. Every obstacle which the seller afterwards imposes, to prevent the corporeal possession of the buyer, is considered as a trespass."

This article was designed to declare the operation of a contract for the transfer of property when embodied in a public act, as between the parties to the act. It establishes, that the transfer is complete by the use of apt words of conveyance in such an act, without the formality of a real delivery; that the power of control and enjoyment, transferred by a grantor in such an act, is equivalent to a manual or physical tradition. So exactly the equivalent, that an "interfering obstacle," interposed by the grantor afterwards, may be treated as a trespass — that is, a disturbance of the possession of the grantee.

This rule from the Louisiana code, corresponding with that of the code Napoleon, deviates from the rule of the Roman and feudal law, which exacted a formal delivery, to perfect the transfer of the property.

The rule is in complete harmony with the American system of conveyancing, which accomplishes the cession of property, with its incidents of possession and enjoyment, without a resort to symbolical acts, or inconvenient ceremonies, by the consent of the owner, legally authenticated.

This explanation of the object of the article of the code, will enable us to define the limits of its operation. A vendor cannot transfer a title, or a possession, which is not vested in him. He cannot, by his conveyance or admissions, affect the claims of persons whose title is adverse to his. It follows, therefore, that the recitals in these acts, that possession had been delivered, and that the vendor was satisfied therewith, are not evidence of that corporeal possession, which is the foundation of a prescriptive right, in a case like the present. Tropl. De Vente, § 36, 40; C. C. 2233, 2235; Emmerson v. Fox, 3 La. R. 183; Ellis v. Prevost, 19 La. 251.

3. As a general rule, the possession necessary to sustain a prescription is founded upon facts, which it is the province of a jury to ascertain. Ewing v. Burnet, 11 Pet. R. 41; Beverly v. Burke, 9 Geo. R. 440.

But the "written proofs," upon which the Circuit Court felt authorized to instruct the jury that the plea of prescription must prevail, are not exhibited in the record, and this court cannot, therefore, test the accuracy of its conclusion.

For the errors in the charge that we have noticed, the judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions for further proceedings to be had therein, in conformity to the opinion of this court.

Ross Winans, Plaintiff in Error, v. Adam, Edward, and Talbot Denmead.

A patent was taken out for making the body of a burden railroad car of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached.

The claim was this. "What I claim as my invention and desire to secure by letters-patent, is, making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions and does not tend to change the form thereof, so that every part resists its equal proportion, and by which also the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the centre of gravity of the load without diminishing the capacity of the car as described. I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame and the draught bar, through the body of the car substantially described."

This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result.

Hence, where, in a suit brought by the patentee against persons who had constructed octagonal and pyramidal cars, the District Judge ruled that the patent was good for conical bodies, but not for rectilinear bodies, this ruling was erroneous.

The structure, the mode of operation, and the result attained, were the same in both, and the specification claimed in the patent covered the rectilinear cars. With this explanation of the patent, it should have been left to the jury to decide the question of infringement as a question of fact.

This case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland.

It was an action brought by Ross Winans for the infringement of a patent-right. The jury, under the instruction of the District Judge, the late Judge Glenn, then sitting alone, found a verdict for the defendants; and the plaintiff brought the case to this court by a writ of error.

The nature of the case is set forth in the explanatory statement prefixed to the argument of the counsel for the plaintiff in error.

It was argued by *Mr. Latrobe*, for the plaintiff in error, and by *Mr. Campbell*, for the defendant in error.

Statement and points of plaintiff in error.

On the 26th June, 1847, Ross Winans, the plaintiff in error, obtained letters-patent of the United States, for a new and useful improvement in cars for transportation of coal, &c.

The occasion for the invention thus patented, and the principle of it, are well set forth in the specification, thus,—

"The transportation of coal, and all other heavy articles in lumps, has been attended with great injury to the cars, requir-

ing the bodies to be constructed with great strength, to resist the outward pressure on the sides, as well as the vertical pressure on the bottom, due, not only to the weight of the mass, but the mobility of the lumps amongst each other, tending 'to pack,' as it is technically termed. Experience has shown, that cars on the old mode of construction cannot be made to carry a load greater than their own weight; but, by my improvement, I am enabled to make cars of greater durability than those heretofore made, which will transport double their weight of coal.

"The principle of my invention, by which I am enabled to obtain this important end, consists in making the body, or a portion thereof, conical, by which the area of the bottom is reduced, and the load exerts an equal strain on all parts, and which does not tend to change the form, but to exert an equal strain in the direction of the circle; at the same time this form presents the important advantage, by the reduced size of the lower part thereof, to extend down within the truck and between the axles, thereby lowering the centre of gravity of the load."

The specification then gives a detailed description of the mode of constructing the cars in question, and proceeds thus: —

"What I claim as my invention, and desire to secure by letters-patent is, making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which also the lower part is so reduced as to pass down within the truck frame, and between the axles, to lower the centre of gravity of the load, without diminishing the capacity of the car as described."

And the specification concludes with a claim for a portion of the construction, not important in this connection.

From the testimony it appears that cars, constructed by the plaintiff, in accordance with the specification, while they weighed but 5.750 lbs. each, carried 18.550 lbs. of coal — making the weight of the load, in proportion to the weight of the car, as 3.3 to 1 — that the thickness of the sheet iron used in the construction of the bodies was but 3.32ds of an inch, and that the dimensions of the band around the top were ¼ of an inch by 2 inches; and it is further shown, in illustration of the importance of the invention, that the plaintiff had constructed a model car, which, weighing but 2¼ tons, carried, nevertheless, 9¾ tons of coal "in perfect safety and satisfactorily from Cumberland to Baltimore." The proportion of the weight of the car, in this instance, to the weight of coal carried in it, was as 1 to 4 nearly. It appears further, from the testimony, generally, that

the cars referred to were used in the transportation of coal from the mines near Cumberland to Baltimore.

It then appears that the defendants, "in view for a call for cars from the mining roads near Cumberland," in 1849, '50, required their draftsman, Cochrane, to get up a car that would suit their purposes; that he went to the Reading road, and "finding nothing there, returned to Baltimore, and went to the plaintiff's shops, where he saw a car nearly finished, which he examined and measured." That it first occurred to him to make a square car, but that, as this would interfere with the wheels, he made an octagonal one.

Another witness proves, that the iron used in the car, thus built by the defendants, was of the same thickness as that used by the plaintiff, to wit, 3.32ds of an inch, while the band around the top was of the same thickness, — to wit, ¼ of an inch, and 1¼ inches in width.

It thus appears that a patent was granted, in 1847, to Ross Winans for a car for carrying coal, whose merits may be summed up thus; — that it carried more coal in proportion to its own weight than any car previously in use, and that the load instead of distorting it, preserved it in shape, acting as a framing.

These eminent advantages, which increased the available power of the locomotive engine, looking to revenue on coal as a freight, from 50 to 100 per cent. were to be attributed to the peculiar shape of the car body, consisting of a frustum of a cone, which permitted the use of iron, as thin as has been described, lessening, in proportion, the weight of the car, or the weight, the transportation of which by the locomotive gave no return in revenue; and it appears that, in view of obtaining the best results from his invention, the plaintiff, in 1849, '50, at the instance of the witness Pratt, perfected a model car for certain mining roads near Cumberland; — that this model car was examined and measured by the defendant's draftsman, to aid him in getting up coal cars for other mining companies in 1849 and 1850; and, subsequently, cars of the same weight of material in the bodies, which differed from the plaintiff's in this only, that while the latter were cylindrical and conical, the others were octagonal and pyramidal, — were built by the defendants, to the number of 24.

Believing that the cars thus built by the defendants were built in palpable violation of his patent, the plaintiff brought the present suit.

It will be seen, by examining the record, that the main question before the jury was, whether the cars, so built by the defendants, were substantially the same in principle and mode of operation with the car described and claimed by the plain-

tiff in his specification, and experts were examined on both sides on this point.

On the part of the defendants it was contended, that the cars of the defendants were octagonal in shape, while the plaintiff's were cylindrical.

On the part of the plaintiff it was insisted, that this was immaterial, provided the octagonal car obtained the same useful results, through the operation of the same principles in its construction; and it was suggested that, if the original construction of the body in right lines saved the infringement, an hundred-sided polygon would be without the patent; and also that, in point of fact, even the conical car was oftener a polygon than a true curve, owing to the character of the material from which it was built; and that if, by accident, it came from the shops a true theoretical cone, a day or two's use made a polygon of it; and that the immediate tendency of the load of coal, when put into an octagon car, was to bulge out its size and convert it into a conical one. All of which was urged for the purpose of showing that the question was necessarily a question as to whether the change of form was colorable or substantial — a question of fact, which it belonged to the jury to determine.

It is not necessary, in this statement, and in view of the questions arising on this appeal, to go into evidence in regard to the merely colorable difference of construction in detail. All the witnesses, on both sides, proved that the advantages which Winans proposed to obtain were substantially obtained in the defendant's cars — the plaintiff's witnesses swearing to the fact directly, and the defendant's witnesses admitting it on cross-examination; and the only testimony quoted now is that of the defendant's own and leading witness.

"That the advantage of a reduced bottom of the car thus obtained, whether the car was conical or octagonal; that the strengthening of the bottom, due to the adoption of the conical form, was the same when the octagonal form was adopted or the circular; that the circular form was the best to resist the pressure, as, for instance, in a steam boiler, and an octagonal one better than the square form; that the octagonal car was not better than the conical car; that for practical purposes, one was as good as the other; that a polygon of many sides would be equivalent to a circle; that the octagon car, practically, was as good as the conical one; and that, substantially, witness saw no difference between the two."

The testimony must indeed be all one way, where the plaintiff is willing to rest his case on the defendant's own showing.

In the view of the plaintiff below, there were two questions; the first for the court, being the construction of the patent; the

second for the jury, being the substantial, or only colorable difference between the cars in principle and mode of operation.

The plaintiff prayed the Circuit Court (his Honor, the late Judge Glenn, sitting alone) accordingly.

In framing the prayer for the court's construction of the specification, the language of the specification was adopted, in describing the object of the invention; and the court were asked to say to the jury, "that what they had to look at was not simply whether, in form and circumstances, which may be more or less immaterial, that which had been done by the defendant varied from the specification of the plaintiff's patent, but to see whether, in substance and effect, the defendants, having the same object in view as that set forth in the plaintiff's specification, had, since the date thereof, constructed cars which, substantially, on the same principle and on the same mode of operation, accomplished the same result." And to give more certainty to the prayer, the plaintiff added the instruction as prayed for by him, "that to entitle the plaintiff to a verdict, it was not necessary that the body of the defendants' cars should be conical, in the exact definition of the term, provided the jury should believe that the form adopted by the defendants accomplished the same result, substantially, with that in view of the plaintiff, and upon substantially the same principle and in the same mode of operation."

The language of the first part of the prayer, here quoted, was taken *verbatim*, nearly, from the charge of Sir N. C. Tindal to the jury in the case of Walton v. Potter and Horsfall, Webster's Pat. Cases, 587.

This was a case where the plaintiff's patent was for the substitution of sheets of India rubber for leather for the insertion of the teeth, in the manufacture of cards for carding wool; and the infringement lay in the use of cloth saturated with a solution of India rubber for the same purpose; and the court, after determining the construction of the specification, gave substantially the same instruction that the plaintiff prayed for here. It is in this case that C. J. Tindal says, "That if a man has, by dint of his own genius and discovery, after a patent has been obtained, been able to give the public, without reference to the former one, or borrowing from the former one, a new and superior mode of arriving at the same end, there can be no objection to his taking out a patent for that purpose. But he has no right whatever to take, if I may so say, a leaf out of his neighbor's book, &c."

It would be hard indeed to find a case where the court's decision, applied to the facts in this cause, more completely negatived the right, set up by the defendants, to build the cars

which they did build; for here, the taking of the leaf out of the book is not left to inference, but day and date are given for the act.

To the same point is the case Huddart v. Grimshaw, also cited in the court below. Webster's Patent Cases, 95.

Here a patent had been obtained for making rope, a part of the process being the passage of the strands, while being twisted, through a tube; and it appeared that they had formerly passed through a hole in a plate. If the tube and the plate were the same, substantially, the difference being colorable only, then the patent was void, otherwise it was good; and the question was left to the jury, who found for the plaintiff.

To the same point is the case of Russell v. Cowley & Dixon, Webster's Patent Cases, 463.

This was the case of a patent for welding iron tubes, by drawing them, at a welding heat, through a conical hole. The infringement was the passing them between rollers; and the question of colorable or substantial difference, was referred to the jury.

So in the case of Morgan v. Seaward, Webster's Patent Cases, 170, which was upon Gallaway's patent for paddle wheels of steam-vessels, and where the question of infringement having arisen, the Court, Alderson, B., told the jury "that the question would be, simply, whether the defendant's machine was only colorably different; that is, whether it differed merely in the substitution of mechanical equivalents for the contrivances which were resorted to by the patentee." And after referring to points of construction, the court continues, "Therefore, the two machines were alike in principle; one man was the first inventor of the principle, and the other has adopted it; and though he may have carried it into effect by substituting one mechanical equivalent for another, still you (the jury) are to look to the substance, and not the mere form, and if it is in substance an infringement, you ought to find so."

So, too, in the case of Crossley v. Beverly, growing out of Clegg's patent for a gas meter; and referred to by Alderson, B., in the case of Jupe v. Pratt and others, Webster's Patent Cases, 144, as follows: "There never was a more instructive case than that. I remember very well the argument put by the Lord Chief Baron, who led on that case, and succeeded. There never were two things to the eye more different than the plaintiff's invention, and what the defendant had done in contravention of his patent-right. The plaintiff's invention was different in form; different in construction; it agreed with it only in one thing, and that was, by moving in the water. A certain point was made to open either before or after, so as to shut up another, and the

gas was made to pass through this opening; passing through it, it was made to revolve it; the scientific men, all of them, said, "the moment a practical, scientific man has got that principle in his head, he can multiply, without end, the forms in which that principle can be made to operate."

As in the case under discussion; the moment a practical, scientific man is furnished with the idea of giving to the car a shape which will, by dispensing with the framing ordinarily used, enable him to make it lighter in proportion to its load, than it has ever been made before, he can multiply without end the forms in which this principle can be made to operate. He can make the car a polygon of an hundred sides, of twenty sides, or of eight sides. He can vary the angle of the cone, or pyramid, through which the coal is discharged, *ad infinitum*. He can make the opening at the bottom larger or smaller to please his fancy. He can avail himself or not of the advantage of lowering the car, in position, so as to lower the centre of gravity. Still the question must always be, whether, whatever the shape he adopts, he is not availing himself of the principle first suggested by the patentee; a question which, in a court of law, is at all times a question not for the court, but the jury; after the former shall have given to the specification that construction which is to govern the latter in determining whether the infringement complained of falls, substantially, in principle and mode of operation, within the plaintiff's patent.

The authorities here cited, and which were relied on in the court below, are held to sustain the prayer of the plaintiff; that, having pronounced upon the construction of the specification, the question of infringement should be left to the jury.

The court below thought differently, however, and, rejecting the prayers of both plaintiff and defendants, instructed the jury, "That while the patent is good for what is described therein; a conical body in whole or in part, supported in any of the modes indicated for a mode of sustaining a conical body on a carriage or truck, and drawing the same, and for those principles which are due alone to conical vehicles and not to rectilinear bodies; and it being admitted that the defendant's car was entirely rectilinear, that there was no infringement of the plaintiff's patent." See Record, pages 16, 17.

Upon this instruction nothing was left for the jury but to render a verdict for the defendant. The court had not only settled the construction, but the infringement also.

The present appeal is from this decision of the late district judge.

The points of the plaintiff in error are,

1. That the court below erred in the construction which it

gave to the specification, should it be held that this construction limited the plaintiff to the strictly conical form.

And upon this point the authority relied on is the patent itself.

2. That the court below erred, even supposing that its construction of the specification was correct, in excluding the inquiry whether the cars of the defendants were not substantially the same in principle and mode of operation with those of the plaintiff; admitting that these last were rectilinear in their sections and not curvilinear.

And upon this point the authorities relied on, are, Walton *v.* Potter, Webster's Patent Cases, 587; Huddart *v.* Grimshaw, Id. 95; Jupe *v.* Pratt, citing Crossley *v.* Beverly, Id. 144; Morgan *v.* Seaward, Id. 170; Russel *v.* Crowley, Id. 463; Phillips on Patents, 125, 6, 7.

(Infringement.) Curtis on Patents, 263, 265, 264, 5, 268; Citing, Wyeth *v.* Stone, 1 Story, 273; Odiorne *v.* Winkley, 2 Gall. 51; Gray *v.* James, Peters, C. C. R. 394; Bovill *v.* Moore, Dav. Pat. Ca. 361.

3. That the court below erred in taking the question of fact from the jury.

Upon which point the authorities already cited are relied on.

Defendant's Points.

The defendant in error submits that the court below was right in refusing the prayer on the other side and giving the instruction which it did.

1. As to the rejected prayer of the plaintiff.

This prayer asserted the essence of the invention to consist in the conical form adopted by the patentee, and rightly so asserted, but the conclusion thence drawn was a *non sequitur.* It was that any other form was a violation. Had the patent claimed the application of a principle operating through the form of a cone, and more or less through other forms, and claimed the principle or mode of operation through whatever shape permitted it, there would have been some ground for the deduction. But the claim is confined to a single form, and only through and by that form to the principles which it embodies; and if, out of many forms embodying more or less perfectly the same mode of operation, the plaintiff in error has made his choice of the best, he is confined to that choice and the rejection which it involves of all other forms less felicitous. It may be admitted, without hesitation, that the substitution of mechanical or chemical equivalents, as they are called, will not affect the rights of a patentee, but the cases in which this principle holds are where the *modus operandi* embraces more than a single way to reach the desired end. Where the invention consists of a principle embodied in

a single form, the form is the principle and the principle the form, and there can be no violation of the principle without the use of the form. Davis v. Palmer, 2 Brockenbrough, 309.

2. As to the court's instruction.

The construction of the patent was exclusively for the judge. He construed it correctly as embracing only a curvilinear form. It necessarily followed that, as the infringements relied on consisted only in the construction of rectilinear forms, there was no evidence to go to the jury of any violation of the patent, and it was proper in him so to instruct them. Greenleaf v. Birth, 9 Peters, 292.

Mr. Justice CURTIS delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States, for the District of Maryland. The plaintiff in error brought his action in that court for an infringement of the exclusive right to make, use, and sell "an improvement in cars for the transportation of coal," &c., granted to him by letters-patent, bearing date on the 26th day of June, 1847; and, the judgment of that court being for the defendants, he has brought the record here by this writ of error.

It appears, by the bill of exceptions, that the letters-patent declared on were duly issued, and that their validity was not questioned; but the defendants denied that they had infringed upon the exclusive right of the plaintiff.

On such a trial, two questions arise. The first is, what is the thing patented; the second, has that thing been constructed, used, or sold by the defendants.

The first is a question of law, to be determined by the court, construing the letters-patent, and the description of the invention and specification of claim annexed to them. The second is a question of fact, to be submitted to a jury.

In this case it is alleged the court construed the specification of claim erroneously, and thereby withdrew from the jury questions which it was their province to decide. This renders it necessary to examine the letters-patent, and the schedule annexed to them, to see whether their construction by the Circuit Court was correct.

In this, as in most patent cases, founded on alleged improvements in machines, in order to determine what is the thing patented, it is necessary to inquire.

1. What is the structure or device, described by the patentee, as embodying his invention.

2. What mode of operation is introduced and employed by this structure or device.

3. What result is attained by means of this mode of operation.

4. Does the specification of claim cover the described mode of operation by which the result is attained.

Without going into unnecessary details, or referring to drawings, it may be stated that the structure, described by this patent, is the body of a burden railroad car, made of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached. This bottom is made movable, in order to discharge the load through the aperture left by removing it.

To understand the mode of operation introduced and employed by means of this form of the car body, it is only necessary to state, what appears on the face of the specification, and was testified to by experts at the trial as correct, that, by reason of the circular form of the car body, the pressure of the load outwards was equal in every direction, and thus the load supported itself in a great degree; that, by making the lower part conical, this principle of action operated throughout the car, with the exception of the small space to which the movable bottom was attached; that, being conical, the lower part of the car could be carried down below the truck, between the wheels, thus lowering the centre of gravity of the load; that the pressure outwards upon all parts of the circle being equal, the tensile strength of the iron was used to a much greater degree than in a car of a square form; and, finally, that this form of the lower part of the car facilitated the complete discharge of the load through the aperture, when the bottom was removed.

It thus appears that, by means of this change of form, the patentee has introduced a mode of operation not before employed in burden cars, that is to say, nearly equal pressure in all directions by the entire load, save that small part which rests on the movable bottom; the effects of which are, that the load, in a great degree, supports itself, and the tensile strength of the iron is used, while at the same time, by reason of the same form, the centre of gravity of the load is depressed, and its discharge facilitated.

The practical result attained by this mode of operation is correctly described by the patentee; for the uncontradicted evidence at the trial showed that he had not exaggerated the practical advantage of his invention. The specification states:

"The transportation of coal, and all other heavy articles in lumps, has been attended with great injury to the cars, requiring the bodies to be constructed with great strength to resist the outward pressure on the sides, as well as the vertical pressure on the bottom, due not only to the weight of the mass, but the mobility of the lumps among each other tending to 'pack,' as

it is technically termed. Experience has shown that cars, on the old mode of construction, cannot be made to carry a load greater than its own weight; but, by my improvement, I am enabled to make cars of greater durability than those heretofore made, which will transport double their own weight of coal," &c.

Having thus ascertained what is the structure described, the mode of operation it embodies, and the practical result attained, the next inquiry is, does the specification of claim cover this mode of operation, by which this result is effected?

It was upon this question the case turned at the trial in the Circuit Court.

The testimony showed that the defendants had made cars similar to the plaintiff's, except that the form was octagonal instead of circular. There was evidence tending to prove that, considered in reference to the practical uses of such a car, the octagonal car was substantially the same as the circular. Amongst other witnesses upon this point was James Millholland, who was called by the defendants. He testified.

"That the advantage of a reduced bottom of the car was obtained, whether the car was conical or octagonal; that the strengthening of the bottom, due to the adoption of a conical form, was the same when the octagonal form was adopted, or the circular. That the circular form was the best to resist the pressure, as, for instance, in a steam boiler, and an octagonal one better than the square form; that the octagonal car was not better than the conical car; that, for practical purposes, one was as good as the other; that a polygon of many sides would be equivalent to a circle; that the octagon car, practically, was as good as the conical ones; and that, substantially, the witness saw no difference between the two."

The district judge, who presided at the trial, ruled,—

That while the patent is good for what [is] described therein, a conical body, in whole or in part, supported in any of the modes indicated for a mode of sustaining a conical body on a carriage or truck, and drawing the same, and to those principles which were due alone to conical vehicles, and not to rectilinear bodies, and it being admitted that the defendants' car was entirely rectilinear, that there was no infringement of the plaintiff's patent.

The substance of this ruling was, that the claim was limited to the particular geometrical form mentioned in the specification; and as the defendants had not made cars in that particular form, there could be no infringement, even if the cars made by the defendants attained the same result by employing, what was in fact, the same mode of operation as that described by the patentee. We think this ruling was erroneous.

Under our law a patent cannot be granted merely for a change of form. The act of February 21, 1793, § 2, so declared in express terms; and though this declaratory law was not reënacted in the Patent Act of 1836, it is a principle which necessarily makes part of every system of law granting patents for new inventions. Merely to change the form of a machine is the work of a constructor, not of an inventor; such a change cannot be deemed an invention. Nor does the plaintiff's patent rest upon such a change. To change the form of an existing machine, and by means of such change to introduce and employ other mechanical principles or natural powers, or, as it is termed, a new mode of operation, and thus attain a new and useful result, is the subject of a patent. Such is the basis on which the plaintiff's patent rests.

Its substance is a new mode of operation, by means of which a new result is obtained. It is this new mode of operation which gives it the character of an invention, and entitles the inventor to a patent; and this new mode of operation is, in view of the patent law, the thing entitled to protection. The patentee may, and should, so frame his specification of claim as to cover this new mode of operation which he has invented; and the only question in this case is, whether he has done so; or whether he has restricted his claim to one particular geometrical form.

There being evidence in the case tending to show that other forms do in fact embody the plaintiff's mode of operation, and, by means of it, produce the same new and useful result, the question is, whether the patentee has limited his claim to one out of the several forms which thus embody his invention.

Now, while it is undoubtedly true, that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly be construed otherwise, and this for two reasons:

1. Because the reasonable presumption is, that, having a just right to cover and protect his whole invention, he intended to do so. Haworth *v.* Hardcastle, Web. P. C. 484.

2. Because specifications are to be construed liberally, in accordance with the design of the Constitution and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain to their own use, not any thing which is matter of common right, but what they themselves have created. Grant *v.* Raymond, 6 Pet. 218; Ames *v.* Howard, 1 Sumn. 482, 485; Blanchard *v.* Sprague, 3 Id. 535, 539; Davoll *v.* Brown, 1 Wood. & Minot, 53, 57; Parker *v.* Ha-

worth, 4 McLean's R. 372; Le Roy v. Tatham, 14 How. 181, and opinion of Parke, Baron, there quoted; Neilson v. Harford, Web. P. C. 341; Russell v. Cowley, Id. 470; Burden v. Winslow, (decided at the present term,) 15 Howard.

The claim of the plaintiff is in the following words:

"What I claim as my invention, and desire to secure by letters-patent, is making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the centre of gravity of the load without diminishing the capacity of the car as described.

"I also claim extending the body of the car below the connecting pieces of the truck frame, and the line of draught, by passing the connecting bars of the truck frame, and the draught bar, through the body of the car, substantially as described."

It is generally true, when a patentee describes a machine, and then claims it as described, that he is understood to intend to claim, and does by law actually cover, not only the precise forms he has described, but all other forms which embody his invention; it being a familiar rule that, to copy the principle or mode of operation described, is an infringement, although such copy should be totally unlike the original in form or proportions.

Why should not this rule be applied to this case?

It is not sufficient to distinguish this case to say, that here the invention consists in a change of form, and the patentee has claimed one form only.

Patentable improvements in machinery are almost always made by changing some one or more forms of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result. And, in the numerous cases in which it has been held, that to copy the patentee's mode of operation was an infringement, the infringer had got forms and proportions not described, and not in terms claimed. If it were not so, no question of infringement could arise. If the machine complained of were a copy, in form, of the machine described in the specification, of course it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors would be valueless, if it

were enough for the defendant to say, your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed.

The answer is, my improvement did not consist in a change of form, but in the new employment of principles or powers, in a new mode of operation, embodied in a form by means of which a new or better result is produced; it was this which constituted my invention; this you have copied, changing only the form; and that answer is justly applicable to this patent.

Undoubtedly there may be cases in which the letters-patent do include only the particular form described and claimed. Davis v. Palmer, 2 Brock. 309, seems to have been one of those cases. But they are in entire accordance with what is above stated.

The reason why such a patent covers only one geometrical form, is not that the patentee has described and claimed that form only; it is because that form only is capable of embodying his invention; and, consequently, if the form is not copied, the invention is not used.

Where form and substance are inseparable, it is enough to look at the form only. Where they are separable; where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention — for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement; and it is not a defence, that it is embodied in a form not described, and in terms claimed by the patentee.

Patentees sometimes add to their claims an express declaration, to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words. The exclusive right to the thing patented is not secured, if the public are at liberty to make substantial copies of it, varying its form or proportions. And, therefore, the patentee, having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms.

Indeed it is difficult to perceive how any other rule could be applied, practicably, to cases like this. How is a question of infringement of this patent to be tried? It may safely be assumed, that neither the patentee nor any other constructer has made, or will make, a car exactly circular. In practice, deviations from a true circle will always occur. How near to a

circle, then, must a car be, in order to infringe? May it be slightly elliptical, or otherwise depart from a true circle, and, if so, how far?

In our judgment, the only answer that can be given to these questions is, that it must be so near to a true circle as substantially to embody the patentee's mode of operation, and thereby attain the same kind of result as was reached by his invention. It is not necessary that the defendant's cars should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be precisely the same in degree. It must be the same in kind, and effected by the employment of his mode of operation in substance. Whether, in point of fact, the defendant's cars did copy the plaintiff's invention, in the sense above explained, is a question for the jury, and the court below erred in not leaving that question to them upon the evidence in the case, which tended to prove the affirmative.

The judgment of the court below must be reversed.

Mr. Chief Justice TANEY, Mr. Justice CATRON, Mr. Justice DANIEL, and Mr. Justice CAMPBELL, dissented.

Mr. Justice CAMPBELL.

I dissent from the opinion of the court in this case.

The plaintiff claims to have designed and constructed a car for the transportation of coal on railroads which shall carry the heaviest load, in proportion to its own weight.

His design consists in the adoption of the "conical form" "for the body of the car," "whereby the weight of the load presses equally in all directions;" does not "tend to change the form of the car;" permits it "to extend down within the truck," lowering "the centre of gravity of the load," and by its reduced size at the bottom adding to its strength and durability. He claims as his invention, and it is the whole of the change which he has made in the manufacture of cars, "the making of the body of the car in the form of the frustum of a cone."

It is agreed that a circle contains a greater area than any figure of the same perimeter; that the conical form is best suited to resist pressure from within, and that the reduced size at the bottom of the car is favorable to its strength. The introduction of the cars of the plaintiff, upon the railroad, for the transportation of coal, was attended by a great increase of the loads in proportion to the weight of the car. The merits of the design are frankly conceded. Nevertheless, it is notorious, that there does exist a very great variety of vessels in common domestic use, "of a conical form," or, "of the form of the frustum of a cone," for the reception and transportation of articles of prime

necessity and constant demand, such as water, coal, food, clothing, &c. It is also true that the properties of the circle, and of circular forms alluded to in the patent of the plaintiff, are understood, and appreciated, and have been applied in every department of mechanic art. One cannot doubt that a requisition from the transportation companies for cars of a diminished weight, and an increased capacity, upon the machinists and engineers connected with the business, would have been answered promptly by a suggestion of a change in the form of the car. The merit of the plaintiff seems to consist in the perfection of his design, and his clear statement of the scientific principle it contains.

There arises in my mind a strong if not insuperable objection to the admission of the claim, in the patent for "the conical form," or the form of the frustum of a cone," as an invention. Or that any machinist or engineer can appropriate by patent a form whose properties are universally understood, and which is in very common use, in consequence of those properties, for purposes strictly analogous. The authority of adjudged cases seems to me strongly opposed to the claim. Hotchkiss *v.* Greenwood, 11 How. 249; Losh *v.* Hague, Web. Pat. Cas. 207; Winans *v.* Providence Railroad Company, 2 Story, 412; 2 Id. 190; 2 Car. & Kir. 1022; 3 W. H. & Gord. 427.

Conceding, however, that the invention was patentable, and this seems to have been conceded in the Circuit Court, the inquiry is, what is the extent of the claim? The plaintiff professes to have made an improvement in the form of a vehicle, which has been a long time in use, and exists in a variety of forms. He professes to have discovered the precise form most fitted for the objects in view. He describes this form, as the matter of his invention, and the principle he develops applies to no other form. For this he claims his patent. We are authorized to conclude, that his precise and definite specification and claim were designed to ascertain exactly the limits of his invention. Davis *v.* Palmer, 2 Brock. 298.

The car of the defendants is of an octagonal form, with an octagonal pyramidical base. There was no contradiction, in the evidence given at the trial, in reference to its description, nor as to the substantial effects of its use and operation. In the size, thickness of the metal employed in its construction, weight, and substantial and profitable results, the one car does not materially vary from the other. The difference consists in the form, and in that, it is visible and palpable.

The Circuit Court, acting upon these facts, of which there was no dispute, instructed the jury that an infringement of the plaintiff's patent had not taken place. I do not find the ques-

tion before the court a compound question of law and fact. The facts were all ascertained, and upon no construction of those facts was the plaintiff, in my opinion, entitled to a judgment.

In theory, the plaintiff's car is superior to all others. His car displays the qualities which his specification distinguishes. The equal pressure of the load in all directions; the tendency to preserve the form, notwithstanding the pressure of the load; the absence of the cross strain; the lowering of the centre of the gravity of the load, — are advantages which it possesses in a superior degree to that of the defendants'. Yet the experts say that there is no appreciable difference in the substantial results afforded by the two.

The cause for this must be looked for in a source extrinsic to the mere form of the vehicles. Nor is it difficult to detect the cause for this identity in the results in such a source.

The coarse, heavy, cumbrous operations of coal transportation do not admit of the manufacture of cars upon nice mathematical formulas, nor can the loads be adjusted with much reference to exactness. There is a liability to violent percussions and extraordinary strains, which must be provided for by an excess in the weight and thickness of the material used. Then, unless the difference in the weight of the load is great, there will be no correspondent difference in the receipts of the transportation companies.

The patentee, not exaggerating the theoretical superiority of the form of his car, overlooked those facts which reduced its practical value to the level of cars of a form widely variant from his own. The object of this suit is to repair that defect of observation. It is, that this court shall extend, by construction, the scope and operation of his patent, to embrace every form which in practice will yield a result substantially equal or approximate to his own.

In the instruction asked for by the plaintiff, "form and circumstances" are treated as more or less immaterial, but the verdict is claimed if the defendants have constructed cars "which, substantially on the same principle and in the same mode of operation, accomplish the same result."

The principle stated in the patent applies only to circular forms.

The modes of operation in coal transportation have experienced no change from the skill of the plaintiff, except by the change from the rectilineal figure to the circular.

The defendant adheres to the rectilineal form. The result accomplished by the use of the two cars is the same — a more economical transportation of coal. This result it is that the

plaintiff desires to appropriate, but this cannot be permitted. Curtis on Patents, § 4, 26, 27, 86, 87, 88; 2 Story, 408, 411.

In the case of Aiken *v.* Bemis, 3 Wood. & M. 349, the learned judge said, "When a patentee chooses to cover with his patent the material of which a part of his machine is composed, he entirely endangers his right to prosecute when a different and inferior material is employed, and one which he himself, after repeated experiment, had rejected."

The plaintiff confines his claim to the use of the conical form, and excludes from his specification any allusion to any other. He must have done so advisedly. He might have been unwilling to expose the validity of his patent, by the assertion of a right to any other. Can he abandon the ground of his patent, and ask now, for the exclusive use of all cars which, by experiment, shall be found to yield the advantages which he anticipated for conical cars only?

The claim of to-day is, that an octagonal car is an infringement of this patent. Will this be the limit to that claim? Who can tell the bounds within which the mechanical industry of the country may freely exert itself? What restraints does this patent impose in this branch of mechanic art?

To escape the incessant and intense competition which exists in every department of industry, it is not strange that persons should seek the cover of the patent act, for any happy effort of contrivance or construction; nor that patents should be very frequently employed to obstruct invention, and to deter from legitimate operations of skill and ingenuity. This danger was foreseen, and provided for, in the patent act. The patentee is obliged, by law, to describe his invention, in such full, clear, and exact terms, that from the description, the invention may be constructed and used. Its principle and modes of operation must be explained; and the invention shall particularly "specify and point" out what he claims as his invention. Fulness, clearness, exactness, preciseness, and particularity, in the description of the invention, its principle, and of the matter claimed to be invented, will alone fulfil the demands of Congress or the wants of the country. Nothing, in the administration of this law, will be more mischievous, more productive of oppressive and costly litigation, of exorbitant and unjust pretensions and vexatious demands, more injurious to labor, than a relaxation of these wise and salutary requisitions of the act of Congress. In my judgment, the principles of legal interpretation, as well as the public interest, require, that this language of this statute shall have its full significance and import.

In this case the language of the patent is full, clear, and exact. The claim is particular and specific.

Neither the specification nor the claim, in my opinion, embrace the workmanship of the defendants. I therefore respectfully dissent from the judgment of the court, which implies the contrary.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

CLINTON WALWORTH, PLAINTIFF IN ERROR, *v.* JAMES KNEELAND AND HANNAH HIS WIFE, AND FRANCES CORNELIA FOSTER AND WILLIAM FOSTER, INFANTS, BY THEIR NEXT FRIEND, JAMES KNEELAND.

Where a case was decided in a State court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the 25th section of the judiciary act.

The State court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States.

But even if the State court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case.

THIS case was brought up from the Supreme Court of the State of Wisconsin, 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 submitted, on a printed brief by Mr. Smith, on behalf of the plaintiff in error, and argued by Mr. Baxter, for the defendants in error.

The counsel for the plaintiff in error made the following points.

1st. The contract in which this suit originated was made in violation of the act of Congress, approved March 3d, 1807, en titled "An act to prevent settlements being made on lands ceded to the United States, until authorized by law. 2 U. S. Stat. 445.

The first section prohibits the occupation and cultivation of the public lands, under the penalty of forfeiture of all the right and claim of the occupant.

The fourth section provides for the removal of such occupants and their punishment by fine and imprisonment.

At the time all the contracts connected with the land in question, to which Walworth was a party, were made, there was no preëmption law of the United States in force. Every occupant of the public lands was a trespasser and occupied in violation of the act of 3d of March, 1807, unless he had permission pursuant to the provisions of the second section of that act.

2d. The bond of Walworth to Arnold, and the contract in which it originated, were made in violation of the 4th section of the act of Congress, of the 31st of March, 1830. U. S. Stat. vol. 8, p. 278.

3d. These agreements respecting this land between Frisbee and Walworth, Frisbee and Arnold, and Walworth and Arnold, all originated in, and were part of, a combination to hinder and prevent, at first any other person than Frisbee, and after his sale, any other than Walworth from purchasing the land at the public sales of the United States. There was a double combination. Walworth, Arnold, and Frisbee, combined together, and they also combined with and became a part of the general organization of the settlers upon the public lands in the Milwaukie land district, to prevent any one, excepting the actual claimant under the rules of such organization, from purchasing such lands at the public sales.

4th. Frisbee testifies that whether the title was obtained by preëmption or under the claim laws, the title to the land, according to the original contract, was to come to him; that is, he was to purchase direct from the United States, and convey one half to Walworth; and he (Walworth) for that one half was to furnish money to pay for the whole, in addition to the $100 he paid Frisbee at the time of making the original contract. In other words, he was to give something more than the price for which the land should be purchased of the United States.

This contract was clearly within both the spirit and the letter of the act of 31st March, 1830, which declares all such contracts absolutely void.

5th. The contract between Walworth and Arnold, if ever valid, was annulled or rendered impossible to be performed by the act of Congress, passed 18th day of June, 1838, entitled "An act to grant a quantity of land to the Territory of Wisconsin for the purpose of aiding to open a canal to connect the waters of Lake Michigan with those of Rock River.

The counsel for the defendant in error moved to dismiss the

case for want of jurisdiction, and on that motion and on the argument of the case, relied on the following points:

I. Foster, the plaintiff in the court below, purchased from Arnold the land in question, and took the assignment of the title bond executed by Walworth, without any knowledge of, or participation in, the illegality (if any existed) between Frisbee and Walworth. He expended his money in the purchase and improvement of the land, without any design to violate or encourage the violation of law.

He therefore contends that Walworth cannot set up the defence of illegality against him.

1. Because they are not in *pari delicto*.

2. Because he was able to establish his case as stated in his bill, and claim specific performance of the contract, without relying on the illegal contract alleged by Walworth to exist between Frisbee and Walworth.

On this point the defendant in error will rely on the following cases: Faikney *v.* Reynous, 4 Burr. 2070; S. C. 1 W. Blackstone's Rep. 633; Petrie *v.* Hannay, 3 T. R. 418; Simpson *v.* Bloss, 7 Taunt. 246; Fivaz *v.* Nicholls, 2 M. G. & S. 501-52; Eng. Com. Law Rep. 501; Bunn *v.* Winthrop, 1 Johns. C. R. 337; Ellis *v.* Nimmo, Lloyd & Goold, 333; 10 Cond. Eng. C. Rep. 533; Lewis *v.* Davison, 4 Mees. & Wels. 654.

II. This court has not jurisdiction, because the decision of the Supreme Court of Wisconsin does not question the validity of any of the statutes referred to in the assignment of errors, nor has the plaintiff in error set up any right, title, privilege, or exemption under said statutes or any of them.

III. The Supreme Court of Wisconsin has not misconstrued the acts of Congress named in the assignment of errors.

On these points the defendant in error will refer to the acts of Congress and authorities mentioned below.

The Judiciary Act, 1 Stat. at Large, 85, L. & B.'s edition. An act to prevent Settlements, etc. 2 Id. 445. An act for the relief, etc. 4 Id. 391-2. An act to grant, etc., 5 Stat. at Large, 245. An act regulating grants, etc., south of Tennessee, 2 Id. pp. 229-30, §§ 2, 3, 1803. An act supplementary, etc. 2 Id. c. 43, § 5, 1805. An act to authorize the State of Tennessee, etc., 1806, c. 31, § 2, condition and 2d proviso, 2 Id. 383. An act regulating grants of land in Michigan, 1807, c. 34, § 2, p. 438, vol. 2. An act supplemental, etc., 1808, c. 10, § 1, p. 455, vol. 2. 1808, c. 40, § 6, p. 480, an act concerning sales. 1808, c. 67, § 3, p. 503, an act supplemental, etc. Act of 1811, c. 46, § 4, 1st proviso, vol. 2, p. 664, preference given to occupants. 1813, c. 20, § 1, p. 797, preference, in sales in Illinois territory, given to settlers. 1814, c. 61, § 4, p. 126, vol. 3, pre-

emption to settlers in Illinois prior to February 5, 1813. 1815, c. 63, § 3, p. 218, vol. 3. 1816, c. 101, § 1, p. 307, vol. 3. 1816, c. 163, §§ 1, 2, and pp. 330, 331. 1820, c. 86, p. 573. 1826, c. 28, vol. 4, p. 154, preëmptions to settlers in Alabama, Mississippi, and Florida. 1830, c. 208, vol. 4, p. 420. 1834, c. 54, vol. 4, p. 678. 1838, c. 119, vol. 5, p. 251. Piatt *v.* Oliver and others, 2 McLean, 278; Oliver *v.* Piatt, 3 How. 410, 411.

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

This case is brought before us by a writ of error directed to the Supreme Court of the State of Wisconsin.

A bill in equity was filed in the Milwaukie District Court of that State by Gustavus A. Foster, against Walworth, the plaintiff in error, to obtain the specific performance of a contract for the conveyance of a certain quarter section of land described in the bill. The contract under which the complainant claims is set out in the bill; and, as he alleges, was made by Walworth with a certain Jonathan E. Arnold; that the land in question had at that time been surveyed by the government, but not offered for sale; and that Arnold, in pursuance of and in execution of the agreement with Walworth, entered upon and took possession of it, and afterwards assigned his interest to the complainant, who took possession, and still held the possession when his bill was filed; that Walworth had become the purchaser, pursuant to his agreement with Arnold, and obtained a legal title from the United States; and was bound, under that agreement and the assignment of Arnold above mentioned, to convey the land to the complainant.

Foster died pending the suit, and the defendants in error are his legal representatives.

Walworth, in his answer, alleges that the original contract in relation to this land, was between him and a man by the name of Frisbee; that Frisbee transferred his interest to Arnold, who agreed to take his place, and fulfil his part of the agreement; and that the contract with Arnold was made upon that condition. He admits that Arnold conveyed his interest to Foster. He also gives in much detail the several contracts; the understanding of the respective parties at the time, as he alleges it to have been; their acts afterwards; the object of the agreement; and the circumstances under which he afterwards became the purchaser of the land claimed. And he denies that there was any valuable consideration moving from Frisbee or Arnold to him to support the contract; and if there was, he denies the construction given by the complainant to the agreement; and denies, also, that his subsequent purchase from the government was made under it. He alleges that neither Frisbee nor Arnold

performed their part of the contract; and, moreover, that the contract was void, because its object and purpose was to prevent competition for public lands, when offered at auction by the government, and therefore against the policy of the law.

Testimony was taken on both sides; and, at the final hearing, the court, by its decree directed Walworth to convey to the defendants in error the one half of the quarter section in question. Walworth appealed to the Supreme Court of the State, where the decree was affirmed. And this writ of error is brought to revise that decree.

Upon looking into the proceedings in the State court, we should be at a loss to understand how this court could be supposed to have jurisdiction upon this writ of error, over any of the questions decided in the State court, if the printed argument in behalf of the plaintiffs in error had not pointed to the one on which he relies. For we do not see that Walworth set up any right or title under an act of Congress; or that any of the contingencies took place at the trial which give jurisdiction to this court under the twenty-fifth section of the act of 1789.

But it appears that he claims the right to remove the case to this court upon the following ground: He alleges in his answer that, at the time of his contract with Frisbee, and also with Arnold, there was no act of Congress which authorized them to settle on this land, or gave any right of preëmption to those who had settled on them; that they were trespassers, and had illegally combined with a large body of men of like character, who had settled upon the public lands in that district, to prevent them from selling for more than one dollar and twenty-five cents the acre, and to secure to each other at that price the land they had respectively selected. And he further states, that these settlers had adopted rules and established a land office in which their respective claims were to be entered; and had agreed that, if the government refused to grant the right of preëmption at the price above named, and directed them to be sold at public auction, the settlers would, by force and terror—or, as he terms it, "by club or Lynch law"—prevent any one from bidding against the settler for the land he had entered at their land office; and would, by such means, enable him to buy it at the lowest government price, that is, at one dollar and twenty-five cents an acre. And that, under the agreement between Frisbee and himself, Frisbee was to hold possession, and have his claim entered at the settlers' land office; and, if Congress should give the right of preëmption at the lowest government price, he and Frisbee or Arnold were to share in the profits, Walworth to furnish the money to pay for it. And, if no right of preëmption was given, Walworth was to be permitted to buy, under the

settlers' regulations, at that price, and the profits in that case also to be shared between the parties. And that these contracts were in violation of the acts of Congress, in relation to the sales of public lands, and contrary to public policy, and, therefore, void. Such is the substance of his defence on this part of the case, so far as we can gather it from his answer, (which is by no means clear in its statements,) and from the evidence he offered to support it, and the printed argument filed in his behalf.

It is due to the State court to say that, in its decree, it declares that such a contract would be void; and it decreed in favor of the complainants upon the ground that it was not proved, by legal testimony, that either Frisbee or Arnold had undertaken to associate themselves with the illegal combination of settlers, or to use any other unlawful means, to enable Walworth to buy the land in question at a reduced price.

But if it had been otherwise, and the State court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the twenty-fifth section of the act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the State court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. And indeed it would be a novelty in legislation and in public policy if Congress had taken so much pains to provide for the protection of persons who had combined with others to perpetrate a fraud on the United States, and found themselves in the end the sufferers by the speculation; or who, by the error of a State court, had been compelled to share its gains with their associates in the fraud. The right or interest claimed in the State court must be of a very different character, to entitle him to the protection of the act of 1789. It has already been so decided in this court in the case of Udell and others v. Davidson, 7 How. 769.

Neither can the writ of error be supported on the ground that

Walworth was unable to purchase, at one dollar and twenty-five cents per acre, another portion of the land mentioned in the contracts, in consequence of its subsequent cession by the United States to the territory of Wisconsin. Whether that cession, and the enhanced price at which it was held, absolved him from the obligation of performing any part of the contract, depended altogether upon its construction. The rights of the parties did not depend on the act of Congress making the cession, but upon the contract into which they had entered. And the construction of that agreement, and the rights and obligations of the parties under it, were questions exclusively for the State court; and over its decree in this respect this court has no control.

The writ of error must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Wisconsin, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged, by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

Farish Carter, Plaintiff in Error, v. Archibald T. Bennett.

A person was sued in the Territorial court of Florida.
After the admission of Florida as a State, the case was transferred to a State court.
The defendant appeared, and pleaded the general issue.
The verdict was given against him.
He then moved in arrest of judgment, upon the ground that the case ought to have been transferred to the District Court of the United States, instead of a State court.
The motion was overruled, and judgment entered up against him.
Upon an appeal to the Supreme Court of Florida, this judgment was affirmed.
This court has no jurisdiction under the 25th section of the judicary act, to review that decision.
What the State court decided, was the motion in arrest of judgment, where the record only is examined, and no new evidence admitted. There was nothing in the pleadings to show that the defendant was a citizen of Georgia, and no defect of jurisdiction was apparent.
The defendant might have pleaded in abatement, that he was a citizen of Georgia, but not having done so, it was two late to introduce the matter upon a motion in arrest of judgment.

As it does not appear, therefore, that the Supreme Court of the State must have decided adversely to the party now claiming the interposition of this court, and decided so upon the construction of an act of Congress, the writ of error must be dismissed for want of jurisdiction.

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

The case is set forth in the opinion of the court.

Mr. Davis made a motion to dismiss it, for want of jurisdiction, which motion was resisted by *Mr. Johnson*.

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

This case comes before us upon a writ of error directed to the Supreme Court of the State of Florida; and a motion has been made to dismiss it for want of jurisdiction.

The suit was brought by Bennett, the defendant in error, against Carter, the plaintiff in error, in December, 1842, while Florida was yet a territory, and was continued from term to term, until she was admitted into the Union as a State. The action was trover for certain property. The declaration was in the usual form, and the defendant pleaded the general issue of not guilty. After Florida became a State, and the territorial court, in which the suit was pending, ceased to exist, the papers were transmitted by the clerk to the Circuit Court of the State for the same county.

The plaintiff and defendant both appeared in the Circuit Court, and the case was continued until December, 1848, when the parties proceeded to trial — and the jury found for the defendant in error, and assessed his damages at $19,999.66.

Several exceptions were taken to the rulings of the court on the trial, which it is not necessary to mention, because they relate to the laws of the State, over which this court can exercise no jurisdiction upon this writ of error. After the verdict was rendered against him, the plaintiff in error, moved for a new trial. But the motion was overruled by the court. He thereupon offered to prove that he was a citizen of Georgia at the time the suit was instituted in the territorial court, and had continued to be so, and still was a citizen of that State. And this fact being admitted by the opposite party, he moved in arrest of judgment, and that the case be dismissed from the court, with an order to the clerk to transfer the papers to the District Court of the United States for the Northern District of Florida, or hold the papers and proceedings subject to any order of transfer or demand from the said court.

This motion was refused, and judgment entered on the verdict. Whereupon he appealed to the Supreme Court of the State; and the judgment of the Circuit Court being there affirmed, he has brought the case before this court by writ of error.

In support of this writ the plaintiff in error contends, that as he was a citizen of Georgia at the time the suit was brought in the territorial court, and also when the act of Congress of February 22d, 1847, was passed, the suit was, by operation of that law, transferred to the District Court of the United States for the Northern District of Florida, and that the Circuit Court of the State had no right to take possession of the papers in the case, nor any authority to try and decide it; and that, by moving in arrest of judgment upon this ground, he had claimed a right under a law of the United States; and that, as the decision was against the right claimed, he is entitled to a writ of error under the 25th section of the act of 1789.

Upon this motion to dismiss the writ of error, the construction of the act of Congress of 1847 is not before us. In this stage of the case we are not called on to decide whether this act of Congress did or did not, *proprio vigore*, transfer the case to the District Court of the United States. The only question presented by the motion is, whether, upon the record before us, we have a right to reverse the judgment of the State Court. And in order to give this court jurisdiction over the judgment of the State court, it must appear by the record that the right now claimed by the plaintiff in error, to remove the case to the District Court of the United States, was so drawn in question in the State court, that it must have been decided in the judgment it has given.

Now, there is nothing in the pleadings to show that Carter was a citizen of Georgia. It is not so stated in the declaration or plea. And when the papers were transmitted to the State court, he appeared there and defended himself upon the plea of the general issue, which he had put in, in the territorial court. This plea admitted the jurisdiction of the court; and the case was tried and the verdict rendered upon these pleadings. And upon a motion in arrest of judgment the court cannot look beyond the record; and the judgment cannot be arrested, unless there is some error in law or defect of jurisdiction apparent in the proceedings. And here there was no error or defect of jurisdiction apparent on the record, even if the construction of the act of 1847, contended for by the plaintiff in error, is the true one. Both parties, by their pleadings, admitted the jurisdiction of the court; and there was no averment, in any part of them, that Carter was a citizen of Georgia. And after a verdict is rendered, the judgment cannot be arrested by the introduction

of new evidence on a new fact. It may, in a proper case, lay the foundation of a motion for a new trial, but not in arrest of judgment.

It is evident, therefore, that the State court, in proceeding to give judgment on the verdict, could not legally have decided upon the validity of the plaintiff's objection to its jurisdiction. They could not hear evidence, in that stage of the case, to prove that Carter was a citizen of Georgia, nor judicially notice it when admitted by the opposite party. And we are bound to presume that they proceeded to judgment on this ground, and did not consider the right claimed by the plaintiff in error as properly before them.

In an action in a circuit court of the United States, where the jurisdiction depends upon the citizenship of the parties, it has always been held, that where the plaintiff avers in his declaration that he and the defendant are citizens of different States, if the defendant means to deny the fact and the jurisdiction, he must plead it in abatement; and if he omits to plead it in abatement, and pleads in bar to the action, he cannot avail himself of the objection at the trial. Still less could he be permitted to do so upon a motion in arrest of judgment. And the same principles which this court sanction in such cases in the courts of the United States, upon questions of jurisdiction depending upon personal privilege, we are bound to apply to the proceedings in the State court.

Undoubtedly it was in the power of the plaintiff in error, when he appeared to the suit in the Circuit Court of the State, to have pleaded to the jurisdiction, upon the ground that he was a citizen of Georgia. Whether such a plea could have been maintained or not, it is not necessary for us to say. But it would have brought before the court the construction of the act of 1847, and it must have been judicially decided. And if the decision had been against the right he claimed under it, this court would have had jurisdiction to hear and determine that question. But upon the record, as it comes before us, it does not appear that this question was ever presented to the State court in a manner that would enable it judicially to notice or decide it. And the writ of error must therefore be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Florida, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed, for the want of jurisdiction.

ROBERT FORSYTH, APPELLANT, v. JOHN REYNOLDS, JOSIAH E. McCLURE, AND JOHN McDOUGALL.

By two acts, passed in 1820 and 1823, Congress granted a lot in the village of Peoria, in the State of Illinois, to each settler who "had not heretofore received a confirmation of claim or donation of any tract of land or village lot from the United States. Lands granted to settlers in Michigan, prior to the surrender of the western posts by the British government, and which grants were made out to carry out Jay's treaty in 1794, were not donations so as to exclude a settler in Peoria from the benefit of the two acts of Congress above mentioned.

THIS was an appeal from the Circuit Court of the District of Illinois, sitting as a court of equity.

The case was this.

On the 4th day of June, 1850, John Reynolds, Josiah E. McClure, and John McDougall, appellees in the court, filed their bill in the Circuit Court of the United States, for the district of Illinois, against Robert Forsyth, appellant in this court.

The bill sets forth that the complainants claim title to a tract of land situated in the village of Peoria, State of Illinois, and particularly described in said bill, their claim of title commencing with a patent from the United States to one John L. Bogardus, on a preëmption established by him at the land office, in Quincy, Illinois; said patent bearing date January 5, 1838; a copy of which, and also of all the intermediate conveyances from Bogardus to said complainants, are filed with said bill as exhibits.

The bill also avers that said complainants have been for several years in possession of said land, and made valuable improvements thereon, amounting to over three thousand dollars.

The bill further sets forth that in the year 1848, Robert Forsyth commenced an action of ejectment in the said Circuit Court of the United States against one James Kelsey and Joshua P. Hotchkiss, then occupants of said premises, for recovery of a portion of said premises, to which the said Forsyth claimed title under French claim number seven, in said village of Peoria, which claim covered the larger portion of the premises above referred to; the said Forsyth claiming by virtue of an act of Congress, approved May 15th, 1820, entitled "An act for the relief of the inhabitants of the village of Peoria, in the State of Illinois," and also by virtue of another act of Congress, approved March 3, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," in pursuance of which acts a patent issued on the 16th December, 1845, to the legal representatives of one Thomas Forsyth, and to their heirs, a copy of which patent is filed as an exhibit with said bill.

The bill further alleges that said Robert Forsyth, derived all

his title to said French claim by inheritance from the said Thomas Forsyth, the said Robert being one of the sons of the said Thomas, and by purchase from the other heirs of the said Thomas.

The bill further charges that the act of Congress of March 3, 1823, before referred to, excluded the right or claim of any settler in the village of Peoria, who had, before the date of the said act, received a confirmation of claims or a donation of any tract of land or village lot from the United States, and that the grant made by said act was only to such settler, provided he had not received any prior grant, confirmation, or donation.

The bill further charges that, by a regulation of the General Land Office, the appellant, Forsyth, in August, 1845, filed an affidavit with the Receiver of the Land Office, at Edwardsville, to the effect that Thomas Forsyth had not received a prior confirmation or donation, and that said Thomas Forsyth was an inhabitant or settler on lot seven, within the meaning of the act.

The bill further charges that the claim of the said Robert Forsyth, made before the Register of the Land Office at Edwardsville, Illinois, on the 7th September, 1820, and the evidence in support of said claim, show that the same was made by said Forsyth in his own right, and not as the legal representative of any other person.

The bill further charges that the said Thomas Forsyth had, prior to the passage of the act of the 3d March, 1823, received from the United States donations and confirmations of two claims in the Territory of Michigan, under an act of Congress entitled "An act regulating grants of lands in the Territory of Michigan," approved March 3, 1807, and that patents for said claims, were duly issued to the said Thomas Forsyth, in the year 1811, certified copies of which patents are filed as exhibits with said bill.

The bill, after propounding certain interrogatories, concludes with a prayer for a perpetual injunction against the said Robert Forsyth, restraining him from prosecuting his said action of ejectment.

The patent, after the usual grant to Bogardus, concludes with the following proviso: "subject, however, to the rights of any and all persons claiming under the act of Congress of 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois."

The patent recites Thomas Forsyth as claiming "under John Baptist Maillet, and in right of his own occupancy and cultivation," and also recites that it appears from the certificate of the register that "John Baptist Maillet was the inhabitant or settler within the purview of said act of Congress of 1823," and that it

has appeared to the satisfaction of the register and receiver that the said inhabitant or settler did not, prior to said act of 1823, receive a confirmation of claims or donation of any tract of land or village lot from the United States, and that the legal representatives of said Thomas Forsyth, under said Maillet, in virtue of the confirmatory act aforesaid, are entitled to a patent."

On the 31st August, 1850, Forsyth filed his answer, admitting the possession of the premises by complainants, as stated by them, and that the value of the improvements was three thousand dollars, as stated by complainants, that the action of ejectment was brought, as stated in the bill, and that the complainants claimed title under the Bogardus patent.

The answer further sets forth that respondent claims title to the premises, by settlement and occupation, of John Baptist Maillet, previous to the year 1790, and from that time to 1801, and a sale of such possession and occupancy to John M. Coursell, and from him to Thomas Forsyth, and Forsyth's occupancy, under such purchases, from 1802 to 1812; also, by the act of Congress, of May 15th, 1820, above referred to; also, by the report of Edward Coles, Register of the Land Office at Edwardsville, Illinois, in pursuance of said acts of Congress, said report, properly authenticated, being filed with the answer; also, by the act of Congress of March 3, 1823; also, by the survey of the village of Peoria, and of said premises, by the surveyor of public lands in Illinois and Missouri, plats of which are filed with said answer, marked "B" and "C;" also, by the patent to Thomas Forsyth, exhibited with said bill, and by devise from said Thomas to Mary, the sister of respondent, and by death of said Mary without issue, whereupon the premises descended to respondent and his brother, and, by deed, to respondent from his brother, for his interest, duly certified copies of the will of Thomas Forsyth, and of the deed from respondent's brother to him, being filed as exhibits with the answer, and the heirship of respondent and his brother fully appearing in the proof.

The answer further states that respondent can produce no deeds from Maillet to Coursoll, and from Coursoll to Thomas Forsyth, and that it was the custom among the French inhabitants, prior to 1812, to transfer the occupancy of real estate by verbal contract and delivery of possession merely.

The answer further states that respondent knows nothing of the donations and confirmations mentioned in said bill as having been made to said Thomas Forsyth, in Michigan, and never heard of such except from said bill, or a short time before it was filed.

The answer further sets up that said Bogardus never occupied said premises in his own right, but as tenant to one Jacques Mette, and that the said Mette had, on the 4th day of March,

1847, received a patent from the United States for that portion of the premises occupied by said Bogardus, and therefore said Bogardus having never occupied said land in his own right, but only as tenant to said Mette, the said preëmption claim of Bogardus, and the patent issued thereon to him, were void, of all which the answer avers the complainant had notice.

The answer further sets up that even if it should appear in proof that the Thomas Forsyth, referred to in said bill, and respondent's father were the same person, and that said Thomas Forsyth did receive the confirmations in Michigan, described in said bill, nevertheless, said confirmations would not prevent the said Thomas Forsyth from holding said premises in Peoria, under a proper construction of the act of 3d March, 1823.

Exhibits were filed with the answer and proof taken, showing the defendant's title under Thomas Forsyth.

On the 7th June, 1850, the complainants filed an amendment to their bill, setting forth that the John Baptist Maillet mentioned in the patent to the legal representatives of Thomas Forsyth, died about the year 1801, and that neither the said Maillet nor his legal representatives, nor any other person, except the said Thomas Forsyth, ever presented any claim to said lot seven before the officers of the land office at Edwardsville, under the provisions of the acts of Congress before referred to.

On the 26th December, 1850, the respondents filed an answer to the amendment, admitting the death of said Maillet, as therein stated, but insisting that Thomas Forsyth was the legal representative of said Maillet, and authorized to claim said premises before the land officers at Edwardsville, under the act of Congress.

Much proof was taken, by the complainants in the case, to show the identity of the Thomas Forsyth who received the confirmations in Michigan, with the Thomas Forsyth to whose legal representatives the Peoria lot was patented, and who was the father of Robert Forsyth, the defendant.

The defendants took the depositions of Lisette Mette, Antoine Smith, Joseph Aubuchon, Sarah Bouche, and others, by whom it was clearly proven that about sixty years ago John Baptist Maillet occupied the premises at Peoria; that he sold to Coursoll; that Coursoll sold to Thomas Forsyth, who continued to occupy the lot; that these sales were made in the ordinary mode of selling real estate among the French at Peoria at that time, by verbal sale and delivery of possession.

The said Lisette Mette also proved that the said Robert Forsyth, defendant, was the son of said Thomas Forsyth, that she was present at his birth, which took place on the lot in controversy.

It is also proven that Thomas Forsyth died in 1833, leaving three children, to wit: Thomas, Mary, and appellant, and that Mary died without issue, leaving Thomas and appellant her sole heirs. There is no controversy on this point.

The case was heard before the district judge, holding the Circuit Court at the December term, 1852, who decreed a perpetual injunction against the defendant Robert Forsyth, enjoining him from prosecuting said action of ejectment, the decree being on the ground that the confirmation in Michigan to Thomas Forsyth rendered invalid the Peoria patent to his legal representatives, under the act of March 3, 1823.

From this decree Forsyth appealed to this court.

The cause was argued by *Mr. Williams*, for the appellant. Briefs were also filed upon that side by *Mr. Lincoln* and *Mr. Gamble*. *Mr. Chase* argued the case for the appellee; and a brief was also filed by *Mr. Purple*.

The following is the notice of the main point in the case, taken from one of the briefs on the part of the appellant.

The objection made to the patent to Forsyth's representatives is, that Forsyth in his life obtained two confirmations for lands in Michigan Territory.

If the act of 1823 designed to exclude from the grant all settlers who had previously received confirmations or donations of lands or lots, in any part of the Territory of the United States, such design was strangely singular. If it excludes all who had received confirmations, it excludes them without reference to the character of the title confirmed or the consideration for the confirmation. It would place on the same footing, those who, under treaties made by the United States with foreign nations, had obtained confirmations of titles which the United States were bound to confirm; and those who had received from the United States lots or lands as mere gratuities. It should not receive a construction that would make it operate so absurdly, unless such construction is unavoidable. No similar act, with such a restriction upon its operation, can be found among the acts of Congress. It is apparent, from the history of the Michigan titles of Thomas Forsyth, which are employed in this case to defeat the title to this lot in Peoria, that if they can have the effect given to them by the Circuit Court, then a confirmation of a Spanish grant in any part of Louisiana, made by the United States under the clear obligation of the Louisiana treaty, would equally defeat a title to a lot in Peoria claimed under the act of 1823.

The titles in the Michigan land, held by Thomas Forsyth,

were held under the second section of the act of March 3d, 1807, (2 United States Stat. 438,) and they were founded upon possession and improvement of the property prior to July 1st, 1776. The tracts are situated at Gross Point, in the Detroit district. Now, the part of Michigan Territory, in which this land was situated, had been occupied by the British authorities up to June or July, 1796, and the possession and improvement of the land which were to be the basis of the title under the act of 1807, were under British sanction. How then did such occupancy of property, undoubtedly within the territorial limits of the United States, become the foundation of a grant by our government? The treaty of 1794, which provided for the evacuation of all places within our territory occupied by the British troops, required, in its second section, that traders and settlers should be protected in the enjoyment of their property, and should be free to settle the same or retain it for their own benefit. This obligation, assumed by the treaty, was recognized and discharged by the act of 1807, as far as that act extended, and the titles thus acquired were not mere gratuities, but had for their consideration all stipulations in the treaty which our government regarded as beneficial to itself. In respect to their consideration, these titles stand upon the same footing as any others which have been acknowledged and confirmed by our government, under any of the treaties by which we have acquired territory, and by which we become bound to acknowledge and perfect the titles initiated under the former government.

When an individual has acquired a title from our government under the obligation of a treaty with a foreign nation, and therefore for a consideration which that foreign nation has given, we would not expect our own government to make the title, so acquired, a ground for excluding that citizen from any benefit conferred upon a class of citizens in a distant part of the country, upon altogether different considerations, when he belongs to the class intended to be benefited, and has himself given the consideration for the benefit. It would appear to be an unnatural supposition that such was ever the design of our government.

The language of the act of 1823, which excludes from the benefit of the grant those who have obtained previous confirmations or donations, does not require such construction as would exclude a person claiming property in Michigan under the act of 1807. A title to property in Michigan under that act is not a donation, for it rests upon the considerations that moved two sovereign powers to the conclusion of a treaty. The term "confirmation" is applied in different acts of Congress to titles of different origin. In the second section of the act, 3d March, 1807, in relation to land titles in Louisiana, it is used with

reference to titles where there is no other foundation for the claim than possession. 2 United States Stat. 440. In the first section of the act 13th June, 1812, (2 United States Stat. 748,) it is applied in like manner to rights, titles, and claims, resting only upon possession. There are very many acts in which the term is used for the purpose of perfecting claims, when, according to law, the person in possession of the property had no title to it, or right to the possession, and therefore, in such case, the confirmation is a mere gratuity.

The counsel for the appellees thus briefly noticed the point in question.

The claims confirmed to Forsyth, at Gross Point, under the act of the 3d March, 1807, are of the same class and character as the one which he now seeks to enforce in Peoria. Settlement and occupation were necessary to establish the validity of both. No other claim, equitable or legal, is advanced in favor of either. In the one case, the right depends upon a settlement prior to the 1st day of January, 1813; in the other, upon a settlement, and continued occupancy, from before the 1st day of July, 1796, to the passage of the act of 3d March, 1807. In neither case, at the time of the passage of the acts, had the settlers or occupants any title to the lands, derived from any source which the Government of the United States were legally or morally bound to respect. Both were gratuities — mere boons; not at all allied to those cases where grants, concessions, or donations have been made by the officers of foreign governments, under the authority of such governments, previous to the time of the acquisition of the Territory in which they were located by the United States.

It is apparent that the object and design of the reservation in the act of 1823, was to prevent any one from becoming the recipient of the bounty of the government, in lands or lots, more than once; and it is not confined in its operation to any special location, or particular class of cases.

Mr. Justice CATRON delivered the opinion of the court.

The bill seeks to set aside a patent to the legal representatives of Thomas Forsyth, because he had obtained from the United States two other donations of land situate in Michigan, previous to his donation of the village lot in Peoria; and it is alleged that for this reason, his donation certificate and patent were fraudulent, as against the complainants, and should not be set up to their prejudice; and so the court below held.

Waiving, for the present, all consideration of the fact that Forsyth claimed the village lot as assignee of Maillet, who had not obtained any previous "confirmations, or donation;" and

secondly, that the patent to Bogardus was made subject to the rights of all persons claiming lots in Peoria, under the act of 1823; and placing the case on the ground that the Circuit Court did, and then how does the claim to relief stand?

It was assumed by the court below, that Forsyth had received as a donation, the two tracts of land in Michigan, within the meaning of the act of 1823. That the act contemplated a donation we think is true.

A donation is a gift and gratuity, and not a grant of land founded on a consideration, as where the government is bound to make it by treaty stipulation conferring mutual benefits. Thomas Forsyth and his family were Canadian settlers and British subjects, residing on our side of the line, established by the treaty of peace of 1783; they professed allegiance to Great Britain, as all that population did at the date of Jay's treaty, in 1794, and up to July, 1796.

By the sixth article of the treaty of 1783, it was provided that no one should suffer by reason that they took part with Great Britain in the war, "in person or property."

As Great Britain held possession of the country in Michigan, regardless of the treaty of 1783, a principal object of Jay's treaty was to obtain actual possession, and to do this it was necessary to secure the removal of the British troops, and an evacuation of the military posts of that power from our side of the line.

The second article expressly provided for these objects, and at the same time, and as matter of justice, it was declared, that all settlers and traders, within the precincts or jurisdiction of said posts shall continue to enjoy, unmolested, all their property of every kind, and shall be protected therein by the American government; that they may sell their lands and houses, or retain the property thereof at discretion; and that those who continue in the country for one year, after the date of the treaty, shall be considered as having elected to become citizens of the United States.

The 9th article is reciprocal and general, and further provides that British subjects holding lands in the United States shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and that they may sell or devise the same as if they were natives.

As, from 1783 to 1794, no title could be made by Great Britain to lands on our side of the line, within the jurisdiction of the posts, it was for mere settlers, to a great extent, that the 2d article of the treaty provided: persons residing there usually having no other evidence of title than possession, improvements, and actual residence on the land.

To execute in good faith this part of the treaty, Congress pro-

vided, by the act of March 3, 1807, (sec. 2,) that to every person or persons in possession at that date of any tract of land, in his own right, in Michigan Territory, which tract of land was settled, occupied, and improved by him or them prior to the 1st day of July, 1796, or by some other person under whom he or they hold or claimed the right of occupancy or possession thereof, and which occupancy or possession had been continued to the time of passing that act, then the said tract or parcel of land thus possessed, occupied, and improved, should be granted, and such occupant should be confirmed in the title to the same as an estate of inheritance in fee-simple.

The act of 1807 pointed out the mode by which those seeking title under it should proceed. Forsyth's two claims were brought strictly within the terms of the act; he got certificates from the commissioners to that effect, and in 1811 obtained his patents.

The larger tract of 600 acres he claimed by a deed of conveyance from his father, William Forsyth; and the other tract for 336 arpens he held, as one of his father's heirs, by a deed of partition. Both tracts front on lake St. Clair, and were within the jurisdiction of the British posts.

We suppose it is free from controversy, that these two tracts of land were the property of Thomas Forsyth, in 1807, by virtue of the treaty of 1794, and just as plainly property as lands held by a concession in Louisiana, under the Spanish government, by force of the treaty of 1803.

In neither case could a donation be assumed to have been made. As Forsyth obtained no donation in Michigan, he was not within the prohibition prescribed, by the act of 1823, to settlers in the village of Peoria, and, therefore, the decree below must be reversed, and the bill dismissed, but without prejudice to either party, in prosecuting and defending the suit at law, sought to be enjoined by the bill, in regard to matters not hereby decided.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the District of Illinois, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to dismiss the bill of complaint without prejudice to either party, in prosecuting and defending the suit at law, sought to be enjoined by the bill, in regard to matters not hereby decided.

The Executors of John McDonogh, deceased, and others, v. Mary Murdoch and others, Heirs of John McDonogh, deceased.

McDonogh, a citizen of Louisiana, made a will, in which, after bequeathing certain legacies not involved in the present controversy, he gave, willed, and bequeathed all the rest, residue, and remainder of his property to the corporations of the cities of New Orleans and Baltimore forever, one half to each, for the education of the poor in those cities.

The estate was to be converted into real property, and managed by six agents, three to be appointed by each city.

No alienation of this general estate was ever to take place, under penalty of forfeiture, when the States of Maryland and Louisiana were to become his residuary devisees for the purpose of educating the poor of those States.

Although there is a complexity in the plan by which the testator proposed to effect his purpose, yet his intention is clear to make the cities his legatees; and his directions about the agency are merely subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity.

The city of New Orleans, being a corporation established by law, has a right to receive a legacy for the purpose of exercising the powers which have been granted to it, and amongst these powers and duties is that of establishing public schools for gratuitous education.

The civil and English law upon this point compared:

The dispositions of the property in this will are not "substitutions, or *fidei commissa*," which are forbidden by the Louisiana code.

The meaning of those terms explained and defined:

The testator was authorized to define the use and destination of his legacy.

The conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, do not invalidate the bequest, because the Louisiana Code provides that "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals are reputed not written."

The difference between the civil and common law, upon this point, examined:

The city of Baltimore is entitled and empowered to receive this legacy under the laws of Maryland; and the laws of Louisiana do not forbid it. The article in the code of the latter State, which says that "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State," does not most probably apply to the citizens or corporations of the States of the Union. Moreover, the laws of Maryland do not prohibit similar dispositions in favor of a citizen of Louisiana.

The destination of the legacy to public uses in the city of Baltimore, does not affect the valid operation of the bequest in Louisiana.

The cities of New Orleans and Baltimore, having the annuities charged upon their legacies, would be benefited by the invalidity of these legacies. Upon the question of their validity, this court expresses no opinion. But the parties to this suit, viz., the heirs at law, could not claim them.

In case of the failure of the devise to the cities, the limitation over to the States of Maryland and Louisiana would have been operative.

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

The bill was filed by the appellees, as the heirs at law of John McDonogh, to set aside his will.

The will itself is too long to be inserted in this report of the case; it would, of itself, occupy more than thirty printed pages. The reporter adopts the following statement of it, made out by

the following French jurists, whose opinion was requested upon the whole case, viz.: Coin-Delisle, Advocate, late of the Council of the Order of Advocates of Paris; Delangle, late Bastonier of the Order of Advocates of Paris; Giraud, LL.D., a member of the National Institute; Duranton, Père, Advocate, Professor in the Law Faculty of Paris; Marcadé, Advocate, late Advocate in the Court of Cassation.

Statement of the facts of the case.

John McDonogh, a native of Baltimore, an inhabitant of McDonoghville, State of Louisiana, made his olographic will at McDonoghville aforesaid, on the 29th of December, 1838, according to the forms prescribed by the local law.

No question is raised about the form of the instrument; nor could it be otherwise. The Civil Code of Louisiana gives every man the right of making an olographic will. Such a will, in Louisiana, as in France, is one written by the testator himself; and, in order to be valid, it must be entirely written, dated, and signed by the testator's own hand. (Art. 1581.) This kind of will is subject to no other form, and may be made anywhere, even out of the State. (Same art.) These are the same rules as those contained in arts. 970 and 999 of the French Civil Code.

John McDonogh died in October, 1850. His will was proved in due form of law.

This will has been printed at New Orleans, at full length, with the testator's instructions appended, under the title of "The last Will and Testament of John McDonogh, late of McDonoghville, State of Louisiana; also his Memoranda of Instructions to his Executors, &c." We do not mean to give it here *in extenso*, deeming a synopsis of it quite sufficient for our purpose.

The testator, after having called on the holy name of God, commences, by declaring that he was never married, and that he has no heirs living, either in the ascending or the descending line. So that, according to the laws of the State, his power of willing away his property was unlimited. Civil Code of Louisiana, 1483.

He orders that, immediately after his death, an inventory shall be made of his property, by a notary public, assisted by two or more persons, whom his executors shall appoint; the same to be done on oath.

First comes a devise to the children of his sister Jane, the widow of Mr. Hamet, of Baltimore, of land which he purchased on the 29th of February, 1819, of one John Payne, in Baltimore county. This lot, containing ten acres, more or less, together with the improvements, goes to his nephews aforesaid, a life estate in the same being, however, reserved to their mother.

He also bequeathes to his said sister, widow Hamet, six thousand dollars, recommending to her so to place the capital as to make the interest support her in her old age.

He then bequeathes their freedom to certain slaves, fixes a fifteen years' term of service to be performed by certain others on his plantations, and orders the remainder of his black people to be sent to Liberia by the American Colonization Society.

And now, in language expressive of piety towards God, and charity towards mankind, the testator (after having made these deductions for his sister, Mrs. Hamet, for the children of his sister, and for the freedom of a certain number of slaves) goes on to lay down what may be called emphatically his will.

He gives, wills and bequeathes, all the rest, residue, and remainder of his estate, real and personal, present and future, as well that which is now his, as that which may be acquired by him hereafter, at any time previous to his death, and of which he may die possessed, of whatsoever nature it may be, and wheresoever situate, unto the Mayor, Aldermen and Inhabitants of New Orleans, his adopted city, and the Mayor, Aldermen and Inhabitants of Baltimore, his native city, and their successors forever, in equal proportions of one half to each of the said cities of New Orleans and Baltimore.

He wills, at the same time, that the entire mass of property thus bequeathed and devised, shall remain charged with several annuities or sums of money, to be paid by the devisees of his general estate, out of the rents of said estate.

He adds, that the legacies to the two cities are for certain purposes of public utility, and especially for the establishment and support of free schools in said cities and their respective suburbs, (including the town of McDonogh, as a suburb of New Orleans,) wherein the poor, and the poor only, of both sexes, of all classes and castes of color, shall have admittance, free of expense, for the purpose of being instructed in the knowledge of the Lord, and in reading, writing, arithmetic, history, geography, and singing, &c., &c.

This is the principal object of the testator's bounty, as appears by the words which usher in the general devise: "And for the more general diffusion of knowledge, and consequent well-being of mankind, convinced as I am, that I can make no disposition of these worldly goods which the Most High has been pleased so bountifully to place under my stewardship, that will be so pleasing to him, as that by which the poor will be instructed in wisdom, and led into the path of virtue and happiness, I give," &c.

For the execution of his will, and with the unequivocal intent of increasing his real estate, after his death, the testator appoints

executors, to whom he gives the seisin of all his personal estate, corporeal and incorporeal, and clothes them with the most extensive powers, without the interference of judicial or extrajudicial authority.

As relates to his real estate, such as it will be found to be at his death, which estate he has just devised to the cities of New Orleans and Baltimore, he expressly forbids the Mayor, Aldermen and Inhabitants of each of the cities, and their successors, ever to alienate or sell any part thereof; but the cities shall let the lots improved with houses, to good tenants, by the month or year; they shall let the unimproved lots in New Orleans, its suburbs, town of McDonogh, or elsewhere, for a term not to exceed twenty-five years at any one time, the rent payable monthly or quarterly, and to revert back, at the end of said time, with all the improvements thereon, free of cost, to the lessors; and, as to the lands, wherever situate, in the different parishes of the State, the cities shall lease them in small tracts, for a term not to exceed one to ten years, revertible back with their improvements, to be re-leased for a shorter time, and at higher rates.

As concerns his personal estate, (which, as we have seen in the general bequest above, also belongs to the cities of New Orleans and Baltimore,) the testator instructs his testamentary executors to invest his personal estate of all kinds, as well as the amount of all debts owing to him, as fast as they are received, together with the interest and increase, in real estate of a particular description, to wit: lots of ground, improved and unimproved, lying in the city or suburbs of New Orleans, and to hand over said real estate, with the title-deeds, to the commissioners and agents of his general estate, so that, by said means, the whole of his estate, real and personal, shall become a permanent fund on interest, as it were, (viz. a fund in real estate affording rents); no part of which fund shall ever be touched, divided, sold, or alienated, but shall forever remain together as one estate, termed in his will, "the general estate," and be managed, as hereinafter directed. The net amount of the revenues collected annually shall be divided equally, half and half, between the two cities of New Orleans and Baltimore, by the commissioners and agents of the general estate, after paying the several annuities and sums of money hereinafter provided for, and applied forever to the purposes for which it is intended.

The testator, dividing into eight equal portions the revenues of his estate, thus made up of the immovables left at his decease, and of those which shall be acquired by his executors, with the aid of his personalty and the interest accruing on his

credits, gives and bequeathes the first eighth part of the net yearly revenue of the whole, during forty years, to the American Colonization Society for colonizing the free people of color of the United States; but the society shall not receive or demand, in any one year, a larger sum than $25,000.

He gives and bequeathes the second eighth part of the net yearly revenue of the whole to the Mayor, Aldermen, and Inhabitants of the city of New Orleans, until said eighth part of the net yearly revenue of rents shall amount to the full and entire sum of $600,000; and that for the express and sole purpose of establishing an asylum for the poor of both sexes, and of all ages and castes of color.

He gives and bequeathes the third eighth part of the net yearly revenue of the whole to the Society for the Relief of Destitute Orphan Boys of New Orleans, for the express and sole purpose of its being invested in real estate, until the annuity shall amount to the full sum of $400,000, exclusive of the interest which may have accrued on it.

He gives and bequeathes the fourth eighth part of the net yearly revenue of the entire estate to the Mayor, Aldermen, and Inhabitants of the city of Baltimore, for the express and sole purpose of establishing a School Farm, on an extensive scale, for the destitute male children of Baltimore, of every town and village of Maryland, and of the great maritime cities of the United States, until the said eighth part shall amount to the sum of $3,000,000.

There now remains the revenue of one half or four eighths of the revenue of what the testator styles his general estate. The two cities of New Orleans and Baltimore being the principal legatees, it is obvious that they are entitled to the four eighths not bequeathed by a particular title; consequently, it is laid down that, until such time as these four annuities, bequeathed under a particular title, shall have been paid off and expire, the cities of New Orleans and Baltimore shall receive, for the establishment and support of said free schools, one half only of the net yearly revenue of rents of the general estate, and no more.

Moreover, the total amount to be received by each of the legatees of one eighth of the revenue, until the respective sums of $25,000, $600,000, $400,000, or $3,000,000 are realized, shows that one of the annuities is to determine before the others are paid off. The testator, therefore, orders that, as soon as any one of the annuities shall be filled and paid off, the proportions of the net yearly revenue of rents of the general estate, which were payable under the extinct annuity, shall go and be payable to the annuity, bequeathed to the city of Baltimore, for

the establishment of a School Farm; so that the $3,000,000 may be made up in as short a space of time as possible. It will not be till the full and entire discharge of the annuities, that the two cities will divide between them the net yearly revenue of rents of the general estate.

We will now turn our attention to the means and devices adopted by the testator to improve the condition of his particular legatees.

He forbids the alienation of the real estate which he leaves at his death to the two cities; and points out how the houses shall be let for short terms, the unimproved lots let for twenty-five years, at most, so as to be revertible, together with all improvements, to the mass of his estate; and the lands leased out, so as to bring in returns more and more ample.

He also orders his testamentary executors to invest his personalty in houses and building lots in New Orleans and its suburbs.

He has not ordered any thing of the kind for the $25,000 of the Colonization Society (first eighth.) The sum is a small one, and can be paid off in a short time.

But as respects the Society for the Relief of Destitute Orphans, (third eighth,) he gives this third eighth part of the revenues to be first deposited in one or more of the banks in New Orleans, which allow interest on deposits; and then, always with the approbation of the Mayor, Aldermen, and Inhabitants of New Orleans, who shall become parties to the deeds, the said society shall invest the money, as good purchases offer, in houses and lots lying in New Orleans and its suburbs, so that such real estate, once acquired, shall be inalienable, and shall for ever be retained and held by it, and remain its property, in order that the revenue of the said real estate may be sufficient for the support of the institution.

With respect to the particular legacy bequeathed to the city of New Orleans, for the purpose of establishing an Asylum for the Poor, (second eighth,) he orders that, annually or semiannually, the amount of the fractions of eighths be invested, as the commissioners receive it, in bank stocks, or other good securities on landed estate, on interest, so that the capital of $3,000,000, may be thereby augmented up to the time when the last of the annuity shall be received from the general estate; that, after this period, (or even earlier, if a favorable opportunity occur,) one third of the whole (not more) be invested in the purchase of landed estate, in the erection of buildings, and the furnishing of necessary articles; and the remainder, or two thirds at least, invested in the purchase of such houses and building lots, in New Orleans and its suburbs, as will probably

greatly augment in value; which real estate, when purchased, shall never be alienated, but a permanent revenue derived therefrom for the support of the institution.

Again, as regards the particular legacy bequeathed to the city of Baltimore for a School Farm, (fourth eighth,) which legacy is to reach the amount of $3,000,000, to be taken out of the eighth charged therewith, and out of the other three eighths as soon as the other three legacies are finally paid off, the fund must be increased as it is received, by investing the moneys in bank stocks, or other good securities on landed estate, on interest; and this capital, with its increase, shall be invested, for one sixth part at the utmost, in the purchase of such land, animals, and agricultural implements as the institution shall need; and the other five sixths invested in the purchase of houses and building lots situated in the city, suburbs, and vicinage of Baltimore, or of tracts of land in its immediate neighborhood, viz., such lots or lands (to be all purchased under fee-simple titles) as will probably greatly augment in value. And, in this instance too, the real estate, when purchased, is never to be sold or alienated, but is to remain forever the property of the institution, to the end that a permanent revenue may be derived therefrom.

We will now examine the measures taken by the testator to prevent the cities from giving the moneys a different destination from that prescribed by the testator.

Not content with appointing testamentary executors, McDonogh, wishing to debar the city corporations from the handling of moneys, has ordered that there be commissioners of his estate, having a principal and central office in the city of New Orleans, where all the muniments and papers relating to his affairs may be kept, as well for the Asylum for the Poor, for the investment of the moneys due to the Orphan Relief Society, for the School Farm of Baltimore, as for the management of the general estate, or fund for the education of the poor. These commissioners are to have the sole management of the general estate, the leasing and renting of its lands and houses, the cultivating of its estates, the collecting of its rents, the paying of the annuities bequeathed as above, and are to do all acts necessary to its full and perfect management.

These commissioners cannot be members of the City Councils; but they shall be appointed by the City Councils of New Orleans, as regards the Asylum for the Poor; by the Mayor and City Councils, as respects the School Farm at Baltimore, with the style of Directors; by the respective City Councils of New Orleans and Baltimore, as to the management of the fund for the education of the poor.

New appointments shall be made annually, on a day fixed by the will.

The city councils shall have a supervision over their operations; and to them the commissioners are liable for the performance of all their duties, and must annually render an account of their administration.

Besides these commissioners, each city shall have agents on the spot to represent its commissioners; and these agents shall also be appointed by the mayors and city councils.

And, after the payment of the annuities, the respective commissioners, or the agents representing them, shall receive one moiety of the net revenue of the year, to be disposed of conformably to the will.

As for the purchases to be made, before the full payment of the annuities by the Commissioners of the Asylum for the Poor, they must be approved by the Mayor and City Councils of New Orleans. The same rule is laid down for the purchases to be made by the Directors of the School Farm. They must be approved by the Mayor and City Council of Baltimore.

The testator recommends to the Commissioners of the Asylum for the Poor to apply to the legislature of the State of Louisiana for an act of incorporation, subject always, however, to the conditions provided for in the will. He has also recommended, in the same language and under the same conditions, to the Directors of the Farm School, to apply, for the same purpose, to the legislature of the State of Maryland. He recurs to the same idea, using the same phraseology; and with the intent, no doubt, that his general estate should become a juridical person, he also recommends to the commissioners to sue out an act of incorporation for said general estate, always subject to the conditions laid down in the will.

We omit a variety of minute regulations concerning the publication of the annual accounts, the building and locality of school-houses and residences for teachers, the school organization, the immense lands for the Poor Asylum, together with the high-flown disquisitions in which the testator indulges. All this matter appears to be foreign to the controversy. The whole may be reduced to these few words: "The cities are the devisees; but the administration of the property devised shall be carried on forever by commissioners appointed by the cities, and accountable to them; and it shall be the duty of said commissioners to hand over the moneys to the new public institutions which the testator orders to be created."

The testator goes on to say: "No compromise shall ever take place between the Mayor, Aldermen, and Inhabitants of

Baltimore, and those of New Orleans, or their successors, in relation to their respective rights to my general estate."

"Neither party shall receive from the other, by agreement, a certain sum of money annually, or otherwise, for its respective proportions. Neither party shall sell its respective rights under this will, to the general estate, to the other or to others; but said general estate shall forever remain, and be managed, as I have pointed out, ordered, and directed.

"And should the Mayor and Aldermen of New Orleans, and the Mayor and Aldermen of Baltimore, combine together, and knowingly and wilfully violate any of the conditions hereinbefore and hereinafter directed, for the management of the general estate, and the application of the revenue arising therefrom, then I give and bequeathe the rest, residue, remainder, and accumulations of my said general estate, (subject always, however, to the payment of the aforementioned annuities,) to the States of Louisiana and Maryland, in equal proportions, to each of said States, of half and half, for the purpose of educating the poor of said States, under such a general system of education as their respective legislatures shall establish by law, (always understood and provided, however, that the real estate thus destined by me for said purpose of education, shall never be sold, or alienated, but shall be kept, and managed as they, the said legislatures of said States, shall establish by law, as a fund yielding rents forever; the rents only of which general estate shall be taken and expended for said purpose of educating the poor of said respective States, and for no other.) And it is furthermore my wish and desire, and I hereby will, that in case there should be a lapse of both the legacies to the cities of New Orleans and Baltimore, or either of them, wholly or in part, by refusal to accept, or any other cause or means whatsoever, then, both or either of said legacies, wholly or partially lapsed, shall inure, as far as it relates to New Orleans, to the State of Louisiana, and, as far as it relates to Baltimore, to the State of Maryland, that the legislatures of those States, respectively, may carry out my intentions, as set forth in this my will, as far and in the manner which will appear to them most proper."

In October, 1852, the Judge of the District Court, sitting as a Circuit Judge, passed the following decree, viz.

That all that part of the olographic will of John McDonogh, beginning at the second paragraph with the words "It is my will and I direct my executors, (hereinafter named,) immediately after my death, to correspond," &c., on the second page, numbered as the sixth page of the printed copy of the will on file, and ending with the words "or otherways, and held and owned by said corporations," on the 33d page of the said printed copy

of said will, being all and every portion of said will relative to the city of New Orleans, the city of Baltimore, the State of Louisiana, and the State of Maryland, the "general estate," the Colonization Society, a projected asylum in New Orleans, the Society for the relief of Destitute Orphan Boys, a projected school farm in Maryland, free public schools in New Orleans and Baltimore, and the appointment of various boards of commissioners, agents, directors, &c., and for the investment and accumulation of the estate, be, and all said provisions are, declared illegal, null, and of no force and effect whatever; and that as to all the estate of said deceased, except such as is disposed of in the first paragraph of said will, the deceased died intestate, and his estate fell, by his death, to his heirs at law. That complainants are heirs at law of the deceased John McDonogh, in the following proportions, to wit: Maria Louisa Ord, wife of Pacificus Ord, Laura J. Welsh, Thomas Welsh, Frank E. Welsh, and William P. Welsh, minors, represented by their guardian, William F. Murdoch, are heirs of twelve seventieths, ($\frac{12}{70}$ths); one half of said portion being for the said Maria Louisa, and the other half being equally divided between said minors. Anne Cole, Mary Murdoch, wife of William F. Murdoch, Eliza Hayne, wife of George Hayne, George F. Cole, Louisa Sheffey, wife of Hugh W. Sheffey, and the children of Margaret Cole, the deceased wife of George P. Jenkins, namely, George Jenkins, Mary McDonogh Jenkins, and Conway M. Jenkins, minors, represented by their father George T. Jenkins, are heirs of twelve seventieths of the estate. The said Anna, Mary, Eliza, George F., and Louisa, each to take one sixth part of said portion, and the remaining one sixth part thereof to be equally divided between said minors. Sarah Day, wife of Nicholas Day, is heir of twelve seventieths of the estate. Jane Beaver, wife of William Beaver, Sarah Beaver, wife of Jacob Beaver, Robert H. Hammett, Jesse Hammett, Anne Maria Snook, wife of Peter Snook, Eliza Anderson, wife of Joseph C. Anderson, and the children of Margaret Hammett, deceased, (said children not being parties,) are heirs of twelve seventieths of the estate; the said Jane, Sarah, Robert, Jesse, Ann, and Eliza, to take each a seventh part of said portion, and the remaining seventh to be reserved for the children of said Margaret, when they shall make themselves parties, and on due proof. Rosalba P. Lynch, wife of Andrew H. Lynch, is heir of twelve seventieths of the estate; the remaining ten seventieths to be reserved for the heirs of the half-blood, when they shall make themselves parties, and on due proof. That the said complainants recover of the defendants' executors of the will of the deceased all and singular the property, real and per-

sonal, corporeal and incorporeal, composing the estate of the deceased, and especially all and singular the property of the deceased, in the several parishes of the State of Louisiana, mentioned or comprised in the inventory of the succession, prepared by Thomas Layton and Adolph Mazureau, notaries public, a copy of which is in evidence; and that said complainants have execution, and be put in possession of the same, in conformity with law and the rules of court. That reference be made to the master in chancery for an account of the administration of the said executors, from the death of the deceased to the execution of this decree; and that said executors account to the said master in the premises, and that said master report to the court; and so much of the said bill as demands said account and the recovery of any moneys in the hands of said executors, is retained for further decree. That any other person or persons, not now parties to the proceedings, claiming title to the estate of the deceased, or any part thereof, be allowed to present their claims respectively before this court, to make due proofs thereof, and to become parties to the proceedings for the due establishment and adjudication thereof. That the costs of the complainants and of the executors, be paid out of the succession of said deceased, and the costs of the other parties defendant by themselves respectively.

Decree rendered 7th October, 1852.

Signed 26th October, 1852.

[SEAL.] THEO. H. MCCALEB, *United States Judge.*

From this decree, the executors appealed to this court.

It was argued by *Mr. Brent*, *Mr. May*, and *Mr. Hunt*, for the appellants, and by *Mr. Benjamin* and *Mr. Johnson* for the appellees. There were also briefs filed, being adopted by the counsel in this cause, prepared by the French jurists above spoken of, by Mr. Pierce and Mr. Grailhe which were used before the Supreme Court of Louisiana, in a case wherein that State contended that the legacies had become lapsed, and consequently inured, in part, to the benefit of that State.

From all this mass of materials, the reporter can only extract notices of some of the most important points which were discussed.

The counsel for the appellants arranged their arguments under the following heads:

First. That the validity of these legacies and annuities depends exclusively on the local laws of Louisiana.

Secondly. That the exposition of those laws, written or unwritten, by the courts of Louisiana, form part of the local

law, and as such will be followed and respected by the Federal courts, and this, whether expressed by a series of decisions or a single one, pronounced, by the State court "*post litem motam*," or even after the decision of this cause in the United States Circuit Court.

Thirdly. That by the laws of Louisiana, legacies for the benefit of the poor, or for education, or establishments of public utility, are legacies to pious uses, and, as such are preëminently favored and protected by law, so much so, that they shall not be suffered, in any event, to fail, unless found liable to be annulled, as "substitutions or *fidei commissa*."

Fourthly. That the universal legatees (the cities) have legal capacity to take the legacies bequeathed to them.

Fifthly. That legacies like these are, in no respect, subject to the prohibitions against substitutions and *fidei commissum*.

Sixthly. That whatever conditions are found in the annuities or legacies, of an illegal or impossible character, are to be considered as erased from the will, by operation and judgment of law, and no illegal or impossible clause, which is not a condition to the legacies, can prove prejudicial.

Seventhly. That even the lapse or annulment of the annuities, from any cause, they being distinct from the universal legacies, so far from affecting their validity, would benefit them, by inuring, entirely and exclusively, to their increase and benefit.

Eighthly. That the two cities are invested with a sufficient legal title as universal legatees, which is not impeached, either by any subsequent provisions, repugnant to the nature of the ownership instituted in them, or by any illegal or impossible conditions annexed by the testator to his legacies, because the title bequeathed, can well stand without, and discharged from the conditions thus imposed, wherever they may be illegal or impossible.

Ninthly. That this very will of McDonogh has been finally and authoritatively adjudicated by the Supreme Court of Louisiana, to be valid under the laws of that State; and such being the judgment of the highest State tribunal, it is conclusive upon this court, upon all questions involving the laws of Louisiana, and can only be revised, or its authority denied, on the ground that it is, in some respect, in conflict with the Constitution or laws of the United States.

Fifth point. Legacies like these are, in no respect, subject to the prohibitions against substitutions and *fidei commissa*.

Both substitutions and *fidei commissa* are prohibited by the Civil Code, Art. 1507.

The legacies to the cities cannot be brought within the category of either of the four classes of substitutions, known to the civil or Spanish Law. Johnson's Civil Law of Spain, 132.

The vulgar substitution would apply to the substituted legacies over to the States. Johnson's Civil Law, 132.

And the States, therefore, could not take, in the face of the prohibition of Art. 1507, but for the express saving contained in Art. 1508, which declares, that "the disposition by which a third person is called to take the gift, the inheritance, or the legacy, in case the donee, the heir, or the legatee, does not take it, shall not be considered a substitution, and shall be valid."

Nor is there any thing of the "substitution, *fidei commissaria*," which is made by giving it in trust to some one appointed heir, to hold the inheritance for a given time, that he may deliver it afterwards to another." Johnson's Civil Law, 126; Beaulieu *v.* Ternoir, 5 Annual, p. 480. See also the case decided by the Court of Cassation in France, cited in the appendix to this brief.

There is, therefore, nothing of a prohibited substitution in this will, and especially none in respect to the title of the cities.

Fidei commissa are equally prohibited by Art. 1507, but there is this difference, that a prohibited substitution annuls the first legacy, in respect to which there is a substituted legatee, while in the case of a *fidei commissum*, the first legacy is not avoided if the trust, or *fidei commissum*, be to a third party for the benefit of the second, or substituted legatee, and distinct from the first legacy. 5 Annual, 480-1; DuP'essis *v.* Kennedy, 6 L. R. 247.

Therefore, to avoid the title of the cities on this ground, there must be either a bequest, in trust for them, or to them in trust for a third party.

Let us examine the decisions on this question.

In the case of Franklin's will, Chief Justice Eustis declared, that "the prohibition certainly embraced the substitutions, and the *fidei commissum* of the Roman, the French, and the Spanish laws." See page 21 of his opinion.

And, in the same case, he considers *fidei commissum* synonymous with trust, under the English law. And this court has decided the prohibition to extend only to express trusts. Gaines *v.* Chew, 2 Howard, 650.

Now, to constitute a case of strict trust, under the English law, or of *fidei commissum*, under the civil law, the trust must not be for the benefit or use of the trustee.

If a legacy is to A, in trust for his own use, it would not be a trust, either under the English or civil law.

Legacies to corporations, or funds in their possession for public purposes, will be enforced in equity as charitable funds. 2 Spence's Eq. 34; see Attorney-General *v.* Heelis, 2 Sim. & St. 76; Attorney-General *v.* Carlisle, 2 Sim. 427; Attorney-General *v.* Brown, 1 Swanst. 297.

It is true that, in the parlance of English chancellors, a devise to a corporation for the benefit of its poor, or for any charitable purpose connected with the purposes of the corporation, is loosely termed a trust, which chancery will enforce; but though such a dedication to charitable uses be fiduciary in its nature, yet we confidently submit, that a legacy to a corporation for the benefit of its poor, or any establishment of public utility, is not that sort of express trust to which the prohibition in the Code of Louisiana has reference. If an individual is the trustee for a third person, or for the poor, it might be safely admitted, that in both cases it was a *fidei commissum*, because he was a stranger to the beneficiaries, but not so when corporations are the legatees, and the legacies, in the words of this court in Vidal *v.* Girard, 2 Howard, 189, are for purposes "germane to the objects of the incorporation," and "relate to matters which will promote and aid and perfect those objects."

One of the illustrations is furnished in the same opinion of this court, in 2 Howard, 189, where it supposes the case of a devise to Philadelphia "to supply its inhabitants with good and wholesome water."

That might, in some sense, be called a trust, but, "relating to matters which promote, aid, and perfect the objects of incorporation," it could not be considered that sort of trust in which the beneficiary is foreign to the trustee, and therefore prohibited.

But it seems to us that this very question has been conclusively settled by the Supreme Court of Louisiana, in the case of DePontalba *v.* New Orleans, 3 Annual Reports, 662, decided in 1848. See D. R. Richard *v.* Milne, 17 La. Rep. 320.

In that case the testator bequeathed a hospital to the city for the use of lepers, and the city having afterwards, when there were no lepers, converted it into a cemetery, the court held "that the city had a legal title to the property as against the heir at law, though the purpose of the legacy had failed." Now that was undoubtedly a legacy in trust for the benefit of a particular class of the community of New Orleans, and would have been termed by English chancellors a trust, still it was held by the Supreme Court of Louisiana, to be a valid title in the city, notwithstanding the prohibition against "*fidei commissa*," which is not even noticed.

This decision, made under Spanish laws reënacted, is the very civil code which is now relied on to destroy legacies to the same city for the support and education of its poor, has, therefore, in our humble judgment conclusively and clearly exempted from the prohibition of article 1507 all legacies to a city for the benefit of its poor, or any work of public utility, or any purpose "germane to the objects of incorporation."

If these legacies for the "establishment of free schools in Baltimore and New Orleans" be stamped with the character of the prohibited "*fidei commissa*," then you must, under the same article of the code, annul every legacy in trust for any legitimate purpose of the corporation, or for establishments of utility and benefit, and to accomplish that end you must not only declare that legacies to corporations for their own benefit are trusts in the meaning of the law, and as such within the prohibition, but you must reserve and strike down the well-settled construction by her courts of the Civil Code of Louisiana. A doubt would escape the prohibition. Cole *v.* Cole; 7 Martin, (N. S.) 418.

We will here beg leave to incorporate into this argument so much of the opinion of Chief Justice Eustis, pronounced on this will of McDonogh, as relates to this question, and which seems to us unanswerable:

"That, without a positive prohibition, municipal corporations in Louisiana should be incapacitated from receiving legacies for the public purposes of health, education, and charity, seems to me repugnant to all sound ideas of policy and to the reason of the law.

"What legacies could they be expected to receive except for some public or humane object? Who would give a city a legacy, to be absorbed by its debts or appropriated to common expenses? Certainly, so far as the conscience of the public is concerned, a legacy of money to a city without any designation would be held to have been given for some object of charity or beneficence.

"I think there are articles in the code which exclude the conclusion as to the incapacity of the city of New Orleans to take egacies of this kind.

"The article 1536 provides that donations for the benefit of a hospital of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments.

"Provision is made by this article to give effect to donations for the poor made by living persons, *inter vivos*, because in donations of this kind the donor is not bound, and the donation is without effect until the act of donation is signed and accepted by a party competent to receive the donation. The article relates to the form of the act and provides for its acceptance and the completion of the donation, and is not its legality presupposed? Is it not predicated upon the legality of this mode of property for pious uses? Such appears to me to be the obvious intendment of the article.

"There is not the slightest ground for any distinction as to the legality of the holding or ownership by donation *inter vivos*

and *mortis causa*—that is, that the property could be acquired by one donation and not by the other.

"Nor does the law make any distinction between a legacy to the poor of a city, and a legacy to a city for the poor. For in both cases it is a legacy to pious uses, and the city is the recipient. Domat, lib. 4, tit. 2; Sect. 2, § 13; Id. Sect. 6, § 1 et seq.

"The article 1543 provides that when the donation is made to minors, to persons under interdiction, or to public establishments, the registry shall be made at the instance of curators, tutors, or administrators.

"The article 607 provides that the usufruct granted to corporations, congregations, and other companies which are deemed perpetual, lasts only thirty years. If these corporations, congregations, and companies are suppressed, abolished, or terminate in any other manner, the usufruct ceases and becomes united with the ownership.

"The legislation concerning the powers of the city of New Orleans, I think, is in the same sense.

"Doubts having existed as to the power of the city to hold property out of its limits, the corporation was declared 'capable of holding or possessing real estate without its limits, and of acquiring, retaining, and possessing, by donation or legacy, any property, real or personal, whether situate within or without the limits of the city.' Act of 1830, p. 50. Digest of Stat. 144, § 150.

"I have no doubt of the legality of the testamentary disposition under consideration.

"I think it would follow, as a necessary consequence from the definition, origin, and nature of legacies to pious uses, that if those in favor of the cities are of that sort, those in favor of the States, in the contingency provided, are of the same character. The difference is, that in the former the mode of administration is regulated by the will, in the latter it is left to the wisdom and discretion of the legislative power.

"The administration of property devoted to pious uses by a legacy, through the instrumentality of overseers, commissioners, or a *quasi* corporation, makes no difference as to the title; both in fact are legacies to pious uses, and not unlike the Girard legacy maintained by this court in 2d Annual Reports, 898. Girard Heirs *v.* New Orleans."

This opinion was concurred in by Mr. Justice Dunbar.

Ninth Point.—The conclusiveness and binding effect of the judicial decisions of the State Courts of Louisiana upon the construction and exposition of the Civil Code and the Unwritten Laws of that State.

In elucidating the above proposition, our remarks will neces-

sarily be confined exclusively almost to a consideration of the decisions of the Supreme Court of the United States.

This case depends on the construction to be given to the laws of Louisiana, composed of a written code, and of so much of the Roman, Spanish, and French laws, as are judicially recognized as of authority in that State.

The Supreme Court of Louisiana, in the case of the State of Louisiana against the executors of McDonogh, has given a construction to this very will, founded on the local law, which, in effect, defeats the claim of the heirs at law.

But before that judgment was pronounced, the Circuit Court of the United States for the District of Louisiana, in a cause instituted in that court by the heirs at law against the executors, decreed in favor of the heirs.

That decree is now before the Supreme Court of the United States on appeal, and the important inquiry is, whether the decision of the Supreme Court of Louisiana is not conclusive upon all the questions in the case, depending on the construction of either the written, or unwritten law of that State.

In cases depending on the laws of a particular State, the Supreme Court of the United States has uniformly adopted the construction which the supreme judicial tribunal of the State has given to those laws. And the reason on which this rule is founded, is stated by Chief Justice Marshall to be, that "the judicial department of every government, is the appropriate organ for construing the legislative acts of that government." 10 Wheaton, 159.

The cases in which the Supreme Court has conformed to the decisions of State courts, are very numerous. The following list of references may save the trouble of search, though it does not comprise the whole: 5 Cranch, 22; Id. 221; Id. 255; 6 Id. 165; 9 Id. 87; 2 Wheaton, 316; 5 Id. 270; 6 Id. 119; 7 Id. 361; 10 Id. 152; 11 Id. 361; 12 Id. 153; 2 Peters, 492; Id. 89; 4 Id. 124; 6 Id. 291; 15 Id. 449; 5 Howard, 134; 6 Id. 1; 7 Id. 198, 219; Id. 812, 818; 10 Id. 401; 13 Id. 271; 14 Id. 485, 504.

In St. John v. Chew, 12 Wheaton, 153, it is said: "This court adopts the local law of real property, as ascertained by the decisions of the State courts, whether those decisions are grounded on the construction of the statutes, or form a part of the unwritten law of the State."

In Elmendorf v. Taylor, 10 Wheaton, 165, the court say: "We must consider the construction as settled finally by the courts of the State; and this court ought to adopt the same rule, should we even doubt its correctness."

Neves v. Scott, 13 How. 271, decided that this court, on

appeal from the Circuit Court, would not be governed by the decision of the Supreme Court of the State, upon any question dependent upon general chancery principles; but the court clearly intimate that it would be otherwise if the case had depended upon "the legislation of Georgia, or the local laws or customs of that State."

In Nesmith *v.* Sheldon, 7 Howard, 812, in which the court, in an equity cause, held a single decision of the Supreme Court of Michigan on the same question to be conclusive, that question depending on the construction of the constitution and local laws of the State.

The court will not demand a series of State decisions, but will hold itself bound by a single decision of the highest State tribunal.

In the Bank of Hamilton *v.* Dudley, 2 Peters, 492, there was but a single decision, and that by a divided court, and yet it was regarded as conclusive.

In Gardner *v.* Collins, 2 Peters, 89, the court say: "If this question had been settled by any judicial decision in the State where the land lies, we should, upon the uniform principles adopted by this court, recognize that decision as part of the local law."

In the United States *v.* Morrison, 4 Peters, 124, and Green *v.* Neal, 6 Peters, 291, a single decision of the highest State court, was held sufficient.

Again: in the Bank of Hamilton *v.* Dudley, 2 Peters, 492, after the case had been argued in the Supreme Court, the court hearing that the same question was depending before the highest judicial tribunal of the State, (Ohio,) held the case under advisement till the next term, to receive the opinion, and after it had been given, conformed to it. See also 7 Howard, 812, 818.

Again, the decision of a circuit judge, though made prior in time to the decision of a State court, upon the same question, does not affect the conclusiveness of the latter. Thus, in the United States *v.* Morrison, 4 Peters, 124, the Circuit Court of the United States for Virginia (Chief Justice Marshall, presiding) made a decision upon the construction of a State statute, in regard to which different opinions had been entertained; subsequently to which, the same question was decided the other way by the court of appeals of Virginia. And though this State decision had not been reported, but was quoted in manuscript, when the case came before the Supreme Court of the United States, Chief Justice Marshall, delivering the opinion, reversed his own judgment in the Circuit Court.

The rule was afterwards conformed to in a still stronger case. The Supreme Court had twice decided the same question, as to

the true construction of the statutes of limitations of Tennessee, upon the authority of two decided cases in the Supreme Court of that State, in 1815. But in 1832, in the case of Green v. Neal, 6 Peters, 291, it appearing that these decisions were made under such circumstances that they were never considered, in the State of Tennessee, as fully settling the construction of the statutes; and that in 1825 the Court of Appeals, by a single decision, had ruled the point differently, the Supreme Court overruled its two former decisions, and adopted that of the State court, as the last and authoritative.

In the case of Grove v. Slaughter, 15 Peters, 449, the court did not depart from this established rule. The State decision relied on, as settling the construction of a provision in the Constitution of Mississippi, was the decision of a divided court — was extrajudicial, and contrary to the legislative construction of the provision, and we will add especially, that it was made after the date of the contract in controversy in that case, and impaired the obligation of the contract. In Groves and Slaughter, the note in suit was dated December 20th, 1836, (15 Peters, 449,) and the State decision, relied on to invalidate the note, was that of Glidewell, &c. v. Hite and Fitzpatrick, not then reported; (see 15 Peters, 497,) but since reported in 5 Howard's Mississippi Reports, 110, by which report, it appears that the State decision was not made until December, 1840, four years after the date of the contract which it sought to impair. It was therefore considered by the Supreme Court as an open, unsettled question, and so decided.

The same question, on the same clause of the Constitution of Mississippi, afterwards, in 1847, came again before the Supreme Court, in Rowan v. Runnels, 5 Howard, 134. In the intermediate time, however, after the decision in Groves v. Slaughter, the question of construction had been decided by the highest tribunal of the State, differently from the decision of the Supreme Court. Both Groves v. Slaughter, and Rowan v. Runnels, were cases arising upon contracts, identical as to subject-matter; and the court felt an insurmountable difficulty in following a State decision, made subsequently to the date of the contract between citizens of different States, and annulling it retroactively; which contract, on full consideration, the Supreme Court of the United States had pronounced valid, and they, therefore, adhered to their first decision, Mr. Justice Daniel dissenting, however, even in the case of a contract.

See also to same effect, Sims v. Hundley, 6 Howard, 1.

The whole amount of these decisions is, that in cases arising upon contract, where the Supreme Court, in the absence of any State decision settling the construction of a provision in the

State constitution, in reference to the validity of the contract, had decided in favor of its validity, they would not reverse that decision, on the ground of an adjudication of the question contrariwise, by a State court, if that adjudication was made subsequently, not only to the first decision by the Federal court, but subsequently to the very contract in issue, between parties who were, by the Federal Constitution, entitled to an adjudication on that contract, by the Federal courts.

If it had been a case involving questions of title to real property, or the construction of local laws, irrespective of contract, the court would, no doubt, have been governed by Green *v.* Neal, 6 Peters, 291, and have overruled its former decision in Groves *v.* Slaughter. See Nesmith *v.* Sheldon, 7 How. 813.

To say nothing, however, of the distinction taken by the court in this case of Rowan *v.* Runnels, it is very clear that the decision is altogether inapplicable to the case of the heirs at law and the executors of McDonogh.

In this case, the question depends on a will of real and personal property, as to which there has been no decision of the Supreme Court; and in wills this court adopts the local law bearing on the case. 7 How. 813, 814, 504; Patterson *v.* Gaines, How.; Vidal *v.* Girard, 2 How. 128; Wheeler *v.* Alexandria, How.

The validity of the will is to be determined by a true construction of the written and unwritten law of Louisiana; and the tribunal of the last resort in that State has decided in favor of its validity. "Undoubtedly," said the Chief Justice, in Rowan *v.* Runnels, "this court will always feel itself bound to respect the decisions of the State courts; and from the time they are made, will regard them as conclusive, in all cases, upon the construction of their own constitution and laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were wrongfully made.

These decisions, therefore, of the Supreme Court of the United States, denying the binding effect of subsequent State decisions, so as to retroact on antecedent contracts, are fully warranted by the spirit, if not the letter, of that clause in the Federal Constitution, which prohibits the States from passing "any law impairing the obligation of contracts."

For, if the sovereignty of the States is not competent to legislate away the obligation of contracts lawfully entered into at the time, it should equally follow that the State Courts cannot construe away the obligation of antecedent contracts, which the Constitution meant to protect from every department of the State governments, and to place under the protecting ægis of the federal judiciary.

But when we come to consider the effect of a decision by the State tribunals upon their local laws, involving any matter not impairing the obligation of a contract, the case is one of a very different character. It must, in that case, result from principle, and the authoritative decisions of this court, that if the validity of a Louisiana will is to be tested by the laws of that State, the exposition of those laws, by her highest judicial tribunal, must be equally regarded as part of the local law of the State, and, as such, binding on the federal courts, whether it be established by a single decision, or by a series of decisions, and whether it involve title to real estate or personalty.

Baltimore and Susquehanna Railroad Company *v.* Nesbit, 10 How. 401, recognizes the principle that this court can, in no case, revise or annul retrospective State legislation, unless it violates some clause of the federal Constitution, or is in conflict with the laws of the United States.

Has this court any greater jurisdiction over the State judiciary, in expounding their own laws, than it would have over the legislature which makes them?

But it may be objected that the true reason why this court did not regard as conclusive a subsequent State decision in the cases of Groves *v.* Slaughter and Rowan *v.* Runnels, and Sims *v.* Hurdley, is not that they were cases of contracts, but because such subsequent decisions would deprive citizens of other States of the practical enjoyment of the privilege of suing in the federal courts on titles already vested in them, and to sustain this position, a paragraph will be cited from the opinion of the Chief Justice in Rowan *v.* Runnels, 5 Howard, 139.

But we respectfully submit that the State courts cannot be deprived of their legitimate function, of expounding authoritatively and conclusively the meaning of their own State laws, merely because, at the time of such exposition, there were parties *in esse* who had a right to sue, or who had sued in the federal courts upon titles already vested in them by virtue of the State laws.

It would be monstrous if the federal courts, obtaining jurisdiction "*ratione personarum*" alone, were to exercise that jurisdiction for the single purpose of prostrating and annulling all expositions of the State laws by the State courts, which had been made after the right had attached to sue in the federal courts.

It is not to be presumed that the State tribunal has so decided from a motive to oppress or prejudice the plaintiffs in the federal courts; and, in the absence of such a presumption, the federal courts are as much bound in a case where their jurisdiction is acquired alone by the character of the parties, to re-

spect the local law, as expounded by local tribunals, "*pendente lite*," or "*post litem motam*," as if it had been declared before the right attached to sue in the federal courts. We submit, with deference, that it is not a principle of "comity" only which gives force to the local decisions; but it is because State decisions, whenever made upon State laws, form part of those laws, and, as such, are the governing rule of the United States courts in every case dependent on State laws, except in the solitary instance of State decisions retroacting on antecedent contracts, and this principle appears to have been adopted by this court, on full and deliberate consideration, in the case of Green v. Neal, 6 Pet. 298.

The counsel for the appellees made the following points:

I. The first point to be settled is the true meaning of the will. This depends altogether on the signification of the language used by the testator, and on no peculiarity of local law. The rules of interpretation laid down by the civil code of Louisiana, (acts of 1705 *et seq.*) correspond with those which guide judges in the courts of common law. All aim, alike, at discerning the intentions of the testator; and as McDonogh has used the English language in expressing those intentions, a reference to local jurisprudence is entirely useless, and this court has accordingly held, that it does not follow the construction of a State court on a will or deed, as it does on the construction of a statute. Lane v. Vick, 3 How. 464, 476; Russell v. Southard, 12 Id. 139.

We maintain the will of the testator to be a scheme devised by him for perpetuating his succession, under the name of his "general estate;" that the title to his property was intended by him to remain in his succession; that, under the cover of a bequest to the cities and States, he intended to shield his property from alienation; that the cities and States were not intended, under any circumstances, to be his beneficiaries; and that, if any title whatever, under the terms of the will, was bequeathed to the cities or States, it was a mere legal title as trustees, unaccompanied by any beneficial interest.

In support of this position, we rely on the plain language of the instrument itself. It is true that the testator says that he "gives, wills, and bequeathes all the rest, residue, and remainder of his estate to the two cities;" but this clause begins by stating, that he makes the bequest "for the more general diffusion of knowledge," &c., and closes by stating that the bequest is "to and for the several interests and purposes hereinafter mentioned, declared, and set forth concerning the same," which purposes he immediately proceeds to specify.

By the analysis of the will, as already set forth, it will be seen that, after this introductory clause containing the devise, he provides,

1st. That his whole property, real and personal, "is to be converted into one mass, entitled his *general estate*."

2d. That the seisin and possession of this "general estate" is to be vested in commissioners and agents, with perpetual succession, and the meaning of the word "seisin" is abundantly shown by the Civil Code, 934, 935, 936, 1600, 1602, 1609, 1617, 1652, 1653; 2 Black. Com. 311, marginal paging; Fowler et al. *v.* Boyd, 15 L. R. 562.

3d. That these commissioners are to obtain an act incorporating the "general estate."

4th. That they are to have the sole and exclusive management and control of the "general estate."

5. That "no part of said general estate, or revenues from rents arising from said general estate, shall go into the hands of the corporations of said cities, but that they, the said corporations, shall forever have a supervision over it."

6th. The testator further provides (p. 25) that "copies of the accounts of the general estate fund shall be delivered to the city councils of the city of New Orleans, who shall visit the books, examine and audit the accounts, and keep up and support a general supervision over the general estate, its accounts, funds, management, and real estate, as also over the free schools," &c.

7th. After providing for the establishment of free schools to educate the poor, the testator says, (p. 30,) "for this purpose, and this only, my desire being that one dollar shall never be expended to any other purpose, I destine the whole of my general estate."

In view of these provisions, so clearly and emphatically detailed, it is impossible to discover any of the elements which constitute title or ownership of property in the cities. The mind is at a loss to conceive what interest in an estate can appertain to parties who are never to have it in possession, never to receive one dollar of its revenues, never to alienate it, and never, even, to manage, administer, or control it. It is evident that all that is bequeathed to the cities is the power of appointing the officers of this imaginary entity, this corporation that the testator intended to create, under the name of his "general estate," coupled with functions which are precisely those attributed by law to the visitors of corporations (see 1 Blackstone, 401); and it is worthy of remark, that with this visitatorial agency Baltimore has nothing to do, beyond receiving annually certified

copies of the accounts of the general estate, and "publishing them in two of the newspapers of the city." Record, p. 25.

If there could be a doubt, under the terms of the will itself, that the testator's intention was to vest the title to his property, not in the cities, but in the general estate, that doubt would vanish on the simple perusal of his own commentary on his will, as contained in the memoranda before referred to. In them he styles the general estate "an institution of vast importance to the State and the world," p. 35. He speaks of the property as "belonging to the general estate," p. 36. He prays the city councils of New Orleans to exempt from taxation "the real estate belonging to said general estate," p. 36. He declares, at pp. 40 and 41, that he has selected land for investment, that "it may yield an annual revenue for the purposes to which it is destined forever;" and expresses the hope that "its rents will amount to some millions of dollars annually," and that it will become in time "a huge mountain of wealth." At p. 43, he speaks of two thousand lots "belonging to this estate, and which will be and remain the property of this estate at my death;" and finally, at p. 55, he concludes that "the great object I have in view, as may plainly be seen, is the gradual augmentation in value of the real estate which will belong to, and be owned by, the general estate for centuries to come."

II. If, however, it should be held that the words of devise to the cities vest a title in them, and that these words cannot be controlled nor explained away by the subsequent declarations of the testator, nor by the limitations which he himself has placed on their meaning, the appellees maintain that the title so vested is the legal estate alone, unconnected with the beneficial interest; that the cities are mere trustees; and that the beneficiaries of the trust are the asylums, societies, school farm, and free school provided for by the will.

The will contains, not what the civil law terms legacies to pious uses; not what the common law terms a legacy to a devisee, subject to a purpose; but it contains dispositions termed in the civil law, *fidei commissa*, and in the common law, a devise for a purpose to a devisee, or a trust; and wills, precisely such in character as that before the court, have been the subject of interpretation under both systems of jurisprudence. 1 Jarman on Wills, (Perkins,) 457, top 2d ed., 503 of 1st ed., and authorities in notes; Lewin on Trusts, 24 Law Library, 87, top paging; Vidal and others *v.* Girard's executors, 2 Howard, 127; Briggs *v.* Penny, 8 Eng. Law & Eq. Rep. 234-5; Heirs of Henderson *v.* Rost, 5 Annual Rep. 458; Succession Isaac Franklin, decided in Louisiana, June 22, 1852, printed in pamphlet; De Pontalba *v.* City of New Orleans, 3 Annual Rep.

660; Corporation of Gloucester *v.* Osborn, 1 H. of Lords, 285; 3 Hare, 136.

It is true that the will, in no part of it, uses the word "trust;" but it is too familiar a principle to need authority, that the use of this word is not essential to the constitution of a trust. Girard uses this word; and his devise to the city of Philadelphia was admitted by all to be a trust, nor would the fact have been controverted even if no such word had been found in the will. The civil law is identical with the common law on this point. Adams's Eq. 189 to 192, Am. ed. and cases cited in the note; Briggs *v.* Penny, 8 English Law & Eq. 231–5; 2 Story's Eq. Juris. § 964–5, 1068, 1074; 1 Jarman on Wills, 334.

But, independently of these considerations, the whole of the ancient civil law doctrine of destination to pious uses has been repealed by an act of the legislature of Louisiana, of March 25, 1828, and the Civil Code contains the rules governing the case. See Acts Assembly of Louisiana, 1828; Civil Code, art. 3521; Handy *v.* Parkinson, 10 L. R. 92; Reynolds *v.* Swain, 13 L. R. 198.

III. The will of John McDonogh is null, because it violates the prohibition of the law of Louisiana against substitutions and *fidei commissa.* Civil Code, art. 15, arts. 1507 *et seq.*

The devise of property, with the prohibition against its alienation, when made with a view to a purpose, has been held to be a *fidei commissum* by all authors who have written on the civil law. A direction not to alienate, where the motive is the benefit of the legatee himself, is a mere *nudum præceptum;* as where a legacy is left of an estate to Titus, who is prohibited from disposing of it, in order that his improvidence may never deprive him of the means of subsistence. But a prohibition against alienating, in order that, in ten years, or at the death of Titus, the estate may become the property of Caius, or may be devoted to any purpose not personal to Titus, contains the very essence of the technical *fidei commissum* and substitution. C. C. 1507; Ricard. Traite des Substitutions, vol. 2, p. 323; Merlin, vol. 32, Verbo. Bis. p. 152; Pothier, Substitutions, No. 584, vol. 6, p. 517, ed. of 1777, in Cong. Library; Toullier, vol. 6, No. 488; 2 Strahan's Domat, 3861; Hermosilla, Gloss. 5, Part 5, Tit. 5, Law 44; 2 Gregorio Lopez, 781.

The *fidei commissum* of the civil law is not, as we concede, identical with the trust of the common law. The former, under the simple jurisprudence of the Romans, was a direction to the legatee to convey the property itself, or a part of it, in full ownership to the intended beneficiary; whereas the latter is a refinement, by which the perfect ownership is decomposed into

its constituent elements of legal title and beneficial interest, which are vested in different persons. But the term "*fidei commissum*" is constantly translated into the word "trust" by writers of authority under both systems, and it has been held in Louisiana, in a series of adjudicated cases, that the trust of the English law is embraced in the prohibition of the *fidei commissum* under the 1507th article of the code. For definition of the *fidei commissum*, see 2 Strahan's Domat, 3823; 3 Marcade, 375; 8 Duranton, 56; 32 Merlin Rep. Verbo Substitution; 5 Toullier, 18; 5 Zachariæ, 240; 14 Pothier's Pand. 186; Dig. Lib. 36, Tit. 1; Partidas VI. tit. 5, l. 1, 14; Antonio Gomez, Variæ Resolutiones, vol. 1, cap. 5; 2 Burge, Conflict of Laws, 100; Gaines *v.* Chew, 2 Howard, 650; Clague *v.* Clague, 13 L. R. 1; Tournoir *v.* Tournoir, 12 L. R. 19. And the proposition that wills containing the technical *fidei commissum* of the Roman law, or the trust of the English law, are utterly null and void in Louisiana; and that the latter estate is one unknown to its law, and abhorrent to its people and their institutions, is abundantly established by the following decisions: Tournoir *v.* Tournoir, 12 L. R. 19; Clague *v.* Clague, 13 L. R. 1; Liautaud *v.* Baptiste, 3 Rob. Rep. 453; Harper *v.* Stanbrough, 2 Annual, 381; Tirrell et al. *v.* Allen, 7 Annual; Ducloslange *v.* Ross, 3 Annual, 432; Beaulieu *v.* Ternoir, 5 Annual, 480; Heirs of Henderson *v.* Rost, 5 Annual, 458; Macarty *v.* Tio, 6 Annual; Franklin case above cited; C. C. 487, *et seq.*

The principle that parties are not at liberty to invest new tenures of property and to impress such tenures on their lands, is one not peculiar to Louisiana, but is a part of the public policy of every country. Kipper *v.* Bailey, 8 Eng. Ch. Rep. 120.

And the decisions of the French courts, as well as the opinions of French jurists on the subject of *fidei commissa* and substitutions, are of no weight or value in Louisiana, by reason of the difference of the legislation of the two countries on the subject. Rowlett *v.* Shepherd, 4 La. Rep. 86; Ducloslange *v.* Ross, 3 Annual Rep. 432.

IV. There is nothing in the law of Louisiana making any exception to this general rule. The article 1536 of the Civil Code, cannot, without violent misconstruction, be applied in any manner to this subject-matter. The Code contains a title called Title 2 of Donations *inter vivos* and *mortis causa.* It is divided into seven chapters, of which the first four are applicable to both classes of donations, and the prohibition in article 1507 against *fidei commissa* is in the chapter 4 entitled "Of dispositions reprobated by law in donations *inter vivos* and *mortis causa.*" After exhausting, in these four chapters, such provisions as are applicable to both classes of donations, the Code

proceeds, in chapter 5, to treat separately of donations *inter vivos*, and in chapter 6 of donations *mortis causa*, placing in each of these chapters the special rules appropriated to its particular subject-matter.

Now chapter five embraces articles 1510 to 1562, and consequently includes the article 1536. Chapter five is divided into three sections, of which the second treats of the form of donations *inter vivos*. In prescribing this form the Code requires an authentic act to be passed before a notary, a delivery by the donor, and (in article 1527) an acceptance in precise terms by the donee. It then proceeds to provide for this acceptance by incapable parties. Article 1532 provides for a married woman; her acceptance must be with consent of her husband. Article 1533 provides that the acceptance for a minor may be by his tutor; 1534, that of an insane person by his curator; 1535, that of a deaf and dumb person by himself or attorney, or curator; 1536, "donations made for the benefit of an hospital, of the poor of a community, or of establishments of public utility shall be accepted by the administrators of such communities or establishments."

It is too plain for argument, on examination of the context of the Code, that this article 1536 has not the remotest bearing on the article 1507, and has not any reference whatever to the same subject-matter. So far from there being any exception in the Code authorizing corporations to become trustees, there is a positive prohibition pointed directly at corporations. See La. Code, article 432.

But there is another conclusive reason why the law can contain no exception in favor of the cities. The prohibition of trust estates in Louisiana is not alone a legal, it is also a constitutional, prohibition. Constitution of 1812, article 4, sec. 11; Constitution of 1845, article 120; Opinion of Chief Justice Eustis, in the Franklin case.

To construe article 1536 as conferring a power on cities to take estates in trust, is to violate the principle that when a capacity is granted by law to a corporation, the clause conferring it is to be construed subordinately to the general law, and not as giving powers beyond those conferred on individuals. McCartee *v.* Orphan Asylum, 9 Cowen, 437, 507. Jackson *v.* Hartwell, 8 Johns. 425.

This clause, if it confers the power supposed, must be subjected to the most rigid construction, and can never be made to comprehend such a trust as McDonogh has devised. In New York, from motives of public policy similar to those prevailing in Louisiana, the creation of trusts has been greatly restricted by statute. 2 Revised Statutes, p. 136.

The strictness with which this policy is enforced by her courts, and the rigor with which trusts contravening its spirit are annulled, may be seen in the cases of Jarvis *v.* Babcock, 5 Barb. 139; McSorley *v.* Wilson, 4 Sandf. Ch. Rep. 523.

V. The will of John McDonogh violates the law of Louisiana in separating the usufruct from the naked property of his estate forever. The nature of these two titles is explained in articles 479, 486, and 525 *et seq.* The law authorizes the separation of the usufruct from the ownership for one life only. Civil Code, 601, 1509.

But where the usufructuary is a corporation which is deemed perpetual, the right is expressly limited to thirty years. C. C. 607.

It is true that where a gift of perpetual usufruct is made, it is frequently construed into a gift of the property itself, on the ground that giving to a person the perpetual enjoyment of property is only a mode of expressing the gift of the title or ownership. See Arnauld *v.* Delachaise, 4 Annual Rep. 119; 2 Prudhon, 6–9.

But this is a mere rule of construction, subject to be controlled by the testator's expression of a contrary intention. The language of the will, as already set forth, expresses so clearly the intention of the testator not to give the property itself, but to place the title forever in abeyance, and to preserve the property as "his general estate," that comment on it is unnecessary.

The language used by the present Chief Justice of Louisiana, with reference to the will of Henderson, is equally applicable to that now under discussion: "There is not a word in the will that takes the ownership out of his succession; but that, if carried into effect, it takes it out of commerce is indisputable." He expressly orders, "it is to remain forever as a part of my succession." The executors might lease, but they could not sell. Henderson *v.* Rost, 5 Annual, 458.

VI. The will of McDonogh is in direct violation of the law of Louisiana, which prohibits perpetuities, and the placing of property out of commerce. Marthurin *v.* Livaudais, 5 Martins, N. S. 302; Cole *v.* Cole, 7 Martins, N. S. 416; Arnauld *v.* Tarbe, 4 La. Rep. 502; heirs of Henderson *v.* Rost, 5 Annual, 458; Franklin case, above cited.

And so strong is the determination of the Legislature to prevent property from being withdrawn from commerce, that it has expressly abrogated the former civil law, and the special article of the code of 1808, which prohibited the alienation of things holy, sacred, and religious. Code of 1808, pp. 95 and 96; 1 Strahan's Domat, § 129, 1435; Civil Code, 447. The will also violates the provision of the law which prohibits the testator

from ordering that property shall never be divided. C. C. Art. 1222-3.

And, although under the terms of the law, such a prohibition is considered as not made, yet where the property is not given in ownership to the devisee, and the prohibition is inserted, with a view to carry out an entire scheme, created by the will, and which must fail if the prohibition be not enforced, then to allow the partition of the property between the devisees for their own use, becomes not an interpretation of the will, but a perversion of the whole design of the testator, and the making of a new will for him. Henderson *v.* Rost, above cited. See also Háwley *v.* James, 16 Wendell, 144, 180.

This consideration also disposes of the question raised specially in behalf of the Orphan Asylum. The annuity is inseparably connected with the trust, and must fall with it; there is no possibility of upholding it when the trust on which it depends is overthrown. It is to be paid from rents and profits which will never accrue. Coster *v.* Lorillard, 14 Wendell, 265; same case, 5 Paige, Ch. Rep. 172; Hawley *v.* James, 16 Wendell, 180.

VII. The beneficiary legatees of McDonogh, the asylum, the school farm, the free schools, are not in existence, nor is even the board of commissioners of his general estate, as a legal corporation, capable of holding property in succession.

They are intended by the testator to be corporations with perpetual succession, he has so declared in his will, and he has attempted to organize them as what he calls "institutions."

The power of creating corporations is a sovereign power, which no individual can usurp. In Louisiana the legislature itself could not incorporate the institutions provided for by this will. Constitution of 1845, Arts. 123, 124.

These articles prohibit the creation of any corporations by special charter, except political and municipal corporations, and provide that no corporation thereafter to be created, "shall ever endure for a longer period than twenty-five years."

The legislature, by act of 30th April, 1847, in obedience to these articles, passed a general law for the organization of such corporations as McDonogh desires to establish by his will, restricting their possession of property to a value of $300,000. Digest Louisiana Statutes, p. 181.

The whole scheme of McDonogh's will is in direct violation of the policy of Louisiana, as established by the constitution and this law, and is null and void for this reason.

Before the adoption of these articles of the Constitution, when the legislature granted special acts of incorporation to religious and charitable societies, its policy was equally marked

by restricting their possession of property and right to receive donations within narrow limits, and confining their duration to a term of years. Bullard and Curry's Digest, p. 343, Nos. 214, 221, p. 353, No. 241, p. 354, No. 248. First Congregational Church v. Henderson, 4 Rob. R. 215, where it appears that the church was prohibited from receiving from any single person by donation or legacy more than one thousand dollars.

It has long ago been held by this court, that a legacy to an association, not incorporated, could not be taken by it as a society, nor by the individuals who composed the association at the death of the testator. Baptist Association v. Hart, 4 Wheaton, 1. And the law of England on this point is well settled. Grant on Corporations, 115, 572.

The statute law of Louisiana is in conformity with these principles, and requires, for the validity of a legacy, two conditions: 1st. The existence of the legatee at the death of the testator; 2d. The capacity of the legatee to receive at the time, if the legacy be absolute; or if conditional, the capacity at the time of the fulfilment of the condition. Civil Code, 1469, 1460, 1459.

These provisions of the civil law are established with great clearness by the highest authorities. 5 Toullier, 99, No. 91-2; Pothier Donations Testamentaires, p. 361; Pothier, Obligations, Nos. 203, 208, 222; 2 Strahan's Domat, 3518, 3038; 3 Marcade, 430; 5 Zacharia, 23; 8 Duranton, No. 221; Coin Delisle, 96, No. 4.

And although the French code, which forms the basis of that of Louisiana, admits of exception; in cases of marriage contracts, to the rule requiring the existence of the donee at the date of the gift, the Louisiana code expressly forbids this exception, and repeats the prohibition. Code Napoleon, 906, 725; Civil Code, 947, 948, 1727.

It is true that, in one case in Louisiana, the court held a legacy valid to corporations not in existence. Milne's heirs v. Milne's executors, 17 La. Rep. 46.

But that case stands alone in the reports, and on the very face of the decision is self-contradictory. It is not the law of the land.

But even admitting its correctness, it was decided on the express ground that the corporations had been created by act of the legislature, immediately after the decease of the testator, and where this action of the legislature has been refused, it has since been held that the devise must fail. Heirs of Henderson v. Rost, 5 Annual 458, opinion of Preston, J.

Now in the case before the court, not only has the Legislature of Louisiana, no constitutional power to create the corporations in

question, but both the States of Louisiana and Maryland have declared their disapproval of the scheme of the will and denounced it as null and void, and contrary to public policy. Record, p. 67, 129; Act of Legislature of Louisiana, 12th March, 1852, p. 132; Resolution at Legislature of Louisiana, 12th March, 1852, p. 136.

The corporations contemplated by McDonogh are, therefore, not only without present existence, but without any probability of future existence, and the property conveyed to them must of necessity fall to the heirs at law.

A case infinitely stronger in favor of the validity of a devise, was decided by the Supreme Court of the Hanseatic cities in favor of the heirs at law. It was the case of a legacy to the city of Frankfort, of a sum of money destined to the establishment of a museum of painting, for the direction and administration of which a society was to be created according to law, and as soon as it was incorporated, the society was to become the owner of the legacy, on condition of applying it to the use prescribed by the testator.

The decision of the court was, that the city could not keep the legacy without violating the intention of the testator; and that the society could not take it, because it had no legal existence at the date of the testator's death. The legacy was therefore annulled in favor of the legal heirs. Roshirt, Ueber den Standelschen Erbfolge, 1828; Muhlenbruck, Beurtheilung des Stadelschen Beerbungsfalles.

And if the dispositions of McDonogh's will be indeed as we maintain in favor of corporations not yet in existence, and therefore incapable of taking, the Code of Louisiana provides that they shall be null, notwithstanding the interposition of the names of the cities, which is a mere device of the testator to shield them from the law.

"Every disposition in favor of a person incapable of receiving shall be null, whether disguised under the form of an onerous contract or made under the name of a person interposed." C. C. 1478.

VIII. The schools which the testator requires to be established in Louisiana are in contravention of the policy of the State, as established by its constitution and laws.

The will requires that the benefit of the schools shall be confined to the poor, as a class. The constitution and laws of Louisiana require that free schools shall be established and kept under the supervision of public officers, where all white children alike, the rich and poor, may be educated by the same teachers, and on terms of equality.

Free schools confined to the poor alone give rise to distinc-

tion of classes in the community, are antirepublican in tendency, and conflict with the policy of the State. Constitution of La. articles 133-4; Acts of Legislature of La. 1841, Digest, p. 239; Acts of Legislature of La. 1847, Digest Laws of La. 228 *et seq.*

And free schools in which poor white and colored children are to be received indiscriminately, and placed on an equality, would be intolerable in States where slavery is recognized as a legal institution.

IX. If it be held that the city of New Orleans can take the trust estate bequeathed to it, the executors must be ordered to account to complainants for the half which is devised to the city of Baltimore.

The trust in favor of that city is to be there executed under the laws of Maryland. By that law the trust in question is void. It cannot be there executed, because the object is not definite.

"Whenever the word poor or poorest has been used as a term of description in a devise or bequest, it has been held to be insufficient for uncertainty." Dashiell *v.* The Attorney-General, Harris & Johns. 399.

The devise to the school farm in McDonogh's will is "for the express and sole purpose of establishing a school farm on an extensive scale for the destitute and the poorest of the poor male children, &c." Record, p. 18. And "for rescuing from vice and ignominy millions upon millions of the destitute youth, &c." Page 22.

The general devise is "for the establishment and support of free schools wherein the poor, and the poor only, of both sexes, of all classes and castes of color, shall have admittance, free of expense." Page 14. Schools for "the poorer classes, for whom these institutions are alone intended," (page 27,) "where every poor child and youth, of every color, may receive a common English education." Page 29.

Such trusts are incapable of execution, according to the concurrent decisions of the highest courts of Maryland. Trippe *v.* Frazier, 4 Harris & Johnson, 446; Dashiell *v.* Attorney-General, 5 Id. 398; Dashiell *v.* Attorney-General, 6 Id. 1; Tolson *v.* Tolson, 10 Gill & Johns. 159; Meade et al. *v.* Beale & Latmer, executors of Ford, decided by Chief Justice Taney, in U. S. C. C., November term, 1850.

These decisions are in strict pursuance of those of the English courts, in cases quite as strongly appealing to good feeling as any of those termed charitable. Ram on Legal Judgment, ch. 19, § 2, in 9th vol. Law Library, and cases there cited.

And this court has more than once determined, "that the

common law of each State must be ascertained by its general policy, the usages sanctioned by its courts, and its statutes; and there is no object of judicial action which requires the exercise of this discrimination more than the administration of charities." Wheeler v. Smith, 9 How. 78; Baptist Association v. Hart, 4 Wheaton, 27; Inglis v. Sailors' Snug Harbor, 3 Peters, 112; Vidal v. Girard's Executors, 2 Howard, 129.

And if the trust is incapable of execution in Maryland, though valid in Louisiana, the property falls to the legal heirs. Hawley v. James, 7 Paige, Ch. Rep. 213; S. C. 5 Paige, Ch. Rep. 323, 441; S. C. 16 Wendell, 61.

So in England it has been held that where a trust was created in personal property abroad, to be invested in lands in England, contrary to the policy of her mortmain laws, the devise is void. Attorney-General v. Mills, 3 Russell, R. 328.

The right of Baltimore to accept such a trust is a question of personal capacity, to be governed by the law of the domicil, according to principles of law universally admitted. Story's Conflict, § 51, 65, 446.

X. The residuary devises to the States of Louisiana and Maryland are the same in their nature and character as those to the cities of New Orleans and Baltimore. They are trusts "That the legislatures of those States, respectively, may carry my intentions, as expressed in this my last will and testament, into effect, as far and in the manner which will appear to them most proper" (p. 29); and this trust is followed by the reiteration of his purpose in the strongest terms he could discover: "For this purpose, and this only, my desire being that one dollar shall never be expended to any other purpose, I destine the whole of my general estate to form a fund in real estate, which shall never be alienated, but be held and remain forever sacred to it alone."

The qualification in the devise to the States merely gives a discretionary power as to the mode of execution of the purpose; it enables them to dispense with such of the machinery of administration of the trust as they might find cumbersome or ill adapted to the object in view, but it is subordinate to the chief illegal conditions of the scheme, and does not admit of its fractional observance. It gives a latitude as to the administration and machinery of the purposes subject to the proviso that these purposes are to be observed, viz. 1st, the education of the poor of the two cities in preference to all others; and, 2d, that this be done by the revenues of a fund formed of inalienable real estate. Morrice v. Bishop of Durham, 9 Vesey, 399; Briggs v. Penny, 8 Eng. Law and Eq. 234–5; Morrice v. Bishop of Durham, 10 Vesey, 521; Story's Eq. Juris, § 979, a. b.; Wheeler v. Smith, 9 Howard, 55; Adams's Eq. 134, Am. ed.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees are the heirs at law of John McDonogh, a native of the State of Maryland, who died at McDonogh, near New Orleans, in the State of Louisiana, in 1850, leaving there a very large succession. In 1839, the decedent executed, at New Orleans, an olographic will for the disposal of the estate he might have at his death. This will is in a legal form, and has been admitted to probate in the District Court of New Orleans. It contains two particular legacies which are not contested, and a single legacy under a universal title. In this bequest the testator declares, "that for the more general diffusion of knowledge, and consequent well being of mankind," and "being convinced that he could make no disposition of those goods which the Most High had placed under his stewardship, as by means of which the poor will be instructed in wisdom and led into the path of holiness," "he gives, wills, and bequeathes all the rest, residue, and remainder of his estate, real and personal, present and future, as well that which was then his as that which he might acquire at any time before his death, and of which he might die possessed, (subject to certain annuities,) to the corporations of the cities of New Orleans and Baltimore forever, one half to each," "to and for the several intents and purposes thereafter declared." The testator directs his executors to convert his personal estate into real property, whereby "the whole of his estate will become a permanent fund in real estate, affording rents, no part of which shall ever be touched, divided, sold, or alienated, but shall forever remain together as one estate, and be managed" as he shall order.

For the management of this estate, thus declared to be inalienable, he directs the two cities each to select, annually, three agents, whose duty it should be to receive seisin and possession of the estate from his executors, immediately after his death. They are "to lease or rent the lots," "cultivate the plantations," "collect the rents," "pay the annuities," "invest the moneys," and, "in fine, do all acts necessary to its full and perfect management, according to the will;" the will of the testator being "that no part of the general estate, or revenue from rents arising from said general estate, shall go into the hands of the corporate authorities of the said cities, but that the said authorities should have forever the supervision of it."

The testator designed the joint management of the agents of the cities, and the joint supervision of their authorities over the estate, to be perpetual. He forbids the cities to vary, by agreement, or by any compromise, the relations he has established between them in regard to it. They must make no sale of their interests; no traffic with their powers of control; no surrender,

for money or other consideration, of their supervisory care. But should they combine to violate his scheme of management or appropriation, their rights are declared forfeited, and "the general estate" is limited over to the States of Louisiana and Maryland, "for the purpose of educating the poor of those States," "under such a general system of education as their legislatures should appoint." He further provides, that should there be "a lapse of the legacies from the failure of the legatees to accept, or any other cause or means whatsoever," the shares should inure for the benefit of the State or States in which the cities are situate; "that the legislatures of those States respectively may carry his intentions, as expressed and set forth in the will, into effect, as far and in the manner which will appear to them most proper."

The testator having provided for the perpetuity of the McDonogh estate, and the destination of its revenues, proceeds to develop a minute and detailed scheme for its management, improvement, and the expenditure of its income. He appropriates one eighth part of its annual revenue, for forty years, for colonizing the free people of color, to the American Colonization Society, the sum not to exceed $25,000 per annum; one eighth part for the erection, in New Orleans, of an asylum for the poor of all ages, castes, and colors; one eighth part to an incorporated society for the relief of orphan boys in New Orleans; and one eighth part for the establishment of a school farm in Maryland. The money appropriated to the asylum, school farm, and orphan boys, he requires to be invested as capital in real estate, and the rents only to be subject to the uses of the donees. The capital of the asylum and school farm is to be entirely collected, before any appropriation takes place for their use; and for the one the capital is to be $3,000,000, and for the other $600,000. The remaining four eighths of the income of the general estate, for the present, and the whole, after the objects above mentioned are fulfilled, are destined "for the education of the poor, without the cost of a cent to them, in the cities of New Orleans and Baltimore, and their respective suburbs, in such a manner that every poor child and youth, of every color, in those places, may receive a common English education—based, however, be it particularly understood, on a moral and religious one;" the whole of the general estate "to form a fund in real estate which shall never be sold or alienated, but be held and remain forever sacred."

To carry his purposes into effect, he directs the selection of boards of managers for the different establishments, and suggests that acts of incorporation may become necessary to facilitate their operations.

The appellees claim that, as to the property embraced in this bequest to the cities, that John McDonogh died intestate.

Their argument is, that although he makes in the commencement of his will a formal gift to the cities; although the cities are designated as his legatees in several clauses of the will, in precise terms; although the property is described as property "willed and bequeathed to the cities," that the testator has sedulously contrived to withdraw from them the seisin and possession of the whole estate, and has committed them to an uncertain and fluctuating board, for the selection of which he has provided; that the dominion and use of this property, in so far as he has permitted either, has been confided to this board of managers, but that this board is held servilely to a code of regulations he has dictated, the aim of which is to hold the "McDonogh estate" together in perpetuity; that by these restrictive regulations the donations to the cities have become nugatory and unavailing.

This conclusion was adopted by the Circuit Court, whose decree is under revisal, and has been sustained in the argument at the bar of this court with great power and ability.

We may remark of the will of the testator, that it indicates his imagination to have become greatly disturbed by a long and earnest contemplation of plans which he says "had actuated and filled his soul from early boyhood with a desire to acquire a fortune, and which then occupied his whole soul, desires, and affections." In the effort to accomplish these cherished hopes he has overstepped the limits which the laws have imposed upon the powers of ownership, overlooked the practical difficulties which surround the execution of complex arrangements for the administration of property, greatly exaggerated the value of his estate; and unfolded plans far beyond its resources to effect; and has forgotten that false calculations, mismanagement, or unfaithfulness might occur to postpone or prevent their attainment. Holding and declaring a firm faith in the interposition of Providence to render his enterprise successful, he apparently abandons himself, without apprehension or misgiving, to the contemplation of the "McDonoh estate," as existing through all time, without any waste or alienation, but improving and enlarging, "extending the blessings of education to the poor through every city, town, and hamlet" of the State where he was born, and the State in which he had lived and was to die; "rescuing from ignorance and idleness, vice and ignominy, millions upon millions of the destitute youth of the cities," and "serving to bind communities and States in the bonds of brotherly love and affection forever."

The exaggeration which is apparent in the scheme he projects,

and the ideas he expresses concerning it, afford the ground of the argument for the appellees. It is, however, unfair to look to the parts of the will which relate to the disorders which reign in society, or to his aspirations to furnish a relief for these "during all time," or to the prophetic visions awakened by the exalted and exciting ideas which dictated the conditions of the will, for the rule of its interpretation. We must look to the conveyances he has made in the instrument, the objects they are fitted to accomplish, and the agencies, if any, to be employed, and endeavor to frame these into a consistent and harmonious plan, accordant with his leading and controlling intentions. In reference to his controlling purpose there can be no mistake. He says, "that the first, principal, and chief object" in his view is "the education of the poor" of the two cities. With equal emphasis and precision he has disclaimed the desire of building the fortunes of his natural relations. He says, "that even to his children, if he had them, (as he has not,) and a fortune to leave behind him, he would, besides a virtuous education, to effect which nothing should be spared, bequeathe to each but a very small amount, merely to excite them to habits of industry and frugality, and no more."

His ruling purpose had no connection with the poor of any one generation. His desire was to establish a foundation to exist for all time — a perpetuity.

He knew that to attain this purpose a succession of persons, animated with a corresponding aim, must be obtained, and that the legal capacities of voluntary associations, even if he could hope to find such to enter into his plans, were wholly unfitted for his design; nor did he hope to effectually combine such persons by any power or prayer of his own. Hence, he selected as his devisees bodies corporate, endowed with the faculties of acquiring and holding property, having determinate ends and abiding agencies to be employed in accomplishing them. These were all requisite for the full attainment of the purposes he has declared.

He excludes, it is true, the municipal authorities from the particular management of the estate, or the application of its revenues.

But, the municipal officers are not his legatees. They are themselves but agents clothed with a temporary authority; nor do the officers perform their executive duties, except by the interposition of agents subordinate to their control and subject to their supervision. Had the testator confined himself to an unconditional donation of the general estate to the cities, for the use of public schools, it would scarcely have fallen under the personal management of the corporate authorities. They would

probably have appointed boards or agencies, to whom powers, more or less general, would have been confided, and over whose conduct their supervision would have been more or less particular and exact. The knowledge of this probably induced the testator to describe the board which his experience and observation had marked as the most efficient and responsible. He defines their number, the manner of their appointment, the form of their accounts, the modes of their business, and urgently exacts that the great, and to his eyes sacred, interests of his charity should not be blended with the vulgar and debauching concerns of daily corporate management. These directions must be regarded as subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity. Nor do we esteem the facts, that he has given his estate a name, regards it as a distinct entity, and couples with it language denoting perpetuity, important as evidence that the cities are not his legatees. A gift to a municipal corporation tends to create a perpetuity. Property thus held ceases to be the subject of donation, or of devise, of transfer by bankruptcy, or in the order of succession. The property of such a corporation is rarely the subject of sale, and practically it is out of commerce. McDonogh supposed that he could prohibit any alienation or division. We do not perceive, therefore, why he should have sought an incorporation of the general estate; nor do we understand that this forms a prominent portion of his scheme.

The will, through every part, discloses that the cities are the particular objects of his interest; and the poor of the cities of his providence and bounty. His will designates the cities, by their corporate name, as his legatees, in definite and legal language. His plan of administration is to be executed through agents, selected by their corporate authorities, and to the end of conveying to the poor of the cities, perpetually, the fruits of his property. We should violate authoritative rules of legal interpretation, were we to disinherit the cities under these circumstances, and to substitute for them "an ideal being" called the "general estate," having no legal capacity, nor juridical character, and whose recognition, therefore, could have no result but to overturn the will of the testator. C. C. 1706; 1 Spence, Eq. J. 529, 530; 5 Ann. R. 557.

Having thus determined that the legacy is to the cities by a universal title, and, having extracted from the will the leading and controlling intention of the testator, the next inquiry is, whether a legacy given for such objects is valid.

The Roman jurisprudence, upon which that of Louisiana is founded, seems originally to have denied to cities a capacity to

inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personalty involved in the acceptance of a succession. The disability was removed by the Emperor Adrian in regard to donations and legacies, and soon legacies *ad ornatum civitatis* and *ad honorem civitatis* became frequent. Legacies for the relief of the poor, aged, and helpless, and for the education of children, were ranked of the latter class. This capacity was enlarged by the Christian emperors, and after the time of Justinian there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom. When the power of the clergy began to arouse the jealousy of the temporal authority, and it became a policy to check their influence and wealth — they being, for the most part, the managers of property thus appropriated — limitations, upon the capacity of donors to make such gifts, were first imposed. These commenced in England in the time of Henry III.; but the learned authors of the history of the corporations of that realm affirm, that cities were not included in them — "perhaps upon the ground, that the grants were for the public good;" and, although "the same effect was produced by the grant in perpetuity to the inhabitants," "the same practical inconvenience did not arise for it, nor was it at the time considered a mortmain." Mereweth. & Steph. Hist. Corp. 489, 702.

A century later, there was a direct inhibition upon grants to cities, boroughs, and others, which have a perpetual commonalty, and others "which have offices perpetual," and, therefore, "be as perpetual as people of religion." The English statutes of mortmain forfeit to the king or superior lord the estates granted, which right is to be exerted by entry; a license, therefore, from the king severs the forfeiture. The legal history of the Continent on this subject does not materially vary from that of England. The same alternations of favor, encouragement, jealousy, restraint, and prohibition, are discernible. The Code Napoleon, maintaining the spirit of the ordinances of the monarchy, in 1731, 1749, 1762, provides "that donations, during life or by will, for the benefit of hospitals of the poor of a commune, or of establishments of public utility, shall not take effect, except so far as they shall be authorized by an ordinance of the government."

The learned Savigny, writing for Germany, says: "If modern legislation, for reasons of policy or political economy, have restrained conveyances in mortmain, that those restrictions formed no part of the common law." The laws of Spain

contain no material change of the Roman and ecclesiastical laws upon this subject. The Beports of the Supreme Court of Louisiana (in which State these laws were long in force) attest their favor to such donations. De Pontalba *v.* New Orleans, 3 Ann. 660.

This legislation of Europe was directed to check the wealth and influence of juridical persons who had existed for centuries there, some of whom had outlived the necessities which had led to their organization and endowment. Political reasons entered largely into the motives for this legislation—reasons which never have extended their influence to this continent, and, consequently, it has not been introduced into our systems of jurisprudence. 2 Kent's Com. 282, 283; Whicker *v.* Hume, 14 Beav. 509.

The precise result of the legislation is, that corporations there, with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is, to limit that general capacity within narrow limits, or to subject each acquisition to the revisal of the sovereign. We have examined the legislation of the European states, so as better to appreciate that of Louisiana. No corporation can exist in Louisiana, have a public character, appear in courts of justice, exercise rights as a political body, except by legislative authority; and each may be dissolved, when deemed necessary or convenient to the public interest. Corporations created by law are permitted to possess an estate, receive donations and legacies, make valid obligations and contracts, and manage their own business. Civil Code, tit. 10, c. 1, 2, 3, art. 418, *et seq.*

The privileges which thus belong to corporations legally existing, have been granted to the inhabitants of New Orleans in various legislative acts. The authorities of the city have, besides, received powers of government extending to all subjects affecting their order, tranquillity, and improvement. It is agreed, that these powers are limited to the objects for which they are granted, and cannot be employed for ends foreign to the corporation. 1 Paige, 214; 15 New H. 317; 4 S. & S. C. R. 156; 3 Ann. 294.

But there can be no question as to the degree of appreciation in which the subject of education is held in Louisiana. The constitution of the State imposes upon the legislature the duty of providing public schools for gratuitous education; and various acts attest the zeal of that department in performing that public duty. Among these, there is one which authorizes and requires the corporate authorities of the city of New Orleans to establish them in that city, and to enact ordinances for their organization, government, and discipline; they are likewise

charged with the instruction, education, and reformation of juvenile delinquents and vagrants. These acts are from a sovereign authority, and endue the city with the powers of acquiring, retaining, and disposing of property, without limitation as to value, and assign to it, as one of its municipal functions, the charge of popular education. No parliamentary grant or royal license in Great Britain—no government ordinance in France—could remove more effectually a disability, if one existed, or create a capacity, if one were wanting, to the corporations of those countries. Rev. Stat. La. 41, 111, 116, 117, 144, 239; 2 Rob. 244, 491.

We shall now examine the devise to the cities, in connection with the various conditions annexed to it. The appellees insist it is a disposition reprobated by law, for that it contains "substitutions and *fidei commissa*," which are prohibited by article 1507 of the code, and which annul the donation in which they are found.

We shall not inquire whether the prohibition extends to donations in favor of corporations, and for objects of public utility, though this seems to have been a question in France. Lefeb. des Don. Pieuses, 31, 33.

We shall limit the inquiry to the nature of the prohibited estates, to determine whether they exist in this legacy. The terms are of Roman origin, and were applied to modes of donation by will, common during its empire, and from thence were transferred to the derivative systems of law in use upon the continent of Europe. The substitute was a person appointed by the testator to take the inheritance, in case of the incapacity or refusal of the instituted heir. A *pater familias* was authorized to make the will of his son during his nonage, or lunacy, or other incapacity to perform the act; and in the case of his death, under such circumstances, the appointee took the succession. This was a mode of substitution.

The *fidei commissum* originated in a prayer, petition, or request, of a testator upon his instituted heir, to deliver the inheritance, or some portion of it, to a designated person. Every testament being originally a law of succession, proposed by the testator, and consented to by the Roman people, the language of legislation, that is, of mandate and authority, was essential to its validity. Precatory words were insufficient to raise an obligation upon the heir, or to vest property in the donee. This was afterwards changed, and words of request then imposed a charge upon the heir, to maintain the faith in which the testator had confided. Afterwards, the distinctions between words of mandate and of request became obsolete, and both were considered with reference to their significance of the intentions of

the testator. The notion of a *fidei commissum* thus became limited, implying no more than an estate in possession, encumbered with the charge to surrender it to another. This might be pure and simple — that is, the duty to surrender might be immediate, or it might be on a condition, or after the expiration of a term even extending to the life of the *gravatus*. The substitute originally came in the place of another; the idea was modified to include those who came after another under certain circumstances.

The conjunction of the *fidei commissum* with the substitution would then become a natural mode of settlement of property. The instituted heir might be charged to hold and enjoy the succession for his life, and at his death that it should go to another, (his heir,) and that heir might in turn become a *gravatus*, for the benefit of another successor, and so from generation to generation.

Such a substitution might be properly called a "substitution *fidei commissaire*," or an "oblique substitution." This mode of limiting estates from degree to degree, and generation to generation, was much employed on the continent of Europe, and served to accumulate wealth in a few families at the expense of the interests of the community. The vices of the system were freely exposed by the political writers of the last century, and a general antipathy awakened against it. Substitutions having this object were prohibited during the revolution in France, and that prohibition was continued in the Code Napoleon, whose authors have exposed with masterly ability the evils which accompanied them. Motifs et Dis. 375.

This prohibition was transferred to the code of Louisiana, with the addition of the *fidei commissa*. These terms imply a disposition of property through a succession of donees. The substitution of the article 1507 of the code being an estate for life, to be followed by a continuing estate in another by the appointment of the testator.

The *fidei commissa* of the Louisiana Code are estates of a similar nature, implying a limitation over from one to another. They are the *fidei commissa* of the Spanish and French laws, in so far as those estates are not tolerated by other articles of the code. We shall not attempt to define them from an examination of the code and the reports of the Supreme Court of that State. It is not necessary for the decision of this case. We are unable to perceive any thing in the code to justify the supposition that the English system of trusts, whether in its limited signification as applied in conveyancing, or in its broad and comprehensive import, as applied by the courts of chancery, were within the purview of the authors of this code in framing

this prohibition. The terms substitution and *fidei commissa* are words foreign to the English law. They are applied to no legal relation which exists in it, and describe nothing which forms a part of it. The technical words, of "charged to preserve and to render," in article 1507, which embrace so much to a continental lawyer, only provoke inquiries in the mind of one accustomed to the language of the common law. The allusion to the "Trebillianic portion" is to a right of which there has never been a counterpart in the English system. The whole article refers exclusively to things of a continental origin. The estates known as *fidei commissa* and substitutions, in so far as regards the order of persons and the duration of their interest, may be created by devise in an English will. This can be done without the interposition of trustees or with them. That is, legal estates or equitable estates can be limited to embody those conditions of the *fidei commissa* and substitution; but the separation of the same estate into parts, legal and equitable, with separate courts in which their respective qualities may be represented, is not of continental origin. We may say of this as Sir William Grant says of another doctrine of equity, "that in its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English." We find nothing of the *fidei commissa* or substitution in the legacy to the cities. The mischiefs resulting from conveyances in mortmain, and which led to restraints upon them, also existed in the substitutions of the French law, and led to their suppression. The remedies for the mischief, in consequence of the difference of the persons, were essentially variant. In the case of natural persons, the abrogation of the capacity to limit property from successor to successor, and generation to generation, removed the evil of perpetuities. But no statute against estates tail, or of remainder, or reversion, operate upon a corporation. The mischief results from the duration of the corporation and the tenacity with which, from its nature, it holds to property. The fee-simple estate to a corporation is that which most effectually promotes the creation of a perpetuity. The remedy in Europe in this case was to restrict the number of corporations, and to reserve an oversight of their acquisitions to the sovereign authority. This precaution was taken, as we have seen, also in Louisiana. If she has granted to her metropolis an unrestricted license to acquire and to hold property, we must conclude there were sufficient motives to justify the act.

Our next inquiry will be, whether the testator is authorized to define the use and destination of his legacy. We have seen that donations to the cities of the Roman empire followed immediately upon the *senatus consultum* which allowed them to

take, and that the destination of such donations to public uses was declared. Domat says, "One can bequeathe or devise to a city or other corporation whatsoever, ecclesiastical or lay, and appropriate the gift to some lawful and honorable purpose, or for public works, for feeding the poor, or for other objects of piety or benevolence." Domat, Lois Civiles, b. 4, tit. 2, § 2.

The city of New Orleans holds its public squares, hospitals, levees, cemeteries, and libraries by such dedications. This court says, (New Orleans *v.* United States, 10 Peters, 662,) "That property may be dedicated to public use, is a well-established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society, in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation."

The Supreme Court of Louisiana, in a number of cases, have applied the principle contained in these citations with confidence. DePontalba *v.* New Orleans, 3 An. 662; Will of Mary, 2 Rob. 440; Duke of Rich. *v.* Mylne, 17 La. 312; Maryland and Louisiana *v.* Roselius, MS.

The code of Louisiana provides that donations made for the benefit of an hospital, of the poor of the community, or of establishments of public utility, shall be accepted by the administrators of such establishments. C. C. 1536. It may be very true this article relates merely to the formal manner by which donations, *inter vivos*, for such objects may be perfected; but it will be observed that the requirement of the French Code of a government license for the gift is dispensed with in the frame of this article, and a strong implication arises from its terms in favor of the validity of such gifts. An acceptance of such donations in a will is unnecessary. Nor do we see any ground for inferring a prohibition of donations by will, which are lawful, *inter vivos*, in the absence of any prohibitive article in the code. We are of the opinion, therefore, that the testator might declare the uses to which he destined his legacy to the cities; and the destination, being for purposes within the range of the powers and duties of its public authorities, is valid.

We shall now examine the question, whether the conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, invalidate the bequest.

The appellees contend that the performance of these conditions is impossible; they are contrary to public policy; introduce tenures at variance with the laws; and would result in mischief

to the State. That the conditions are of the essence of the gift, and the will would not conform to the dispositions of the testator, if they should be erased or disregarded. They insist that the appellees take by virtue of the law, but the devisees claim under a will. That, if they cannot exhibit a clear and valid devise of the property, the legal right of the heir should not be defeated. That this court cannot, under the guise of judicial construction, sanction an instrument from which the main prescriptions of the testator are obliterated.

The argument on this point against the cities possesses great logical force. It is admitted that illegal or immoral conditions will vitiate a contract, (C. C. 2026); but the code provides that "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals, are reputed not written." The authorities cited establish that, under the word "conditions," the various modes of appropriation, use, and destination attached to this legacy are included. Merlin says, "Conditions take different names according to their object; they are called in turn charges, destinations, motives, designations, terms. But although the conditions, charges, destinations, &c., &c., ought to be distinguished, nevertheless the word condition often serves to express them all." Merlin's Rep. Cond. § 2.

The signification of this article of the code becomes then an important inquiry. It is found in the Digest of Justinian, and from thence passed into the codes of France and Spain. Touil. 5, No. 255; 1 Escrich. Dic. leg. 565. It was copied from the Code Napoleon into the Code of Louisiana. Savigny furnishes us with the history of the law as found in the Pandects. One of the schools into which the Roman jurisconsults was divided (Proculeians) placed the construction of contracts and testaments, containing illegal or impossible conditions, on the same principle, and insisted that the whole disposition in each should be vitiated by them; another (Sabinians) changed the rule with reference to the instrument, and, while contracts were vitiated by the illegal or immoral conditions, in wills the conditions only were pronounced nugatory. Justinian adopted the opinion of the latter, which seems to have been preferred in practice before; and his adoption has been regarded as a legislative sanction of their rule in favor of testaments. Great authorities in France oppose this doctrine, and in Prussia it exists, but in a modified form, while it has been wholly rejected in Austria. 5 Toul., No. 247; Savig. Rom. Law, § 122-3-4.

The common-law rule depends upon the fact, whether the performance of the illegal, immoral, or impossible condition is prescribed as precedent or subsequent to the vesting of the estate of the devisee. In the former case, no estate exists till

the condition is performed, and no right can be claimed through an illegal or immoral act. In the latter case, the estate remains, because it cannot be defeated as a consequence of the fulfilment of an illegal or immoral condition. This, however, applies only to devises of real estate; for the ecclesiastical and chancery courts, in regard to bequest of personalty, follow the rule of the civil law, as above expressed. 1 Rop. Leg. 754–5; 7 Beav. 437; 1 Eden, R. 140; 2 Spence, Eq. J. 229.

The conditions in the case before us, which impose restraints upon alienation and partition, and exact a particular management through agents of a specified description, are conditions subsequent, and would not, by the rule of the common law, divest the estate, if pronounced to be illegal or immoral. 3 Pet. S. C. R. 377; 1 Sim. R. N. S. 464; 7 E. L. & Eq. 179; 2 J. C. Scott, C. B. R. 883; 2 Zabriskie R. 117; 10 Ala. R. 702.

These conditions belong, too, to the class that are reprobated as repugnant to the legal rights which the law attaches to ownership. The common law pronounces such conditions void, in consequence of that repugnancy, and the civil law treats them as recommendations and counsel, not designed to control the will of the donee. 1 Rop. Leg. 785; 4 Kent's Com. 130; Toul. 5, No. 51; Id. No. 405; Dalloz. Dic. tit. Cond. 96; 10 E. L. & E. R. 23.

Our opinion upon the article of the code we have cited is, that it does not prescribe a rule of interpretation, to aid the understanding of the courts in finding the intention of the testator, but that it is a peremptory enactment of the legislative authority, applicable to the subject-matter in all cases, without reference to any declared or presumed intentions of the author of a particular donation. The code treats such conditions in contracts as the wrong of both the parties, and annuls the act. In the case of the testament, while it refuses to allow the condition, it saves to the innocent legatee the disposition in his favor. It may be that this is done on the presumption that, independent of the condition, the legatee is the favorite of the testator, or from a consideration of the legatee alone. Savigny Rom. Law, § 122, *et seq.*

We have thus far treated the cities as occupying an equal position, and have considered the case with reference to the city of New Orleans alone.

The city of Baltimore is legally incorporated, and endowed with the powers usually granted to populous and improving cities. The General Assembly of Maryland, in 1825, authorized the city to establish public schools, and to collect taxes for their support; and, in 1842, it was empowered to receive in trust, and to control for the purposes of the trusts, any property which

might be bestowed upon it, by gift or will, for any of its general corporate purposes, or in and of the indigent and poor, or for the general purposes of education, or for charitable purposes of any description whatsoever, within its limits. The legal capacity of the city, therefore, corresponds with that of the city of New Orleans. Do the laws of Louisiana make a discrimination?

The code declares, "that all persons may dispose of or receive by donations, *inter vivos* or *mortis causa*, except such as the law declares expressly incapable." C. C. 1456. There is no distinction between corporations and natural persons in the power to receive by donation, nor do we find any discrimination between domestic and foreign corporations, except, perhaps in a single article. "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State." C. C. 1477.

We greatly doubt whether this article applies to all the citizens or corporations of the States of the Union. The constitutional relations between the citizens of the different States are those of equality, in reference to the subject of this article. This court, in the case of the Bank of Augusta v. Earle, (13 Pet. 520,) said, "that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union. This comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.

These principles were applied to a purchase of lands by the corporation of one State in another. Runyon v. Coster, 14 Pet. 122.

The principles of these cases have been adopted in Louisiana. 4 Rob. La. R. 517; 17 La. R. 46, 312.

We know of no departure from these principles in Maryland, and do not doubt that the corporations of Louisiana would take in the same manner as those of Maryland in that State.

The question remains to be considered, whether the destination of the legacy to public uses in the city of Baltimore affects the valid operation of the bequest. All the property of a corporation like Baltimore is held for public uses, and when the capacity is conferred or acknowledged to it to hold property, its destination to a public use is necessarily implied. Nor can we perceive why a designation of the particular use, if within the general objects of the corporation, can affect the result; nor is there

any thing in the nature of the uses declared in this will which can withdraw from the legacy a legal protection.

Neither do we concede that the uses, being in a degree foreign to the State of Louisiana, impair the effect of the will. It is well settled that, where property is conveyed to a use which would be protected, if to be executed at home, in the absence of a prohibition, the conveyance would be valid if the execution were ordered to take place abroad. This question was considered by Mr. Justice Story, in the opinion prepared by him for the case of the Baptist Association v. Smith, published in 3 Pet. 486, 500.

He says, "there is no statute of Virginia making such bequests void; and, therefore, if against her policy, it can only be because it would be against the general policy of all States governed by the Common Law." He concludes: "there is no solid objection to the bequest, founded upon the objects being foreign to the State of Virginia." In the late case of Whicker v. Hume, (14 Beav. 509,) on appeal, (16 Jur. 391,) a bequest to trustees, to be appropriated in their absolute and uncontrolled discretion, for the benefit and advancement and propagation of learning in every part of the world, as far as circumstances will permit," was pronounced valid. We find nothing in the Code of Louisiana indicating a spirit less comprehensive or catholic; we shall not, therefore, infer the existence of a restriction where none has been declared. We are of the opinion, that the uses for which the testator has devised his estate to the city of Baltimore, are approved alike in the legislation of Louisiana and Maryland, and that the execution of them may be enforced in their courts.

We have considered the legacy without a reference to the annuities which the testator has charged upon it. It is only necessary for us to determine a single question in regard to them. Are the heirs at law interested in the question of their legality?

The Civil Code (C. C. 1697) declares "that legatees under a universal title, and legatees under a particular title, benefit by the failure of those particular legacies, which they are bound to discharge."

It will be seen that all the annuitants, having a distinct character from the cities, have a claim upon them for their annual allowance. Should these annuities be invalid this charge would be removed, and the cities relieved. Such was the decision of the Supreme Court of Louisiana, (Prevost v. Martel, 10 Rob. 512,) and such the conclusion of the Court of Cassation, in Hanaire v. Tandon, the report of whose judgment is appended to one of the briefs of the appellants.

The annuities created to establish an Asylum for the Poor and a School Farm — and of the validity of which grave doubts exist — are charges upon the legacy of the cities. If the directions of the testator cannot be legally complied with, the charge will be remitted without defeating the legacy. Sav. Roman Law, § 120, 129.

We shall not express any decided opinion in reference to either of the annuities, but leave the question of their validity to be settled by the persons interested, or by the tribunals to whose jurisdiction they appropriately belong.

We have considered it to be our duty to examine the several questions which arise upon the record, so that the important interests involved in them may be relieved from further embarrassment and controversy. In our opinion, the failure of the devise to the cities would not have benefited the appellees; for that the limitation over to the States of Maryland and Louisiana would have been operative in that event.

We close our opinion with expressing our acknowledgments for the aid we have received from the able arguments at the bar, and the profound discussions in the Supreme Court of Louisiana, with whose judgment we have concurred.

The decree of the Circuit Court for the Eastern District of Louisiana is reversed, and the cause remanded to that court, with directions to dismiss the bill of the plaintiffs with costs.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to dismiss the bill of the complainants, with costs in that court.

Andrew Wylie, Jr., Administrator of Samuel Baldwin, Appellant, v. Richard S. Coxe.

Where a contract was made with an attorney for the prosecution of a claim against Mexico for a stipulated proportion of the amount recovered, and services were ren-

dered, the death of the owner of the claim did not dissolve the contract, but the compensation remained a lien upon the money when recovered.

A court of equity can exercise jurisdiction over the case if a more adequate remedy can be thus obtained than in a court of law.

The want of jurisdiction should have been alleged in the court below, either by plea or answer, if the defendant intended to avail himself of it. It is too late to urge it in an appellate court, unless it appears on the face of the proceedings.

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

It was a bill filed by *Mr. Coxe*, under the circumstances stated in the opinion of the court.

The Circuit Court passed the following decree.

In Equity.—This cause having been set down for hearing, by consent upon the bill, answer, general replication, and the testimony filed in the case, and having been argued by counsel, and having been fully and materially considered by the court, it is thereupon, on this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and fifty-two, ordered, adjudged, and decreed, that the averments in said bill contained are fully established and sustained, and that complainant is justly and truly entitled to the relief which he prays; and inasmuch as it is thus shown and established that said respondent, as administrator of Samuel Baldwin, did obtain an award as averred, for the sum of seventy-five thousand dollars, which said sum it is admitted that he has received from the government of the United States, and that he holds the same free and clear of all debts due by said intestate; and it being fully shown and established that, by and under the contract made in the lifetime of said Samuel Baldwin between the said Samuel and said complainant, said complainant is justly and equitably entitled to have and receive out of said fund, so in the hands of said defendant, as administrator as aforesaid, at the rate of five per centum on the said sum of seventy-five thousand dollars.

Whereupon, it is now further ordered, adjudged, and decreed, that said defendant, as administrator as aforesaid, do forthwith pay over to said complainant the sum of three thousand seven hundred and fifty dollars.

And whereas it further appears, and it is admitted, that said award became and was payable to said defendant, as administrator as aforesaid, on the sixteenth day of May, eighteen hundred and fifty-one, it is further ordered, decreed, and adjudged, that said defendant, as administrator as aforesaid, do further pay to said complainant interest on said sum of three thousand seven hundred and fifty dollars, to be calculated and estimated

from said 16th May, 1851, until paid, together with the costs of this suit.

From this decree, Wylie, the administrator appealed to this court.

Afterwards he filed a petition to the Circuit Court to set aside the decree for reasons which it is unnecessary to state; but the court overruled the motion, from which judgment also Wylie prayed an appeal to this court. This is mentioned in order that the case in 14 Howard, 1, may be understood.

The case as it now stood before this court, was argued by *Mr. Wylie*, for the appellant, and *Mr. Badger*, for the appellee.

Mr. Wylie made the following points:

First Point. — The death of Samuel Baldwin in December, 1847, put an end to the agency of both John Baldwin and Richard S. Coxe, as to this claim. Hunt *v.* Rousmanier, 8 Wheat. 174; Campbell *v.* Kincaid, 3 Monroe, Rep. 566. Newbaker *v.* Alricks, 5 Watts, 183.

Second Point. — There is no contract even alleged as between complainant and respondent, much less a contract fixing the compensation of the former at five per cent. on the amount recovered. On the contrary, any such contract, agreement, or understanding, is positively denied by the answer, nor was there the slightest proof thereof on the part of the complainant. And yet the court below decreed the payment of the five per cent. as though such a contract had been proved.

Third Point. — There was no evidence on the part of complainant to show that he had rendered any valuable service in the case, which in equity and good faith required compensation; and if such service had been rendered at the request of the administrator, there being no special contract shown, the decree of the court below was erroneous. The *quantum meruit* should have been established in another tribunal.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery, from the Circuit Court for the District of Columbia.

The complainant, Richard S. Coxe, filed his bill stating that about the year eighteen hundred and forty-two or three, a certain Samuel Baldwin, a citizen of the United States, residing in Mexico, had a claim against the Mexican Republic for personal outrages and losses of property through the officers of that government. Many similar claims were brought to the notice of the Government of the United States, to enlist its efforts for an indemnity from the Mexican Republic; that the complain-

ant was employed by Doctor John Baldwin, the brother of Samuel, to prosecute his claim, and various documents and papers connected with the same, were placed in his hands, showing the origin and merits of the claim; that he brought it to the notice of the government for several years, urging an indemnity. Much time and labor were expended in this service, in written communications and otherwise to different Secretaries of State. War against Mexico was declared, which suspended his efforts, until a peace was concluded in 1848, which provided for the settlement of those claims. An act of Congress was passed, and a board of commissioners authorized to examine and decide such claims. The board being organized, the papers in relation to Baldwin's claim were laid before it. That up to April, 1849, no other person acted as agent or attorney for the claim but the complainant. He did every thing that was done in bringing the case before our government for an indemnity. Samuel Baldwin died, and letters of administration by the advice of the complainant, were granted to Andrew Wylie, the defendant. The claim was allowed by the commissioners, amounting to the sum of seventy-five thousand dollars, and the complainant believes that to his measures and arguments this allowance may be principally attributed.

It was understood that a commission of five per cent. should be allowed on the sum awarded for the services of the complainant. That the defendant has refused to pay the compensation stated, &c.

The defendant admits that he was called upon by John Baldwin and complainant, and at their instance he took out letters of administration on the estate of Samuel Baldwin. The complainant was not employed by defendant—but supposing he had been engaged as counsel by the widow, a memorial was prepared to be presented to the board, setting forth the claim, by the defendant and submitted to the complainant, which he approved, and it was used before the board. Other documents being furnished, another memorial was presented by the defendant.

Mr. Goix, the agent of the widow, came on from Mexico, bringing with him the will of Samuel Baldwin, which bequeathed to his wife and children his property and appointed her executrix. Goix, being the agent of the widow, dismissed the complainant as the attorney in the case, after which he was not consulted by the defendant; and any services rendered by the complainant subsequently, were voluntary. The defendant, however, admits, that on one or two occasions, the complainant "happened to be present with the board of commissioners, while the claim was under consideration, and rendered essential service in removing

objections which might have proved very injurious, if not fatal to it, if they had not been removed."

John Baldwin, a brother of Samuel, being sworn, states, that he received various documents from his brother in relation to this claim, with instructions to take measures for the recovery of it. He placed the papers in the hands of the complainant, and agreed with him to prosecute the claim on the same conditions as a claim he had prosecuted for witness. The papers were translated, and, with a memorial, were filed in the department of State. His brother died, and at the instance of complainant the defendant was appointed administrator, for whose services witness agreed to pay five per cent. but witness did not intend to supersede the complainant, and thinks he is entitled to his fee.

In answer to an interrogatory, the witness says, the complainant was to receive a contingent fee of five per centum out of the fund awarded, whether money or scrip; if nothing was received, he was entitled to nothing for his services.

It is contended by the defendant, that the complainant having been dismissed by the agent of the widow, who was the executrix of her husband, and not being employed by the defendant, he has no right to the compensation claimed. That John Baldwin acted as the agent of his brother, in making the contract with the complainant is proved. The defendant seems to suppose that, as on the death of Samuel Baldwin, the agency of his brother ceased, the contract which had been made by him was no longer in force. The relation of administrator enabled the defendant to control the case and dispense with the further services of the complainant; but he had no power to annul the contract if made *bonâ fide*, by the complainant, and the business had been faithfully prosecuted by him.

It appears the complainant, on being employed in the case, had the papers translated and filed, with a memorial, in the Department of State; and that for several years, with much labor, he did all in his power to procure the action of the federal government in its behalf. A claim of indemnity from Mexico, through the remonstrances of our government, was the only step which, at that time, could be taken. A war intervened, and on the restoration of peace, provision was made for the examination and decision of such claims, and also for their payment.

The complainant gave advice as to the necessary evidence to be procured in Mexico, for the establishment of the claim, and was consulted respecting the memorial to the commissioners; and while they had the claim under examination, it is admitted that the complainant, by his explanations and arguments, removed difficulties and objections which, unexplained, would in

all probability have prevented the allowance of the claim. We think the contract is proved, also the services rendered under it, by the complainant, and that he is entitled to the compensation claimed.

It is objected that equity can exercise no jurisdiction in the case, as adequate relief may be obtained at law.

There may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction. The 8th section of the act to carry out the Mexican treaty, authorizes a bill to be filed, where an individual other than the one to whom the money was awarded claims it, to contest the right, and to enjoin the payment of the money. This applies only to cases where different individuals claim the fund, but the reason of such a proceeding may, to some extent, apply to other cases. And it applies to the case before us, if the money still remain in the treasury. The bill, however, does not seem to have been drawn with reference to the act.

The evidence proves that the complainant was to receive a contingent fee of five per centum, out of the fund awarded, whether money or scrip. This being the contract, it constituted a lien upon the fund, whether it should be money or scrip. The fund was looked to and not the personal responsibility of the owner of the claim. A bill filed under the act would have authorized an injunction for the amount claimed, by complainant. Such a procedure would be within the act. But under the contract the lien on the fund in the hands of the administrator, is a sufficient ground for an equity jurisdiction. The payment of the fund to the executrix in Mexico would place it, probably, beyond the reach of the complainant.

The want of jurisdiction, if relied on by the defendants, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the appellate court, unless the want of jurisdiction is apparent on the face of the bill.

We affirm the decree with costs.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and interest until paid, at the same rate per annum that similar decrees bear in the courts of the District of Columbia.

HAMILTON MURRAY, USE, &c., PLAINTIFF, v. JOHN A. GIBSON.

A statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State.

This statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defence in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained.

THIS case came up from the Circuit Court of the United States for the Southern District of Mississippi, upon a certificate of division in opinion between the judges thereof.

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

It was argued by Mr. *May*, for the plaintiff, who made the following points.

First. That the Federal courts will be governed by the State law of limitations in the forum where the suit was instituted, that is, by the law of Mississippi in this case. See Green v. Neal, 6 Peters, 291; Harpending v. The Dutch Church, 16 Peters, 455; Porterfield v. Clark, 2 Howard, 76.

Second. That in construing the statutes of limitations of Mississippi, this court will conform to, and adopt the exposition thereof made by the Supreme Court of Mississippi, and in the event of contradictory or inconsistent decisions by that court, the last decision will be preferred and followed, even though it may be opposed to a former decision of this court. Elmendorf v. Taylor, 10 Wheat. 152; Bank of Hamilton v. Dudley, 2 Peters, 492; United States v. Morrison, 4 Peters, 124; Green v. Neal, 6 Peters, 291.

Third. That the plea is defective under the act of limitations of Mississippi, passed March 5th, 1846. See Hutch. Code, 833.

Because that statute is inapplicable to an action on a judgment rendered, as this was anterior to its passage, and it was so adjudged by the Supreme Court of Mississippi. See Boyd, &c. v. Barrenger, &c., 1 Cushman's Mississippi Reports, 269.

Fourth. That said plea is equally defective under the 14th sect. act of Mississippi of 1844. See the act in Hutch. Code, 832.

Because the plea does not aver that two years or more had expired from the passage of said last act, before the institution of this suit, as the said act requires, and as the Supreme Court of Mississippi also ruled it should have done, in the same case of Boyd, &c. v. Barrenger, 1 Cushman's Reports, 269.

Mr. Justice DANIEL delivered the opinion of the court.

The question adjourned for our consideration on this record, cannot be more clearly or succinctly disclosed than it has been by the certified statement of the pleadings upon which the judges of the Circuit Court were divided in opinion. That statement is in the following words:

May Term, 1851.

"This day came on this cause for trial before Judges Peter V. Daniel and Samuel J. Gholson, presiding.

"The declaration is an action of debt, brought on the 16th May, 1850, and founded on a judgment rendered on the 29th day of November, 1844, in the district court of the parish of Madison, in the ninth judicial district of the State of Louisiana, against the defendant, and in favor of the plaintiff. To this action the defendant pleaded a number of pleas, of which the 7th plea is in the words and figures following: 'And for further plea in this behalf the said defendant says, that the said defendant was, at the time of the commencement of the suit in the District Court of the parish of Madison, in the State of Louisiana, and also at the time of the rendition of the judgment in the plaintiff's declaration mentioned, and ever since has been, and now is, a citizen of the State of Mississippi, residing in the county of Hinds, and that more than three years expired, and were complete and ended, from and after the time of the rendition of such judgment, without the limits of this State, to wit, in the parish of Madison, in the State of Louisiana, before the institution of this suit, and this he is ready to verify; wherefore, &c.'

"JOHNSON, MAYS, & CLIFFTON, *For defendant.*"

"To said plea the plaintiff filed a general demurrer.

"Among other matters to be tried, the question occurred before the court whether the demurrer of the plaintiff to the defendant's plea above copied ought to be sustained. And after argument by counsel, the opinions of the two judges aforesaid are opposed and disagree upon the question aforesaid; one of said judges being of opinion that said plea is a good and sufficient bar to the plaintiff's action, and that said demurrer should be overruled; and the other of said judges being of opinion that said plea is not a good or sufficient bar to the plaintiff's action, and that said demurrer should be sustained.

"And thereupon, at the request of the counsel for both parties to said suit, the point aforesaid upon which said disagreement happens is hereby stated under the direction of the judges aforesaid, and is by them, upon the request of said counsel, signed

and sealed, and ordered to be enrolled, and made part of the record in said cause.

"And the court orders and directs that said point be duly certified, under the seal of said court, to the Supreme Court of the United States of America, at the next session of said Supreme Court hereafter to be held.

P. V. DANIEL, [SEAL]
S. J. GHOLSON. [SEAL.]"

Upon an examination of the defendant's seventh plea and of the law to which it has reference, it is obvious that the purpose of the defendant was to interpose, as a bar to a recovery upon the judgment rendered by the court in Louisiana, the provision of the statute of Mississippi, enacted on the 5th of March, 1846, and to be found in Hutchinson's Digest of the statutes of that State of 1848, Art. 8, p. 833. The language of the provision is as follows: "No record of any judgment, recovered in any court of record without the limits of this State, against any person who was, at the time of the commencement of the suit on which the judgment is founded, or at the time of the rendition of such judgment, a citizen of this State, shall be received in any court of this State as evidence to charge such citizen with liability, after the expiration of three years from the time of the rendition of such judgment without the limits of this State."

As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only. Especially should this rule of interpretation prevail, where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of those rights. The peculiar language of the provision of the Mississippi statute, if taken in its literal acceptation, would not only evince the force and propriety of the rule above mentioned, but might suggest a serious doubt as to the compatibility of that provision with the principles of common right, or with the mandate of the Federal Constitution; for by the literal terms of that statute, the rights of the citizen of a different State seem to be made dependent, not upon his diligence in the institution or prosecution of his suit, but upon an event over which he can have no control, viz. the trial of the action brought upon the previous judgment. From these difficulties, which would seem to flow from the letter of the statute, the Court of Errors and Appeals for the State of Mississippi have relieved that law by the interpretation they have placed upon it.

Thus, in the case of Boyd *v.* Barringer, reported in the 23d volume of Mississippi Reports, by Cushman, page 270, they have declared that the statute of the 5th of March, 1846, has no application to judgments rendered before its passage; and in the 24th volume of Mississippi Reports, page 377, in the case of Garrett *v.* Beaumont, they have affirmed the same position. In a decision, pronounced on the 2d Monday of December, 1853, in Moore *v.* Lobbin, a manuscript copy of which has been certified and submitted by consent of counsel, the same court have expounded that provision of the statute of 1846 which declares "that no record of any judgment recovered in any court of record without the limits of the State, against any person who, at the commencement of the suit on which the judgment was recovered, or at the time of the rendition of said judgment, was a citizen of the State of Mississippi, should be received in any court of that State as evidence to charge such citizen with liability after the expiration of three years from the time of the rendition of such judgment without the limits of the State."

In expounding this provision the court say, "the phraseology of this statute renders it not free from difficulty of construction. It is an amendment of the general statute of limitations, and the legislature must have had in view that general principle governing all statutes limiting actions, that the periods prescribed have reference to the commencement of the action. We cannot suppose that the legislature intended to do more than to debar a party of any right to maintain an action commenced on such judgment after the lapse of the time mentioned, or that any reference was had to the time of trial of a suit which might be commenced long before the expiration of the time limited. Such a construction would involve the most unjust and unreasonable consequences." The court, after more extended views of the subject, arrives at the following conclusion: "We are therefore led to sanction such a construction of the statute as is most consistent with reason and justice, and not in conflict with the Constitution of the United States; and we are accordingly of opinion that this is a statute of limitations, affecting the commencement of the suit; and that if an action on such judgment be instituted before the expiration of three years from the date of its rendition, a transcript of the record of it is admissible in evidence on the trial, though more than three years have elapsed at the time it is offered in evidence."

Such is the construction placed by the highest court of Mississippi upon the statute of 1846, which the seventh plea of the defendant sought to interpose as a bar to the action against him.

According to that construction, the statute of 1846 could operate no such bar, because the judgment in Louisiana, on which

the action was founded, was recovered on the 29th of November, 1844, more than a year previously to the passing of the statute in question; and, by the same interpretation, the right of the plaintiff to count upon and to adduce in evidence, in support of his action, the record of that judgment, was in nowise affected by the period of the trial, but that the law had reference exclusively to the interval of time between the first judgment and the institution of the action founded thereon.

It is the practice of this court to adopt the interpretation given by the highest tribunals of the several States to their respective acts of legislation where such interpretation does not conflict with the paramount authority of the Constitution, or laws of the United States binding upon their own courts, or with the fundamental principles of justice and common right. Perceiving in the case before us no conflict whatsoever between such authority and the decisions of the Supreme Court of Mississippi herein referred to, but, on the contrary, an entire coincidence between them, we approve and adopt those decisions, and, in conformity therewith, we order it to be certified to the Circuit Court that the 7th plea of the defendant pleaded in this case is not sufficient to bar the action of the plaintiff, and that the demurrer of the plaintiff to that plea ought to be sustained.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the question or point on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the acts of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the plea pleaded by the defendant is not a good or sufficient bar to the plaintiff's action, and that the demurrer of the plaintiffs should be sustained. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

JOHN DEN, EX DEM. ARCHIBALD RUSSELL, PLAINTIFF IN ERROR, v. THE ASSOCIATION OF THE JERSEY COMPANY.

The soil under the public navigable waters of East New Jersey belongs to the State and not to the proprietors. This court so decided in the case of Martin v. Waddell, 16 Peters, 367; and the principle covers a case where land has been reclaimed from the water under an act of the Legislature.

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

The action of ejectment was brought to recover a tract of land at Paulus Hook, now Jersey City, on the Jersey shore, formerly under the tide waters of the Hudson river, and below low-water mark. The *locus in quo* has been reclaimed from the water by artificial means, and was in the possession of the Jersey Associates, and occupied by them as building lots.

Upon the trial in the Circuit Court it was ruled that the plaintiff had failed to make out a title, and the jury found for the defendants.

The plaintiff excepted to the opinion of the court and the cause came up on a writ of error.

It was argued by *Mr. Rutherford* and *Mr. Van Santvoord*, for the plaintiff in error, and by *Mr. Zabriskie* and *Mr. Scudder*, for the defendants.

The title of the plaintiff in error was derived from the proprietors of East New Jersey, who claimed under a grant from Charles the Second to his brother James, Duke of York, in 1664.

The proprietors living in 1776 having espoused the cause of the Americans, in the struggle of the Revolution, their property was not confiscated; and they are still recognized by the State of New Jersey as an existing body, for many purposes. They own a considerable quantity of unappropriated land, which is exempt from taxation.

The argument of the case in this court covered a great deal of ground upon both sides; but as the decision of the court turned upon a single point, viz. that the main feature of the case had been adjudicated upon in Martin v. Waddell, 16 Peters, 367, it is not deemed necessary to do more than state the argument made by counsel to show the difference between the two cases.

Mr. Van Santvoord, one of the counsel for the plaintiff in error, thus noticed the point:

We are to show, therefore, that the propriety in the soil under the navigable waters of New Jersey, passed to the Duke of York and his grantees, and that it passed not as one of the regalia of the crown, or as a concomitant of government, but as an absolute proprietary interest, subject, it is true, to every lawful public use; but not the less on that account a hereditament, and the subject of lawful ownership and of the right of full and unqualified possession when that public use shall have ceased.

In examining the question it will be necessary, first, to remove an obstacle which is encountered at the very threshold of the discussion. It is contended, and the circuit judge so charged the jury, that the matter is already *res adjudicata*, and that the decision in Martin and others *v.* Waddell involves the very point in controversy. If this be so, the discussion, of course, is at an end. For though a decision like that of Arnold *v.* Mundy, 1 Halst. 1, in a State court is not conclusive, yet an adjudication by this court of the very subject-matter of the controversy is; and we are not at liberty to question it, or permitted to look beyond the rule and the decision in the particular case for the reason upon which such decision is founded.

We contend, then, that the question presented by the present case was not necessarily involved, and certainly not passed upon, in Martin *v.* Waddell, nor was it in Arnold *v.* Mundy. Our claim is perfectly consistent with the actual decisions in both cases, and is even fortified by those decisions. I shall, therefore, briefly consider what was really decided in Martin *v.* Waddell, and point out the distinction between that and the present case. And,

First. This is an ejectment for lands reclaimed from the bed of a navigable river, and in the actual possession of the defendant as building lots. Martin *v.* Waddell was an ejectment for lands still under water, in the constructive possession of the defendant as a fishery.

Ejectment is a possessory action, and the suit is brought to recover the possession, in the one case of the fishery, or the use of the land, in the other case of the land itself.

Second. In Martin *v.* Waddell, the only possession of which the *locus in quo* (being then under water) was susceptible, was in its capacity of a public easement, or highway for navigation, or for fishery, and their correspondent uses. The only possession withheld by the defendant, and claimed by the plaintiff, was the use of the *locus in quo* as a fishery. The decision in that case was, that the plaintiff was not entitled to such possession, because he had not an exclusive right to such use or possession; but the question of the ultimate fee in the soil, or *jus proprietatis*, was not involved.

This position may be illustrated by supposing the possession claimed by the plaintiff, and withheld by the defendant, to have been the exclusive use of the soil and waters for navigation. The defendant being in possession by his boats, rafts, &c., the plaintiff seeks to oust him by an ejectment; and must fail, for the same reason that he failed in Martin v. Waddell, because navigation being a *jus publicum*, the defendant had a right, in common with every other citizen, to be there. But no one will pretend that such a decision would carry with it the more important one, in respect to the fee of the soil. So in Martin v. Waddell, the franchise of fishery is elevated into a *jus publicum*, and placed upon the same footing with navigation. The plaintiff, by an ejectment, can no more be put in exclusive possession of it, than he could of an exclusive right of navigation in a public river, because it is not susceptible of ownership.

Third. It makes no difference that the action was technically brought for the land under water. The sole and only controversy was in respect to the claim set up by the plaintiff's lessor of an exclusive right of fishing, and nothing else was passed upon in the case. Ejectment cannot be brought for a fishery *eo nomine;* but if a fishery be claimed, the action must be brought for the land covered with water. Thom. Co. Litt. p. 200.

Thus, also, ejectment will not lie for a watercourse, but the ground over which the water passes, being deliverable in execution, upon which an entry can be effected, may be recovered in this action. Challoner v. Thomas, Yelv. 143; see also Jackson v. Buel, 9 Johns. 298; Jackson v. May, 16 Johns. 184.

It was formerly held that a franchise of fishery, being an incorporeal hereditament, and not susceptible of delivery, could not be recovered in ejectment, (Cro. Jac. 144, Cro. Car. 492); and it is now only upon the assumption that a fishery is a tenement, and may be delivered in possession, that an ejectment will lie to recover it. Saund. Pl. & Ev. 981.

Fourth. These distinctions were taken and strongly urged in Martin v. Waddell by the counsel who argued the case against the proprietors. He says:

"The plaintiff, to recover, must maintain two positions,—

1. That he has a possessory title to the premises in question, the soil of this navigable river. And,

2. That there was not a common right of fishery in the people at large in the premises in question."

He must maintain both positions. A mere title to the soil would not enable him to recover. It must be a possessory title, and that, too, to the exclusion of every other right of possession, including the common right of the people at large to use the

locus in quo as a fishery. Accordingly, in another part of his argument, the counsel remarks: "A question has arisen whether the King of England can grant the soil of the sea and its arms, so as to destroy or prejudice public rights. Not considering this question at all material to the main argument, I have purposely left it out." The question, therefore, of the title to the soil was not presented by counsel, or passed upon by the court.

Fifth. That it was the use of the water as a fishery, and not the title to the land, that was in question, is manifest also from the opinion of the court. "It appears," says the Chief Justice, "that the principal matter in dispute is the right to the oyster fishery in the public rivers and bays of East New Jersey." Justice Thompson, in his dissenting opinion, attempts, indeed, to show that it was the use of the land, and not of the water as a fishery, that was in controversy, making a distinction between fishing for floating fish, and dredging for oysters, but this view was not concurred in. "Should it be admitted," he says, "that the right to fish for floating fish was included in this public right, it would not decide the present question," that is, the propriety in the soil. The whole argument goes to show, as was stated by the counsel for the State, that the question presented was not as to the power of the king "to grant the soil, so as to give an individual the right to take it after its character had been changed by alluvion, wharfing out, &c.;" but the power of the king "to grant it, so as to vest in an individual the soil, and divested of all common use before the change takes place." If, therefore, the right to fish for both shell-fish and floating fish be such "common use," as was held in that case, the present question remains still untouched.

Sixth. The actual decision in the case of Martin v. Waddell, as I have endeavored to show, establishes nothing more than this, namely, that the particular right or claim in controversy—the possession of an oyster fishery—could not be recovered in an action of ejectment, because an oyster fishery, like every other fishery in navigable waters, was a part of the *jure regalia*—a royalty—a necessary attribute of government, and, as such, did not pass under the grant as private property, but became disconnected from the proprietary interest, and passed out of the crown with the surrender of government to Queen Anne. If there be any thing else in the opinion delivered in that case, it is not conclusive or binding as authority. But we contend that there is nothing in that opinion which goes further than this; for though it does not, in express terms, discriminate between the "dominion and propriety in the navigable waters, and in the soils under them," but connects them together, yet the whole scope of the argument seems to show that it was the

franchise of fishery alone which Chief Justice Taney held had passed "as a part of the prerogative rights annexed to the political powers conferred on the duke;" and that the question of the ultimate fee, or propriety in the soil, subject to the public use, was not considered as influencing the decision.

And lastly — When it is said, in the opinion of the court, that the navigable waters and the soils under them passed as a royalty incident to the forms of government, "to be held in the same manner and for the same purposes that the navigable waters of England, and the soils under them are held by the crown," the whole question as to what is properly the domain of the crown, which is alienable as a private interest to a subject, and what is the common property which is inalienable, save as a trust necessarily incident to government, is left open, except so far as that it is undoubtedly decided by the case in question, that the waters of a public river in respect to their use, including the public right of fishery in all its branches, is a part of this common property and is inalienable. This was precisely the point taken and the decision made in Arnold v. Mundy, 1 Halst. 1.

We maintain, then, that the soil under navigable waters, disconnected from its public use, is part of the domain of the crown. And this leads at once to the main point in controversy.

The *locus in quo*, a portion of the bed of the Hudson river, passed to the Duke of York and his assigns, not as a royalty annexed to the political powers conferred upon the duke by the patent, but as an absolute propriety in the soil, subject to the public uses of navigation, &c., and also, subject to the public right of fishery, and every thing necessarily incident to such right. This might, and perhaps would include the right of anchorage, the right to erect wharves, docks, &c., and every other use of the soil necessary to facilitate commerce and render the navigable water serviceable as an easement or public highway; as well as the right to make every proper use of the soil for the purposes of fishery, not inconsistent with the regulations of the sovereign power, in this case the State, in respect thereto. If this proposition can be successfully maintained, the proprietary title is established, and the right of the plaintiff to recover must be admitted.

This is the main, and indeed it may be said the only, question presented by this case; and I propose to discuss it with a specific reference to the decision in Martin v. Waddell; yielding as I do to that decision an unqualified assent.

Let us set out with the undeniable proposition conceded in the case of Martin v. Waddell, and as expressed in the prevailing opinion of the court, that the "right of the king to make this grant with all its prerogatives and powers of government,

cannot, at this day, be questioned." That is, the entire grant—the proprietary interest, and the powers of government, together with the royalties necessarily incident and annexed to the powers of government. They all passed to the duke and his heirs and assigns in the same manner as they were held by the king himself, and of course the twenty-four proprietors so held them. Nothing, either of property or dominion in New Jersey, remained in the king.

The important question then arises, and the question which must be decisive of this case, how and in what capacity, under the Constitution and laws of England, were lands under navigable waters, either in public rivers or arms of the sea, held by the king, and what was his power over them? Were they held as a proprietary and alienable interest, the subject of an exclusive possession as the proper domain of the king when the public servitude had ceased? Or were they held by the king in the capacity of trustee merely for the public, and, like the franchise of fishery, &c., inalienable by grant or otherwise from the king to a subject to be held as private property?

Chief Justice Taney very properly and truly remarks, in Martin *v.* Waddell, that, "in deciding a question like this, the laws and institutions of England, the history of the times, the object of the charter, the contemporanous construction given to it, and the usage under it, for the century and more which has elapsed,—are all entitled to consideration and weight."

Pursuing precisely this course, let us examine the question in the same way, namely:

1st. By the laws and institutions of England.

2d. By the history of the times.

3d. By the objects of the charter, the contemporanous construction given to it and the usages under it, &c., &c., &c.

The counsel for defendants in error thus stated the point.

Sixth Point. That the Supreme Court of New Jersey and the Supreme Court of the United States, have both expressly decided that the Board of East Jersey Proprietors, the grantors in this case, under whom Russell claims title, had no right or title to, and could not grant the soil under tide waters bounded by the shores of New Jersey. The plaintiff's title, or proprietary title, in this case, is precisely the same as in Arnold *v.* Mundy and in Martin *v.* Waddell's Lessee. In this case the position of the defendants is stronger, as they are riparian owners, and have wharfed out from their own lands, under the express authority of the act of the legislature incorporating them. Arnold *v.* Mundy, 1 Halst. 1; Martin et al. *v.* Waddell's Lessee, 16 Peters, 369.

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

This is an action of ejectment brought by the plaintiff in error against the defendants in the Circuit Court for the district of New Jersey, to recover a parcel of land situate in Jersey City. The land in question has been reclaimed from the water, by the defendants, under the authority of the legislature; and is now in their possession, and occupied by them as building lots.

The plaintiff claims the premises under sundry mesne conveyances from the Proprietors of East New Jersey, and the title of the proprietors is the point in question. And they claim that, by virtue of the various grants by which they became proprietors of East New Jersey, the fee of the soil under the navigable waters of that part of the State was conveyed to them, as private property subject to the public use; and as that use has ceased in the premises in question, they are entitled to their exclusive possession.

It is not necessary to state particularly the charters and grants under which they claim. They are all set out in the special verdict in the case of Martin v. Waddell, reported in 16 Pet. 367. The title claimed on behalf of the proprietors in that case was the same with the title upon which the plaintiff now relies. And upon very full argument and consideration in the case referred to, the court were of opinion that the soil under the public navigable waters of East New Jersey belonged to the State and not to the proprietors; and upon that ground gave judgment for the defendant. The decision in that case must govern this.

The counsel for the plaintiff, however, endeavor to distinguish the case before us from the former one, upon the ground that nothing but the right of fishery was decided in Martin v. Waddell; and not the right to the soil. But they would seem to have overlooked the circumstance that it was an action of ejectment for the land covered with water. It was not an action for disturbing the plaintiff in a right of fishery; but an action to recover possession of the soil itself. And in giving judgment for the defendant the court necessarily decided upon the title to the soil.

It is true, the defendant claimed nothing more than the exclusive right of planting and growing oysters on the soil for which the ejectment was brought. The special verdict found that he was in possession under a law of New Jersey, which gave him the exclusive privilege of planting and growing oysters, on the premises in question upon the payment of a certain rent to the State. The principle question therefore in dispute between the parties in that suit, and indeed the only one of any value was the oyster fishery. But the right to the fishery depended on the right to the soil upon which the oysters were planted and grown;

and if the plaintiff could have shown that the proprietors, under whom he claimed, were legally entitled to it, the judgment of the court must have been in his favor.

Nor do we see any thing in the opinion delivered on that occasion, in relation to the rights of fishery, further than they contributed to illustrate the character and objects of the charter to the Duke of York; and to show that the soil, under public and navigable waters, was granted to him, not as private property, to be parcelled out and sold for his own personal emolument; but as a part of the *jura regalia* with which he was clothed, and as such was surrendered by the proprietors to the English crown, when they relinquished the powers of government, and consequently belonged to the State of New Jersey when it became an independent sovereignty.

There being nothing in the title now claimed for the proprietors, to distinguish this case from that of Martin *v.* Waddell, it is not necessary to examine the other and further grounds of defence taken by the defendants.

The judgment of the circuit court must be affirmed with costs.

Order.

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

Arthur Morgan Foley, Plaintiff in Error, *v.* Samuel T. Harrison, Defendant, and Louis Lesassier, Intervenor.

In 1841, Congress passed an act (5 Stat. at Large, 455) declaring that there shall be granted to each State, &c., (Louisiana being one,) five hundred thousand acres of land.

This act did not convey the fee to any lands whatever; but left the land system of the United States in full operation as to regulation of titles, so as to prevent conflicting entries.

Hence, where a plaintiff claimed under a patent from the State of Louisiana, and entries only in the United States office; and the defendant claimed under patents from the United States, the title of the latter is the better in a petitory action.

The defendant has also the superior equity; because his entries were prior in time to those of the plaintiff, and the decision of a board, consisting of the Secretary of the Treasury, the Attorney-General, and the Commissioner of the Land Office, to whom the matter had been referred by an act of Congress, was in favor of the defendant.

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

It was a petitory action, commenced by Foley in the Fifth District Court of New Orleans, claiming lots No. 1 and 2 of section No. 3, the west half of section No. 10, and the northwest quarter of section No. 15, in township eleven, range thirteen east, containing in all 855 acres and nine hundredths.

By the act of 4th September, 1841, section 8, (5 Statues at Large, 455,) Congress granted to several of the States, of which Louisiana was one, five hundred thousand acres of land each, for purposes of internal improvement; "the selections in all of said States to be made within their limits respectively, in such a manner as the legislatures thereof shall direct; and located, in parcels conformably to sectional divisions and subdivisions of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States, in said States respectively, shall have been surveyed according to existing laws."

In 1844, the Legislature of Louisiana, in pursuance of the power with which it was invested by the above-cited act of Congress of directing the manner in which the selections of land thus granted should be made, passed an act establishing an office for the sale of the unlocated lands granted to the State, with a register, and the State treasurer as the receiver thereof. Session Acts of 1844, p. 61.

By the 7th section of that act, it was made the duty of the register and treasurer "to issue warrants for the lands donated by Congress, and not as yet located, provided they shall not be issued for less than eighty nor more than six hundred and forty acres, which warrants shall be sold in the same manner as the lands located, provided they shall not be sold for less than three dollars per acre; and it shall be the duty of the governor to issue patents for all the lands that have been sold, and for the lands located by warrants, when contemplated to be sold by that act, whenever he shall be satisfied that the same have been properly located."

Under the provisions of the above-recited act of Congress, granting the land, and the above provisions of the State legislature, directing the manner in which the selections should be made, Foley purchased two warrants from the State officers, and, on the 7th January, 1846, located them in the Land Office of the United States, at New Orleans, upon the lands now in controversy.

The defendants claimed title under five patents, issued from the General Land Office on the 1st September, 1847. These patents purported to be issued under an act of Congress of August 3, 1846, and were founded on certain floats, which were claimed under the second section of the preëmption act of 1830, (4 Stat. at Large, 421,) which was revived for two years by the act of 19th June, 1834, (4 Stat. at Large, 678.)

In order to show more clearly the respective titles of the plaintiff and defendants, the reporter has arranged them in chronological order.

Date	Plaintiff's Title.	Defendant's Title.
1830, 1834,	Acts of Congress.	Acts granting preëmption rights — settlements included within the Houmas claim — floats issued — a large part of the claim having been decided to be public land by Commissioner Graham, in 1829, upon which settlements were made. Barrett and Bell located these floats upon the land now in dispute.
1836.	————	Commissioner of the General Land Office directed the Register and Receiver at New Orleans to withhold from sale all the lands within the claimed limits of the Houmas grant. May 17. Sale by Barrett to Bell.
1841. Sept. 4.	Congress passed an act (5 Stat. at Large, 455) declaring that there shall be granted to each State, &c., (Louisiana being one,) 500,000 acres of land.	
1844. March 25.	Louisiana passed an act authorizing the State Register to issue warrants for the above land.	The Houmas claim confirmed in its whole extent by the Secretary of the Treasury. Entries made of locations from floats arising within it ordered to be cancelled. Patents were ordered to be issued for the whole of the Houmas claim. May 3. Sale by Widow Bell to Harrison.
1845. Dec. 24.	The Commissioner of the General Land Office wrote that the cancelled entries left the land public, and it could be entered by the State. Foley accordingly made his location. Harrison filed a caveat in the State Land Office.	
1846.	January 7. Foley made his location at the Register's Office of the United States, upon the lands now in controversy. March 9. Commissioner wrote to the Register and Receiver at New Orleans, suspending entries, either by State selection or otherwise. April 20. Foley took out two patents from the Governor of Louisiana.	

	August 3. Congress passed an act providing for the adjustment of all suspended preëmption land claims. The Commissioner of the Land Office, the Attorney-General, and Secretary of the Treasury were to decide.
Feb. 5. Foley brought suit against Harrison in the fifth District Court of New Orleans (State court.)	
1847.	June 28. The Secretary of the Treasury decided that he would approve the locations made under the floating claims, held by the actual settlers and improved by them, in preference to the State locations, made subsequently, and covering these improvements. July 9. The Commissioner, August 2. The Acting Secretary of the Treasury, August 27. The Attorney-General; all sanctioned this decision. Sept. 1. Five patents issued from the United States to Harrison.
1848. January 7. Foley located two warrants upon the property in dispute, and entered them at the Land Office of the United States at New Orleans.	

The District Court decided that Foley should recover the *lot* No. 1, of section 3, township eleven, range 13 east, containing $211\frac{18}{100}$ acres, and that the plea of prescription pleaded by defendant be sustained as to lot No. 2, of section 3, township eleven, range 13 east, and the west half of section 10 of the same township and range.

The Supreme Court of Louisiana reversed this decree, and ordered judgment for the defendant for the land in controversy.

Foley sued out a writ of error under the 25th section of the judiciary act, and brought the case up to this court.

It was argued by *Mr. Lawrence*, for the plaintiff in error, and by *Mr. Benjamin*, for the defendant in error.

Mr. Lawrence. The 1st section of the act of 1830 gave to any settler on public land, &c., the right of preëmption to the quarter section settled on. The 2d section provided that where two or more persons were settled on the same quarter section, the first two settlers should each take one half of said quarter section, if by a north and south or east and west line it could be so divided as to include the settlement and improvement of each in a half quarter section; and in such case the said settlers shall be entitled to a preëmption of eighty acres of land else-

where in the same district. This latter privilege was called a "floating right," or "float."

Now, without being so hypercritical as to contend that this section only intended to confer a floating right when the quarter section could be divided in half by a north and south or east and west line, so as to include in separate parts the improvements of each settler, it is very clearly the intention of Congress not to confer the right of preëmption to eighty acres "elsewhere," unless the parties had under the same act the right of a preëmption to the quarter-section settled on. If the latter were not public land, were reserved land, were not the subject of a preëmption right, then no settlement on such land could give a floating privilege elsewhere. And so it has been universally held in the land department. In fact, the 4th section of the act expressly declares, "nor shall the right of preëmption contemplated by this act extend to any land which is reserved from sale by act of Congress or by order of the President, or which may have been appropriated for any purpose whatever." 19 Louis. Rep. 399; 2 Laws Ins. and Op. 632.

Now it is especially to be observed that the settlement, out of which these floats are supposed to arise, was within the claimed limits of the Houmas grant. This is not disputed.

By agreement of parties the report of the Secretary of the Treasury on the Houmas claim is made evidence in this cause.

I do not intend to trouble the court with any argument as to the validity or invalidity of the Houmas claim in its whole extent, or in any part of its extent. It has been a matter of controversy in the Treasury Department from the time of the acquisition of Louisiana to this day. All that is necessary to be known in this cause is, that its limits were claimed to be from the Mississippi to the Amité, and so the claim was filed. See Report of Secretary of Treasury, pp. 96, 97.

The 6th section of the act of 3d March, 1811, which authorizes the sale of the public lands in the territory of Louisiana, has the following proviso: "That, till after the decision of Congress thereon, no tract of land shall be offered for sale the claim to which has been in due time and according to law presented to the Register of the Land Office, and filed in his office for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Orleans." 2 Stat. 665.

If, then, this claim has not been acted on by the decision of Congress, neither a preëmption right to land settled on within it, nor a floating right to a preëmption elsewhere by virtue of any settlement within it, could be acquired.

Several different views have been taken of the Houmas

claim. By some it has been supposed to be a complete grant, needing no confirmation from this government. By others it has been supposed to have been confirmed to its full extent by the decisions of the commissioners under the acts of 2d March, 1805, (2 Statutes, 324,) and 21st April, 1806, (2 Statutes, 391,) and by the confirmation certificates issued by the commissioners. By others it has been held that the commissioners had no power under those acts to issue final certificates, and could only submit the claims presented to them for the decision of Congress. Again, it has been supposed that this claim was confirmed by the act of 12th and 18th April, 1814, (3 Statutes, 121 – 139.)

Now, it is immaterial to the particular question involved in this case, viz. whether the lands within the Houmas claim were reserved lands, which of these conflicting views is correct, or whether any of them are correct. For if Congress, by these acts, has not made its decision on the Houmas claim, then by the act of 1811 it is still reserved from sale. If it was a complete grant from the Mississippi to the Amité, it was not within the operation of the preëmption act of 1830; it was not public land. If, as Mr. Graham supposed, the validity of the grant was affirmed by the commissioners under the acts of 1805 and 1806, but that the extent of its limits required judicial determination, it was still claimed before the boards of commissioners, and filed with the recorder of land titles, as a grant from the Mississippi to the Amité, and, unless it has been acted on by Congress, is still reserved from sale, under the act of 1811. If the commissioners, under the acts of 1805 and 1806, had power to decide this claim finally, then they did decide in favor of the claim, and issued their certificates of confirmation, and it was no longer public land. If the effect of the act of 1814 was to confirm the certificates issued by the commissioners under the acts of 1805 and 1806, as Mr. Secretary Bibb decided, (and under his decision patents have been issued for the whole Houmas claim,) then the act of 1814 was the decision of Congress contemplated in the act of 1811, and the claim, to its full extent, was private property, and not public land. And if, as Mr. Attorney-General Clifford holds, the act of 1814 was only intended to cover cases in which certificates of confirmation had been properly issued, under the acts of 1805 and 1806, and these certificates had not been properly issued, then the Houmas claim is still undecided, and, of course, the land within it is still reserved.

It is obvious, then, that under any of these conflicting views, the land within the limits of the Houmas claim was not subject to the operation of the preëmption laws, and that the settlements thereon conferred no rights either to the lands themselves or to floats. The entries which were permitted, therefore, were

absolutely void; and so Attorney-General Legare decided. Brown's lessee *v.* Clements, 3 Howard, 664-5; Wilcox *v.* Jackson, 13 Peters, 498; Stoddard *v.* Chambers, 2 Howard, 318.

The entries, permitted by the location of these floats, were accordingly cancelled in 1844. And it was after this cancellation of those entries that our locations were made by virtue of the State warrants.

The court below seemed to be of opinion that these entries were authorized by Commissioner Graham, in a letter to the surveyor-general, of February 17, 1829. (2 Laws Ins. and Op. 893.

In this letter Mr. Graham supposes that the board of commissioners had only decided on the validity of the grant, leaving the extent to be determined by the courts. And he supposes that a survey running back 1½ leagues in depth, would leave sufficient space for the determination of the courts. But he does not, by a single word, authorize (if he could) the register and receiver to permit entries of any kind. The letter was not addressed to them. Indeed, the land was not at that date subject to sale, public or private. There was no preëmption law in force at the time. But if there had been, and if it had contained instructions to permit entries beyond the league and a half, it would have been in direct contravention of the act of 1811. These entries were permitted by the register and receiver, not only without any instructions from the General Land Office, but in violation of the act of 1811, and were therefore void.

Now we do not rely upon any particular virtue in the mere act of cancellation, except so far as it was an official declaration of the invalidity of the floats. We do not mean to contend that the General Land Office can take away any real right of a certificate holder, by cancelling the certificate; and yet we do not doubt that the commissioner may cancel a void certificate of entry. The cancellation does not make the entry void, but the nullity of the entry is the reason for the cancellation. The party is not deprived of any right by the cancellation, because, the entry being void, the party had acquired no right by the entry.

But whether these entries were cancelled properly or improperly, or if they had not been cancelled at all, it is enough for our purpose that they were void. They formed no obstacle to the sale of the land to any one else, or to a location of the land by any one else.

This is the uniform and clear doctrine of this court, as well as of the Supreme Court of Louisiana itself. Wilcox *v.* Jackson, 13 Pet. 498; Ballance *v.* Forsyth, 13 Howard, 18; Campbell *v.* Doe, 13 Howard, 245; 19 Louis. Rep. 334, 510; 3 Rob. 293.

We have thus far considered the right of the plaintiff in error, upon his certificates of location alone, and without reference to the State patents.

According to the cases above cited from the Louisiana Reports, such certificates were sufficient ground for a petitory action.

The case of Surgett *v.* Lapice et al. 8 Howard, 48, in this court, sustains the same ground.

2. Let us now inquire whether those patents, under the act of Congress of 1841, do not pass the fee in the lands selected, without any further patents from the United States.

The court below seem to suppose that nothing but a patent can pass the fee from the United States, and they cite cases to sustain that view. If that court had examined those cases a little more carefully, it would have been seen that this court expressly mentions legislative grants as cases in which no patent issues. Wilcox *v.* Jackson, 13 Pet. 498.

The act of 1841 enacts that there shall be granted to each of the States named 500,000 acres of land; and provides that the selection should be made in the manner directed by the State legislatures. It does not itself provide for the issuing of patents by the General Land Office. The Legislature of Louisiana directed the manner in which her selections should be made, and also that the governor should issue patents. As soon, then, as the locations of the State warrants were made in the United States Land Office, upon public land which had been surveyed, and which was not reserved, then by force of the act of Congress of 1841, and the act of the State legislature in pursuance of it, the fee in those particular lands passed from the United States.

It has been shown, then, that, at the time when Foley's locations were made on the lands in controversy, they were public lands, and that the defendant's location of floats thereon was void, and had been cancelled by the land office, because the settlements out of which those floats had arisen were within the Houmas claim.

Let us now see by what authority the patents were subsequently issued to the defendant upon these floats.

They were issued under the supposed authority of the act of 3d August, 1846, (9 Stat. 51,) upon the mistaken idea that the State selections required the approval of the Treasury Department before any right could be acquired under them.

It is to be observed that the State selections were not approved by the General Land Office merely because of a contemplated law, (which, as will be seen hereafter, never passed,) to confirm the entries by floats arising out of the Houmas claim. No other reason is assigned for their non-approval. The very

letter which submits them for the action of the secretary, states that the selections were made on land liable to selection, and that the register and receiver had been so instructed. And the Secretary of the Treasury, in making his decision, offers no objection to the propriety of the State selections. He merely "proposes" to approve the locations by the floats, rather than the locations by the State warrants, under the idea that the respective rights of the parties rested in his discretion alone.

Now there is not one word in the act of 1841 requiring the State selections to be approved by the Treasury Department. The selections were to be made in the manner to be directed by the State legislatures. It is true the selections could only be made of surveyed, unreserved public land, and in certain parcels. But that is just as true of all the preëmption laws. And yet this court has uniformly held that a preëmptioner acquires a right by his settlement under the law, although the land department disapproves of the entry. Lytle *v.* Arkansas, 9 Howard, 314; Cunningham *v.* Ashley et al. 14 Howard, 377; Surgett *v.* Lapice, 8 Howard, 48.

There are laws which expressly require the approval of the Secretary of the Treasury, but this is not one of those. The land department has a very proper regulation of its own, both in regard to State selections and claims to preëmption, under which its officers examine whether the particular case conforms to the law under which the claim is made. But it is not understood there as adding any thing to the right of the claimant by its approval, or taking away any thing from it by its disapproval. If the law gives the right, the person has it, whether the office approves or disapproves.

But if any approval were necessary to confirm the plaintiff's right, such approval was had, as to two of the tracts in controversy.

3. It is submitted, on the part of the plaintiff in error, that the act of 3d August, 1846, was not applicable to the case of the defendants in error. That act applied to "suspended" entries, not to void and cancelled entries. The term "suspended entries" is one well known to the land office, and is always used to designate entries of land under the authority of law, but which are not patented, because of some informalities attending them. They are, consequently, held in suspense in the General Land Office, until those informalities are cured. But in the case of void entries they are cancelled, and the receiver is ordered to refund the money paid on them.

It is true that a law was recommended to Congress confirming entries by floats arising out of the Houmas claim. But that recommendation was not carried into effect; and the reason

why it was not carried into effect was, that almost every one of them was found to be fraudulent. But even that law only proposed to confirm entries where no private right had in the mean time been acquired. And it also was intended to exclude all cases in which fraud appeared.

But the law did not pass, and for good reasons; and the attempt is now made to bring these void, cancelled, and probably fraudulent, entries within a general law applicable to all the States, providing merely for the issuing of patents in suspended cases.

4. But even if the defendant's entries were within the meaning of the act of 1846, the rights of the plaintiff are expressly saved. The proviso to the first section enacts that the adjudications "shall only operate to divest the United States of the title to the land embraced by such entries, without prejudice to the rights of conflicting claimants."

Without this proviso there can be little doubt that any previously-acquired right would be good against the confirmation authorized by this act. But with the proviso, such rights cannot be overlooked. Mills *v.* Stoddard, 8 Howard, 365; Stoddard *v.* Chambers, 2 Howard, 284; Ballance *v.* Forsyth, 13 Howard, 18.

5. As to the plea of prescription:

Under the Constitution of the United States, and the acts admitting new States into the Union, no State law can interfere with the primary disposal of the public lands. Prescription cannot run until the legal title is out of the United States. Were it otherwise, effect could be given to State laws which would invalidate the titles emanating from the United States, and deprive the federal government virtually of the power of disposal which the Constitution secures. The legal title did not pass to the plaintiff until the location was made on the lands in controversy in 1846. This suit was commenced in 1847.

By an agreement, found on page 75 of the record, it will be seen that all questions as to improvements, rents, profits, are reserved.

It is confidently submitted:

1. That the floats of the defendant were originally void, because they arose from a settlement on reserved land.

2. That the location of those void floats on the tracts in controversy gave no title whatsoever to those tracts.

3. That those tracts were in 1846 (and were so decided to be by the land department) public, unreserved, surveyed lands, and consequently within the operation of the act of 4th September, 1841.

4. That the locations of the plaintiff were made in the manner directed by the legislature of Louisiana.

5. That those locations, so made, gave to the plaintiff a valid right to the tracts located, by force of the act of 1841, without any approval of the land department.

6. That if such approval had been necessary, it was had in the letter of the commissioner, on page 14 of the record.

7. That no subsequent law of Congress could defeat such right.

8. That the act of 3d August, 1846, expressly reserved such right, and that for these reasons the plaintiff in error is entitled to recover.

Mr. *Benjamin*, for the defendant in error, made the following points.

I. The title set up by plaintiff is not, under the evidence adduced, either a legal or equitable title to the land in controversy.

The 8th section of the act of Congress of the 4th September, 1841, (5 Statutes at Large, 455,) granting 500,000 acres of land to the State of Louisiana, does not set apart any particular land, and separate it from the public domain. It only authorizes the State to make locations of land to that extent; and the location, when made by the State, does not *ipso facto* separate from the public domain the land so located. Nothing in the act deprives the officers who are charged with the duty of executing the land laws of their control over the locations, in order to see that they conform to the law; that they are lands which have been previously surveyed; that they are vacant; that they have not been reserved, &c., &c. It is only upon the approval of such locations that the final severance from the public domain of the lands so located takes effect.

Such is the practice and settled construction of the law in the General Land Office.

The location by the State, of the land in controversy, was not approved.

The patents issued by the State of Louisiana can have no effect upon the title; they only operate as a conveyance of the right of the State. Now, these patents are dated 20th April, 1846. But on the 9th March, 1846, the commissioner of the General Land Office had instructed the land officers in New Orleans not to permit the location of the lands in controversy, and had reserved action on locations already made, until Congress should determine the course to be pursued.

It also appears, from the testimony of Robert J. Ker, the Register of the State Land Office, that the plaintiff was aware that the land which he sought to locate under the State warrant, was claimed by others; that the warrant for the entry of the land in controversy was refused to him, and only floating warrants ac-

corded; and that under these floating warrants he entered the very lands which the State register had refused to him.

The foregoing recital of facts shows a total absence of any title whatever. The United States have issued a patent certificate to defendant, and having refused to issue a patent to the plaintiff, or to approve of his location, the case comes completely within the principles established in Wilcox *v.* Jackson, 13 Peters, 498; Bragnelle *v.* Broderick, 13 Peters, 436.

II. The question of title between the parties has already been settled by the judgment of a special tribunal, authorized by Congress to take cognizance of the controversy, and to decide it conclusively between the parties.

By the first section of the act of Congress of 3d August, 1846, (9 Statutes at Large, 51,) the Commissioner of the General Land Office was "authorized and empowered to determine, upon principles of equity and justice, as recognized in courts of equity and in accordance with general equitable rules and regulations, to be settled by the Secretary of the Treasury, the Attorney-General, and Commissioner, conjointly, consistently with such principles, all cases of suspended entries now existing in said land office, and to adjudge in what cases patents shall issue upon the same." The second section of the laws speaks of "the power and jurisdiction" given to the commissioner, and of his "adjudications;" and the fourth section directs patents to issue to those persons in whose favor decisions have been rendered.

By reference to the record, page 57, it will be seen that the tribunal, thus authorized by Congress, made an adjudication in favor of the defendant in error, which was approved by the acting Secretary of the Treasury, p. 59, and by the Attorney-General, p. 59, and was in conformity with the rules and regulations established under the act, and the principle previously proposed by the secretary.

The act of Congress grants no appeal from the decision of the commissioner, and the proposition is too clear for argument that the power of Congress to dispose of the public lands is complete and unlimited. If, therefore, the case was within the jurisdiction conferred by the act, the question is *res judicata.*

The act confers the power to decide "all cases of suspended entries now existing in said land office." Was the case of defendant a suspended entry? A conclusive answer to this inquiry is found in the letter of the Commissioner of the General Land Office, dated 9th of March, 1846, in which he expressly says that these entries, as well as the State selections, are "suspended to await the action of Congress."

But it is contended that the original entries, under which the patents were issued to defendants, were utterly void, as being in

violation of the proviso of the 6th and 10th sections of the act of Congress of 3d March, 1811, (2 Stat. at Large, 662.) The answer to this objection is found in the fact that the confirmation of the Houmas grant by the act of the 12th April, 1814, (3 Stat. at Large, 121,) satisfied the object of this proviso.

But, independently of this consideration, it is sufficient to say that the question whether the entries were or were not void, is one of the very questions which, by the terms of the act of Congress, were submitted to the decision of the special tribunal created by that act. Its language declares that the commissioner is to decide "all cases of suspended entries," and necessarily confers on him the power to decide whether the entry was void or voidable, or valid. This is the precise jurisdiction conferred on him, and the jurisdiction is without appeal. The argument of the plaintiff calls on this court to reverse the decision of the commissioner who pronounced that the entry was not void, but was a sufficient basis for a patent, which is equivalent to calling on the court to exercise an appellate jurisdiction over his judgment on the merits of the entry. The commissioner can in no sense be said to have assumed a jurisdiction over a subject not confided to him by the act. There is no exception made by the lawgiver — all suspended entries are to be determined. The only legitimate subject of inquiry is, whether the defendant's entry was a suspended one; as soon as this is ascertained in the affirmative, the jurisdiction attaches, and the allegation by the plaintiff that the entry was void is simply an assertion that the commissioner erred in deciding it not to be void.

That the decision of the tribunal, created by the act of Congress to decide on this suspended entry, is conclusive, is established by the jurisprudence of this court. Wilcox *v.* Jackson, 13 Peters, 498; Elliott et al. *v.* Peirsol et al. 1 Peters, 328.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Louisiana.

A petitory action by petition was commenced in the fifth District Court of New Orleans, on the 5th of February, 1847, by the plaintiff in error, claiming a tract of land of which the defendant had possession. The plaintiff claims under two patents from the State of Louisiana, issued under the law of that State of the 25th of March, 1844, and alleges title in the State, under the act of Congress of 4th September, 1841.

On the day the action was commenced, the defendant filed his answer claiming the same land under a purchase made by Robert Bell and Thomas Barrett from the United States, the 16th of May, 1836, and by mesne conveyances transmitted to

the defendant. He pleads a prescription of a peaceable possession of more than ten years — that large and valuable improvements have been made on the premises, &c.

On the trial in the District Court of New Orleans, the plaintiff gave in evidence, patents from the State of Louisiana, for eight hundred and fifty-five acres and nine hundredths of an acre, the land in controversy, by virtue of the act of Congress of the 4th of September, 1841. The certificates of entries of the land were also in evidence.

The defendant produced in evidence five patents from the United States, dated 1st of September, 1847, and a sale of the premises by Thomas Barrett to Robert Bell by authentic act on 17th May, 1836, and a series of mesne conveyances, terminating in a sale and conveyance by the widow R. Bell, to the defendant, on the 9th of May, 1844.

A jury not being demanded under the Louisiana law, the court gave judgment that the plaintiff recover of the defendant lot No. 1 of section 3, township 11, range 13 east, containing 211 acres. The plea of prescription was sustained as to the residue of the tract. From this judgment the defendant appealed to the Supreme Court of the State.

The Supreme Court reversed the judgment of the District Court, and entered judgment in favor of the defendant for the land in controversy.

The plaintiff, on the ground that he claimed title under an act of Congress, and relied on the construction of another act, to nullify the title of defendant, and as the decision of the Supreme Court was against the right asserted by him, procured the allowance of a writ of error under the 25th section of the judiciary act.

The 8th section of the act of 4th September, 1841, declares, "that there shall be granted to each State specified in the first section of the act, of which Louisiana is one, five hundred thousand acres of land for purposes of internal improvement," provided such State had not received land for that purpose. And it is provided that "the selections in all of the said States, shall be made within their limits respectively, in such manner as the legislature shall direct; located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale, &c.;" no locations to be made until the land shall be surveyed by the United States.

In 1844 the legislature of Louisiana passed an act, establishing an office for the sale of the unlocated lands granted to the State, with a Register and State Treasurer as receiver.

The 7th section of the act makes it the duty of the register

and treasurer, to issue warrants for the lands donated by Congress and not as yet located; provided they shall not be issued for less than eighty nor more than six hundred and forty acres, which warrants shall be sold in the same manner as the lands located, provided they shall not be sold for less than three dollars per acre; and it shall be the duty of the governor to issue patents for all the lands that have been sold, and for the lands located by warrants, when contemplated to be sold by that act, whenever he shall be satisfied that the same must have been properly located."

Under the act of Congress and the State law, the plaintiff purchased, it is alleged, two warrants from the State officers, and on the 7th of January, 1848, entered them in the Land Office of the United States, at New Orleans, upon the lands in controversy. And it is contended, that these locations, independently of the patent issued by the State, being made on public land not reserved from sale by any law of Congress or proclamation of the President, which had been surveyed, and were entered in parcels conformably to the act of Congress, gave the plaintiff a right to the lands in controversy under the act of 1841, unless the defendant had, at that time, an equitable or legal title to them.

The act of 1841 authorized the State to enter the lands, where surveys had been executed and the lands were open to entry, under the acts of Congress. The State of Louisiana acted within its powers, in issuing warrants, and establishing land offices, as a means of disposing of the lands. But it had not the power to convey the fee, as it had not been parted with by the general government. The words of the act of 1841, are "that there shall be granted to each State," not that there is hereby granted. The words import, that a grant shall be made in future. Lessieur et al. *v.* Price, 12 Peters, 75.

It could not have been the intention of the government, to relinquish the exercise of power over the public lands, that might be located by the State. The same system was to be observed in the entry of lands by the State as by individuals, except the payment of the money; and this was necessary to give effect to the act, and to prevent conflicting entries.

The defendant claims under five patents from the United States, dated the 1st of September, 1847, which was some months after this suit was commenced. These patents were issued under the act of 3d of August, 1846. That act provides, "that the Commissioner of the General Land Office be, and he is hereby authorized and empowered, to determine, upon principles of equity and justice, as recognized in courts of equity, and in accordance with general equitable rules and regulations, to

be settled by the Secretary of the Treasury, the Attorney-General, and Commissioner conjointly, consistently with such principles, all cases of suspended entries, now existing in said land offices, and to adjudge in what cases patents shall issue upon the same." This power is limited to two years; and the exercise of it shall only operate to divest the title of the United States, but shall not prejudice conflicting claimants.

By the above act the commissioner was required to arrange his decisions in two classes, and the 4th section requires patents to be issued in cases in the first class.

On the 9th of July 1847, the commissioner reported to the Secretary of the Treasury "ten entries by preëmption, made at the Land Office of New Orleans, which were heretofore suspended, at the General Land Office. He says, they have been adjudicated by me and placed in the first class, under the act of the 3d August, 1846. It is stated that the first seven, of the ten cases reported, are entries by floats, arising from settlements within the Houmas claim, and would have been embraced with similar cases in abstract No. 13; but that the land in whole or in part, has been selected by the State under the act of 4th of September, 1841, since the floats were decided to be illegal under the act of 1834." This report is agreed to by the acting Secretary of the Treasury and the Attorney-General.

As this decision was made by a special tribunal, *with full* powers to examine and decide; and, as there is no provision for an appeal to any other jurisdiction, the decision is final within the law.

Under the preëmption act of 1830, revived and continued for two years by the act of 1834, preëmption rights were granted to settlers on the public lands, not exceeding to each settler one hundred and sixty acres. And where two settlers are found on the same quarter section, each being entitled to a preëmption for one hundred and sixty acres, the quarter which they occupied was divided between them, and each received a certificate for eighty acres in addition, giving a preëmption right elsewhere on the public lands, which certificates were called floats. A number of these certificates were purchased by Thomas Barrett and Robert Bell, and by virtue of which they located the land in dispute. The settlements on which these certificates were issued were made on the Houmas claim, and as doubts existed whether the land embraced by this claim would be properly called public lands, under the preëmption laws, the entries were suspended. And these were the entries included in the above report of the Commissioner of the General Land Office, and sanctioned by the Secretary of the Treasury and the Attorney-General.

The patents issued by the State to the plaintiff were dated the 20th of April, 1846. And it seems that, on the 9th of the preceding month, the Commissioner of the General Land Office wrote to the Register and Recorder of New Orleans: "As Congress has taken the subject of the floating preëmption entries arising from preëmption settlements within the limits of the Houmas private claim into consideration, and is about to confirm them in the hands of *bonâ fide* assignees, I deem it proper, in order to prevent future inconvenience, to direct that all the land embraced by such entries, except as to those where the purchase-money has been refunded and the claim abandoned, be hereby considered as excused from disposition in any way, either by State selection or otherwise. The State selections already made will be suspended to await the action of Congress."

"If the contemplated law confirms all entries in the hands of *bonâ fide* assignees, it will, in all probability, defeat all locations made by State selections. In the mean time, it is necessary that all appropriations of the lands covered by such entries be suspended."

It is true that, on the 24th December, 1845, the commissioner wrote to the same land office "that, after the cancellation of preëmption claims, if the land is not otherwise interfered with or reserved, it is considered as public land liable to be located by the State." And it seems that the tracts for which the plaintiff obtained patents, were designated in the letter of the commissioner as coming within the category.

This decision or opinion of the commissioner did not affect the rights of the defendant, as appears from subsequent proceedings of the same office. As soon as the defendant was apprised of the above letter, he filed a caveat in the State Land Office, and, on the 9th of March, 1846, the commissioner, in his letter, as above stated, suspended the plaintiff's entries. And, on the 25th of June, 1847, the Secretary of the Treasury, on a representation made by the Commissioner of the Land Office, "approved the locations made under the floating claims, held by the actual settlers who had improved the land, in preference to State locations. And this decision was sustained in the proceeding under the act of the 3d of August, 1846, by the report of the commissioner, sanctioned by the Secretary of the Treasury and the Attorney-General, as above stated.

The Houmas claim, as filed before the Commissioners on Land Titles, extended from the Mississippi river to the Amite, embracing a large extent of country. It was confirmed by the commissioners, and also by an act of Congress passed in 1814. This confirmation, however, was construed to be limited, and

not extending to the boundaries claimed. The survey authorized by the Treasury Department extended only one and a half leagues back from the river; and the register and receiver were instructed to treat the residue of the claim as public lands. This induced a great many persons to settle on the claim up to the year 1836. In that year, by order of the Land Office, the register and receiver were directed to withhold from sale the lands within the claim. This suspension was continued, and the patent certificates which had been issued to purchasers were declared to have been issued without authority.

Afterwards, in 1844, this claim, to its whole extent, was recognized as valid by the Secretary of the Treasury; in consequence of which, entries made within the grant were cancelled, and the purchase-money returned. This action of the Land Office has been referred to, for the purpose of understanding the nature of the preëmption rights acquired by settlers upon the Houmas claim, and the floats which were issued, as above explained, under the law. These floats were issued under the authority of the government, and, when presented by *bonâ fide* purchasers, could not be disregarded. This was the origin of the right set up by the defendant. It has been sanctioned by the Land Office, by the Secretary of the Treasury, and the Attorney-General, under the act of 1846, and a patent has been granted. Under the claim of the defendant, possession of the land has been held many years, and the improvements on it have made it of great value.

The plaintiff's title originated by his obtaining a float, as it was called, from the State Land Office, at three dollars an acre, in virtue of which he located the land in controversy, on 7th January, 1846, with the Register of the Land Office of the United States. The plaintiff, through John Laidlaw, made an application to have the land specified in the float or warrant, but the Register of the State declined to specify any lands in the warrant. He refused for some time to issue a patent on the location, as he had "misgivings" as to whether it would be right for him to do so; but eventually he issued it on the order of the governor, to test the validity of the title.

As the patent from the State did not convey the legal title to the plaintiff, he must rely only on his entry, and that, in a petitory action, cannot stand against the patent of the defendant. But, if the case were before us on the equities of the parties, the result would be the same. The entries of the land claimed by the defendant were prior in time to those of the plaintiff, and of paramount equity. The entries of both claims were suspended by the order of the government, and the decision of the Secretary, and especially the decision of the Com-

missioner, the Secretary of the Treasury, and the Attorney-General, under the act of 1846, was final, and related back to the original entries of the land. The circumstances under which the plaintiff located his warrants on a very valuable sugar plantation, of which the defendant had long been in possession, do not strongly recommend his equity. We affirm the judgment of the Supreme Court of Louisiana, with costs.

Order.

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

ERASTUS CORNING, JOHN F. WINSLOW, AND JAMES HORNER, APPELLANTS, *v.* THE TROY IRON AND NAIL FACTORY.

Where the respondent in a chancery suit in the Circuit Court took two grounds of defence, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, he cannot appeal from this as a part of the decree.

The decree was in the respondent's favor, dismissing the bill with costs, and no appeal lies from an opinion expressed by the judge upon the facts of the case, not affecting the decree.

Moreover, the decree complained of has already been argued before this court upon the appeal of the other party, and both grounds of defence decided to be insufficient, and the decree reversed. There is, therefore, no such decree as that appealed from.

Besides, the court below has not acted upon the mandate and entered a final decree; therefore there is no final decree to appeal from.

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.

It was a branch of the case of Troy Iron and Nail Factory *v.* Corning et al. reported in 14 How. 193. The decree of the Circuit Court, now appealed from, is given at page 194. The bill was originally filed by the Troy Iron and Nail Factory against Corning et al. and the Circuit Court dismissed the bill, but this court reversed that decree. By reference to page 194, 14 Howard, it will be seen, that the Circuit Court, in its decree, used the following language, viz. "And it appearing to the said court that the said Henry Burden was the first and original inventor

of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued," &c., &c.

Corning et al. being defendants in that suit, and succeeding in having the bill dismissed, did not appeal from the decree; but when the appeal was decided against them by this court, as reported in 14 Howard, they entered an appeal from that part of the decree, which was as follows:

"And that so much or such parts of said decree as declares, orders, adjudges, and decrees, as follows, to wit:—'And it appearing to the said court, that the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d September, 1840, as in said bill of complaint set forth; and that said complainants have full and perfect title to the said patent for said improvements, by assignment from the said Henry Burden, as is stated and set forth in the said bill of complaint,'—may be reversed, and that the appellants may be restored to all things which they have lost by reason thereof.

This was the appeal now pending, which *Mr. Stevens* moved to dismiss, filing the following motion:

Supreme Court of the United States.—The Troy Iron & Nail Factory, Appellees, v. *Erastus Corning, John F. Winslow, and James Horner, Appellants.*

In Equity.

State of New York, Northern District, City and County of Albany, ss.

Samuel Stevens, of Albany, being duly sworn, says that he is of counsel and solicitor for the Troy Iron & Nail Factory, appellees in this court, and one of the solicitors and counsel in the Circuit Court of the United States for the Northern District of New York for the complainant.

That upon the hearing of the said cause in the Circuit Court of the United States for the Northern District of New York, upon pleadings and proofs, a decree therein was pronounced by the said court, which was duly entered by the clerk of the said court on the fourth (4th) day of September, 1850, which is in the words and figures following:

At a special term of the Circuit Court of the United States for the Northern District of New York, in equity, held at the city of Utica in said District on the fourth day of September, one thousand eight hundred and fifty.

Present, the Honorable Samuel Nelson, Justice.

The Troy Iron and Nail Factory, v. *Erastus Corning, John. F. Winslow, and James Horner.*

IN EQUITY.

This cause having been heretofore brought to a hearing upon the pleadings and proofs, and counsel for the respective parties, having been heard and due deliberation thereupon had, and it appearing to the said court that the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d September, 1840, as in said bill of complaint set forth, and that the said complainants have a full and perfect title to the said patents for said improvements by assignment from the said Henry Burden, as is stated and set forth in the said bill of complaint.

But it also further appearing to the court, on the pleadings and proofs, that the instrument in writing bearing date the 14th October, 1845, stated and set forth in the said bill of complaint, and also in the answer of the said defendants thereto, entered into upon a settlement and compromise of certain conflicting claims between the said parties, and among others of mutual conflicting claims to the improvements in the spike machine, in said bill mentioned, and when said instrument was executed by the said Henry Burden of the one part, and the said defendants of the other, the said Henry Burden at the time being the patentee and legal owner of the said improvements, and fully authorized to settle and adjust the said conflicting claims, did, in legal effect and by just construction, impart and authorize and convey a right to the defendants to use the said improvements in the manufacture of the hook-headed spike, without limitation as to the number of machines so by them to be used, or as to the place or district in which to be used.

Therefore it is ordered, adjudged, and decreed, that the said bill of complaint be, and the same is hereby, dismissed, with costs to be taxed, and that the defendants have execution therefor.

That on the twenty-second day of October, 1850, the said complainant appealed from the said decree to this court, which appeal was duly allowed by Mr. Justice Nelson, one of the justices of said court, and that afterwards, to wit, in the December term of this court, 1852, the said cause upon the said appeal and upon the record returned to this court by the said clerk of the said Circuit Court of the United States for said Northern District, came on to be heard and was argued, whereupon this court pronounced a decree in the words and figures following, to wit:

United States of America, ss.

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Northern District of New York;

Greeting: Whereas lately in the Circuit Court of the United States for the Northern District of New York, before you or some of you, in a cause between the Troy Iron and Nail Factory, complainants, and Erastus Corning, John F. Winslow, and James Horner, defendants, in chancery, the decree of the said Circuit Court was in the following words, to wit:

Therefore, it is ordered, adjudged, and decreed, that the said bill of complaint be, and the same is hereby, dismissed, with costs to be taxed, and that the defendants have execution therefor, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appear.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and fifty-two, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel, on consideration whereof it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in the cause be, and the same is hereby, reversed, with costs, and that the said complainants recover against the said defendants, three hundred and sixty dollars and forty-two cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook and brad-headed spike, patented to Henry Burden, the 2d September, 1840, and assigned to the complainants, as set forth in complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a master under the direction of the said Circuit Court, as is prayed for by the complainants, and for such further proceedings to be had therein, in conformity to the opinion of this court, as to law and justice may appertain. January 18.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Roger B. Taney, Chief Justice of

said Supreme Court, the first Monday of December in the year of our Lord one thousand eight hundred and fifty-two. [L. S.]

And deponent further says that afterwards and on the 28th day of June, 1853, the said decree of this court was, by the said Circuit Court for said Northern District of New York, made the decree of said Circuit Court, which last-mentioned decree is in the words and figures following, to wit:

At a term of the Circuit Court of the United States for the Northern District of New York, held at the court-house in the village of Canandaigua, on the 28th day of June, 1853.

Present: The Honorable Samuel Nelson, Nathan K. Hall, Judges.

The Troy Iron and Nail Factory v. *Erastus Corning*, *James Horner*, *and John H. Winslow.*

IN EQUITY.

The above named, the Troy Iron and Nail Factory, the complainants in the above entitled suit, having duly appealed to the Supreme Court of the United States from that part of the decree made in this suit, which dismissed the bill of complaint herein with cost to be taxed, and the said Supreme Court of the United States having duly heard the said appeal at the December term, 1852, upon the transcript of the record, and having reversed the said decree of the Circuit Court of the United States for the Northern District of New York, with costs, and having ordered, adjudged, and decreed that the said complainants recover against the said defendants three hundred and sixty dollars and forty-two cents for their cost in said Supreme Court and that they have execution therefor: the said Supreme Court having remanded the said cause to the said Circuit Court with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook or brad-headed spikes, patented to Henry Burden the 2d September, 1840, and assigned or transferred to the complainants, as set forth in complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a master under the direction of the said Circuit Court, as is prayed for by the said complainants in their bill of complaint, and for such further proceedings to be had thereon, in conformity to the opinion and decree of the said Supreme Court as to law and justice may appertain, which order, decree, and instructions appear to this court by the mandate of the said Supreme Court:

Now, therefore, on filing the said mandate, and in pursuance

thereof, and after hearing *Mr. Stevens*, for the said complainants, and *Messrs. Seymour* and *Seward*, for the defendants, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, and in obedience to the said mandate, doth order, adjudge, and decree, that the instrument in writing, bearing date the 14th day of October, 1845, stated and set forth in the pleadings in this cause, executed by the said Henry Burden and the said defendants, did not, in legal effect or otherwise, or by just construction, license, impart, authorize, or convey a right to the said defendants to use the said improvements in the manufacture of the hook-headed spikes, by the machinery mentioned in the said bill of complaint, or any rights secured to the said Henry Burden by the said letters-patent, and assigned or transferred to the said complainants, as aforesaid.

And it is further adjudged and decreed, that the said defendants have infringed and violated the said patent, so granted to the said Henry Burden, as aforesaid, by making and vending the said hook-headed spikes by the said machinery patented to the said Burden on 2d September, as aforesaid.

And it is further adjudged and decreed, that the said defendants do account to the said complainants for the damages or use and profits, in consequence of the said infringements by the said defendants.

And it is further adjudged and decreed, that an account of the damages, or use and profits, be taken and stated by Marcus T. Reynolds, Esq., counsellor at law, as master of this court, *pro hac vice*, and that the defendants attend before the said master, from time to time, under the direction of the said master, and that the said complainants may examine the said defendants under oath as to the several matters pending on the said reference, and that the said defendants produce before the said master, upon oath, all such deeds, books, papers, and writings, as the said master shall direct, in their custody or under their control, relating to said matters, which shall be pending before said master.

And it is further ordered and decreed, that a perpetual injunction issue out of and under the seal of this court, against the said defendants, commanding them, their attorneys, agents, and workmen, to desist and refrain from making, using, or vending any machine containing the new and useful improvement for which letters-patent were granted to the said Henry Burden on the second day of September, 1840, and from in any manner infringing or violating any of the rights or privileges granted or secured by said patent.

And it is further ordered, that the said complainants recover

of the said defendants the damages or use and profits which shall be reported by the said master, and that upon the confirmation of his report or decree, be entered against the defendants therefor, and also for the costs of the complainants in this suit in this court, and that the said complainants have execution therefor and for the costs in the said Supreme Court.

And it is further ordered and decreed, that such other proceedings be had herein, in conformity to the opinion of the said Supreme Court, as to law and justice may appertain, and that the parties and master may apply, upon due notice, to this court, upon the foot of this decree, for such other and further orders, instructions, and directions, as may be necessary.

(A copy.) A. A. BOYCE, *Clerk.*

And deponent further says, that on the fifth day of October, 1853, the solicitor for the defendants served upon Henry Burden, the president of the said complainants, a petition of appeal and a citation thereon, in the words and figures following:

To the Supreme Court of the United States of America:

The petition of Erastus Corning, John F. Winslow, and James Horner, respectfully represents, that a decree was lately made in the Circuit Court of the United States for the Northern District of New York, in equity, bearing date the fourth day of September, 1850, in a certain cause pending in said court, wherein The Troy Iron and Nail Factory were complainants, and your petitioners were defendants, certain parts of which decree, as hereinafter specified, are, as your petitioners are advised, erroneous, and ought to be reversed.

And your petitioners further show, that the matters in dispute in said cause, exclusive of costs, exceed the sum of two thousand dollars. Whereupon your petitioners pray that the said decree, together with the pleadings, depositions, and all other proceedings in said cause, may be sent to the said Supreme Court of the United States and filed therein on the first Monday of December next, and that so much or such parts of said decree as declares, orders, adjudges, and decrees as follows, to wit: "And it appearing to the said court that the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d September, 1840, as in said bill of complaint set forth, and that the said complainants have a full and perfect title to the said patent for said improvements, by assignment from the said Henry Burden, as is stated and set forth in the

said bill of complaint, may be reversed, and that the appellants may be restored to all things which they have lost by reason thereof. DANIEL L. SEYMOUR, *Solicitor for Appellants.*

Dated Troy, Sept. 8, 1853.

By the Honorable Samuel Nelson, one of the Judges of the Circuit Court of the United States for the Northern District of New York.

Whereas, Erastus Corning, John F. Winslow, and James Horner, lately filed in the Circuit Court of the United States for the Northern District of New York, a petition of appeal directed to the Supreme Court of the United States of America, stating that a decree was lately made in the Circuit Court of the United States for the Northern District of New York in Equity, bearing date the 4th day of September, 1850, in a certain cause therein pending, wherein the Troy Iron and Nail Factory were complainants, and Erastus Corning, John F. Winslow, and James Horner, were defendants, certain parts of which said decree are alleged to be erroneous and ought to be reversed, and further, stating that the matters in dispute in said cause, exclusive of costs, exceeded in value the sum of two thousand dollars;

And whereas the said Erastus Corning, John F. Winslow, and James Horner, by their said petition prayed that the said decree, together with the pleadings, depositions, and all other proceedings in said cause may be sent to the said Supreme Court of the United States, and filed therein on the first Monday of December next, and that the said parts of said decree may be reversed, and the said appellants restored to all things which they have lost by reason thereof;

You are therefore hereby cited to appear before the said Supreme Court of the United States at the City of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, in the Circuit Court of the United States for the Northern District of New York, the 23d day of September, 1853. S. NELSON.

And deponent further says, that he has been informed and believes that the record and proceedings in said appeal have been duly filed with the clerk of this court.

SAMUEL STEVENS.

Sworn before me this 16th day of November, 1853.

LEONARD KIP,

Master and Examiner in the Circuit Court of the Northern District of New York.

Supreme Court of the United States.

The Troy Iron and Nail Factory v. *Erastus Corning et al.*

IN EQUITY.

SIR,—Be pleased to take notice that upon the pleadings, papers, and proceedings in this cause in the Circuit Court of the United States for the Northern District of New York, and upon the record, and proceedings returned to this court by the clerk of said Circuit Court on the appeal by the complainant to this court, and upon the affidavit hereto annexed, and copy of which is herewith served upon you,—this honorable court will be moved at the next term thereof to be held at the Capitol, at the City of Washington, District of Columbia, on the first Monday of December next, at the opening of the court on that day, or as soon thereafter as counsel can be heard for a rule or order dismissing the appeal of the defendants to this court of or such other and further rule or order as may be agreeable to equity.

Albany, November 9th, 1853.

SAMUEL STEVENS, *Solicitor for Complainants.*

To D. L. SEYMOUR, *Defendants' Attorney.*

Upon this motion to dismiss the appeal, the cause was taken up.

It was argued by *Mr. Stevens* and *Mr. Johnson*, for the motion, and *Mr. Seymour* and *Mr. Seward* against it.

Mr. Stevens, in support of the motion to dismiss, made the following points:

The only ordering part of the decree—the only judgment pronounced by the court below—was a decree dismissing the complainants' bill, with costs; from that decree the complainants duly appealed to this court, which decree was reversed, and a decree ordered according to the prayer of the bill, which was duly entered in the Circuit Court, before the defendants made the present appeal.

Preceding the ordering part of the decree, certain recitals were made by the Circuit Court, showing the reasons or grounds upon which that court pronounced the ordering part of the decree.

It is from the recitals preceding the decree in this cause, and not from the decree, that this appeal has been made.

The complainants, the respondents to this appeal, now move to quash or dismiss it upon the following grounds:

First. This court has appellate jurisdiction only upon appeals from final judgments or decrees of the Circuit Court. 1 United States Statutes at Large, p. 84, § 22.

The ordering part of a decree is the only final decree or judgment of the court.

The preliminary recitals preceding the ordering part of the decree, is no part of the decree or judgment of the court.

Such recitals are simply the reasons or grounds of the decree.

Those reasons or grounds of the decree cannot be appealed from. A party might as well claim to appeal from the opinion of the court, as from a synopsis of the opinion which constitutes the recitals upon which the ordering part of the decree is based.

The only decree in this case was a decree dismissing the complainants' bill, with costs. Seaton's Forms of Decrees, pp. 8, 9.

From the whole of that decree the complainant appealed, the whole of which decree was reversed by this court at its last term, and the Circuit Court was ordered by the mandate of this court to enter a decree in said cause, according to the prayer of complainant's bill, and such decree was entered by the said Circuit Court, at the June term thereof, 1853, in compliance with said mandate of this court.

The defendants cannot have that decree of this court reviewed or altered by an attempt to appeal from the reasons upon which the Circuit Court pronounced its decree.

Second. But if the recitals preceding the ordering part of the decree of the Circuit Court could be appealed from, the defendants should have brought a cross appeal, which would be heard by this court with, and at the same time of, the original appeal, and one decree only would be pronounced by the appellate court. 1 Barbour's Ch. Prac. 397; Uguart's Prac. in House of Lords on Appeals and Writs of Error, pp. 37-40; Palmer's Prac. in House of Lords on Appeals and Writs of Error, p. 33; Hawley *v.* James, 16 Wend. 85-274; Mapes *v.* Coffin, 5 Paige's Rep. 296.

A party cannot have a decree of the Circuit Court reviewed by this court two, three, or more times, by appealing from different parts of the decree at different times. Every ground which he might have urged on the hearing of the first appeal, will be deemed to have been made by him, or if not made, to have been abandoned. The Santa Maria, 10 Wheat. Rep. 443-4; Ex parte Sibbald, 12 Peters's Rep. 488.

This attempt at an appeal by the defendants from the reasons of the decree, is analogous to an application to this court for a rehearing upon the original appeal, which is never granted after the cause has been remitted to the Circuit Court. McArthur *v.* Browder, 4 Wheat. Rep. 488.

Third. The decree of the Circuit Court entered in this cause on the 4th September, 1850, was reversed by this court at its December term, 1852, and the proceedings were remitted to the Circuit Court, and that court, at its June term, 1853, entered a new decree, in pursuance of, and in compliance with, the mandate of this court. Therefore, on the 5th of October, 1853, the date of defendants' present appeal, there was no such decree of the Circuit Court as that entered by said court, of the 4th of September, 1850, from parts of which the defendants claim to appeal.

Fourth. The only decree existing in the Circuit Court in this cause, since its June term, 1853, is an interlocutory, and not a final decree, and cannot be appealed from. Kane *v.* Whittick, 8 Wend. Rep. 219; 9 Peters's Rep. 1; 15 Id. 287.

Appeals from the Circuit Court to this court can only be from final decrees or judgments. 1 United States Statutes at Large, p. 84, § 22.

Mr. Seymour and *Mr. Seward* opposed the motion to dismiss the appeal, upon the following grounds:—

I. The decree of the Circuit Court, made on 4th September, 1850, disposed of the whole cause on the merits, and was, therefore, a final decree, and an appeal may be taken from it. See act of Congress, March 3, 1803. By this act, an appeal to the Supreme Court is given "from all final judgments or decrees rendered, or to be rendered, in any Circuit Court." See also act 24th February, 1789; the San Pedro, 2 Wheaton, 132; see act of 1819, (3 United States Statutes at Large, p. 481, chap. 19); see Patent act of 1836, § 17, (5 United States Statutes at Large, p. 124); Laws United States Courts, 117, 118, 119. This last act enlarges the right of appeal in patent cases. It gives the court a discretion to allow the appeal in cases other than those already provided for by law. The appeals authorized by this law are only allowed from a final decree in United States courts. Patterson *v.* Gaines and others, 6 Howard, 585.

A decree dismissing a bill is a final decree. 2 Daniel's Chancery Pleading and Practice, Perkins's ed. pp. 1199, 1200; McCollum *v.* Eager, 2 Howard, 64.

The decree, therefore, of the Circuit Court, in this cause, may be appealed from, under the acts of Congress aforesaid.

II. This decree consists of three parts: the introductory part; the part declaring the rights of the parties, as this does of the complainants; and another part ordering or directing a thing or things to be done. See 2 Daniel's Chancery Pleading and Practice, Perkins's ed. pp. 1210 to 1214, as to the forms of decrees. The rules of this court do not allow of recital. See rule

85; so, too, Stat. 3 and 4 William IV., cited in 2 Daniel's Pr. 1212; Seaton's Decrees, 159. It declares the right of complainants to the patent-right, and the right of the defendants to use the patented machinery, under the agreement of October 14, 1845.

This decree proceeds and adjudges and determines two important matters of defence which had been distinctly set up in the pleadings, and upon which much testimony had been given, to wit:

First. "That the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint, mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d day of September, 1840, as is in said bill of complaint set forth."

Second. "That the said complainants have a full and perfect title to the said patents for said improvements, by assignment from the said Henry Burden, as is stated and set forth in the said bill of complaint."

These portions of the decree are final decisions on the merits of the case, giving to the complainants the full and complete title to the machinery; a vital point, which, if decided for the defendants, decides the whole case for them; no matter what may be the decision as to the agreement of October 14, 1845.

An appeal will lie from the decision of the Court, upon either or both of these contested points. 3 Daniel's Ch. Pr. 1606.

III. Even if the adjudication contained in the decree of the originality of the invention in question, and of the complainants' title to the patent, need not have been inserted in the decree, yet they were inserted by the Circuit Court, upon the special motion of the complainants, and against the opposition of the defendants, who should therefore not be prejudiced by it. See affidavits read on this motion by the defendants.

IV. The appeal by the complainants brought up only the questions decided to their prejudice. Buckingham v. McLean, 13 Howard, 150, 151.

The equity practice of the Supreme Court of the United States is regulated by the laws of the United States, the rules of the court, and in the absence of any provision in them applicable to a given case, by the practice of the English High Court of Chancery. Rule 90, Supreme Court. The State of Rhode Island v. The State of Massachusetts, 14 Peters, 210; Bein v. Heath, 12 Howard, 168; Dorsey v. Packwood, 12 Howard, 126.

By the practice, both of the American and the English Courts of Chancery, this is a proper case for a cross appeal to be brought by defendants. 1 Turner and Venable's Chancery Practice, 733, edit. 1835; 2 Smith's Chancery Practice, p. 31, edit. 1837;

3 Daniel's Ch. Practice, 1685, 1688, 1606; Blackburn v. Jepson, 2 Vesey & B. 359; Hawley v. James, 16 Wendell's R. 61, 85; Mapes v. Coffin, 5 Paige, 296; Clowes v. Dickinson, 8 Cow. 330.

V. The present is the proper time to bring it.

1. The decree of the Circuit Court being final, the laws of March 3, 1803, and of 1819 and 1836, give an unrestricted and unqualified right of appeal to either party for five years.

2. Because an appeal now taken from the latter decree would bring up for review only the proceedings subsequent to the mandate. The Santa Maria, 10 Wheat. 31; *Ex parte* Sibbald, 12 Pet. 488.

There is no rule of the Supreme Court adopting the rules of the House of Lords.

VI. The decision of this court, on the appeal of the complainants, affects only the part of the decree complained of by them, to wit, the construction of the agreement of October 14, 1845; and, while the declaratory parts of the decree of the Circuit Court, in favor of the complainants, remain unreversed, the right to sustain their bill for a perpetual injunction, and to recover damages, followed as a consequence, from the construction given by this court to the agreement of October 14, 1845.

VII. The defendants are entitled to an appeal at some time within five years from the decision of the Circuit Court against them, on the validity of the patent in question. Now, if the complainants' position is true, that nothing is appealed from but the order directing the bill to be dismissed, these defendants have not now, and never have had, an opportunity to appeal at all; because that decree was in their favor, and a party cannot appeal from a decree in his own favor.

It is a mere subtlety to say that because the decree, deciding the validity of the patent and the title of the complainants in their favor, ordered no relief; but, on the contrary, for a different reason, directed their bill to be dismissed, that, therefore, the decision of the validity of the patent and the title of the complainants is mere recital, and not a substantial part of the decree, and proper subject of an appeal. The test is this: Are the validity of the patent and the title of the complainants now open to dispute by the defendants in the Circuit Court? Certainly they are not. But, according to the complainants, those points are not open to appeal; so that a decision on a vital point against the defendants is not the subject of appeal at all.

Again. If what the complainants allege is correct, that there is no decree now remaining in the court below but the decree which is entered on the mandate; and, also, that, on appeal

from that decree so entered on the mandate, the party aggrieved can review only the proceedings subsequent to that decree, then it results that the defendants can have no appeal at all from a decree in which the material issue upon the invention is found against them by the court below.

Again. In answer to this, it is said that, on the appeal brought by the complainants upon the issue as to a license found against them, the defendants were at liberty to fall back, and contest the issue of the invention found against them; but, in reply, we say that, by the rules of courts of equity, as well as by statute, it is optional to the defendants whether they will so fall back, and contest the issue found against them on the hearing of the appeal of the complainants, or whether they will bring their own distinct appeal.

VIII. The respondents' motion should be denied.

Mr. Justice GRIER delivered the opinion of the court.

The Troy Iron and Nail Factory filed their bill in the court below, claiming to be assignees of a patent granted to Henry Burden, for a "new and useful improvement in the machinery for manufacturing wrought nails or spikes." The bill charges, that the appellants, Corning & Company, have infringed their patent, and prays for an injunction and an account of profits, &c. The answer of the respondents below took defence on two grounds — first, that Burden was not the first and original inventor of the machine patented; and, secondly, that the respondents used their machine under a license from the patentee. The court below sustained the defence on the latter ground, and entered the following decree: "Therefore, it is ordered, adjudged, and decreed, that the said bill of complaint is hereby dismissed, with costs to be taxed, and that the defendant have execution therefor."

The case is now before us on a motion to dismiss the appeal. Looking at the case as exhibited to us by the record, it appears to be an appeal by respondents from a decree dismissing the complainant's bill with costs. It often happens that a court may decree in favor of a complainant, but not to the extent prayed for in his bill, and he may have just cause of appeal on that account. But the prayer of the respondent's answer is, that "he be hence dismissed, with his reasonable costs and charges, on this behalf most wrongfully sustained." And, having such a decree on the present case, he cannot have a more favorable one.

It is true that the petition for the appeal in this case prays only, "that so much of such parts of said decree, as declares, orders, adjudges, and decrees as follows, to wit, "And it appear-

ing to the said court that the said Henry Burden was the first inventor of the improvement, &c., may be reversed, and that the appellants may be restored to all things which they have lost by reason thereof."

But the matter complained of forms no part of the decree of the court below.

It shows only, that the judge, in reciting the inducement or reasons for entering a decree in favor of the respondents below, was of opinion that they were entitled to such decree, because they had succeeded in establishing one only of the two defences alleged in their answer. It is the opinion of the court, on a question of fact involved in the case, but not affecting the decree. If the decree be correct, the party in whose favor it is given, has no right to complain; yet his appeal prays that it "may be reversed, and the appellants restored to all things which they have lost by reason thereof;" and the record shows they have lost nothing.

If the decree be reversed, according to the prayer of the appellants, the court must necessarily enter a decree for the complainants below. This would, probably, not meet the views of the appellants. They have put themselves in the anomalous position either of asking for the affirmance of the decree from which they have appealed, or of requesting this court to reverse a decree in their favor, and send back the record to the court below, with directions to enter the very same decree, but to assign other reasons for it. The court were not bound to give any reasons for their decree. The law gives the party aggrieved an appeal from a final decree of an inferior court. But it does not give the party who is not aggrieved an appeal from a decree in his favor because the judge has given no reasons, or recited insufficient ones for a judgment admitted by the appellant to be correct.

There is a part of the history of this case which does not appear on the record; but, being known to the court, and assumed by counsel on both sides to make part of the case, it will be necessary to notice the case under that aspect.

The decree in favor of the appellants, which is now appealed from, has already been before this court on an appeal by the complainant below. The parties were then fully heard, the decree of the Circuit Court reversed, and the case remanded for further proceedings. It is reported in 14 Howard, 194. It appears, therefore, that there is no such decree as that which is now complained of. The decree of the Circuit Court has been entirely annulled, reversed, and set aside by this court. Before that was done, the appellants had a full hearing on every point of defence set up in their answer. The court below had de-

cided that the defendant had a good defence under his plea of license, but not under the plea that Burden was not the first inventor of the patented machine. This court has decided, that the appellant's defence was insufficient on both pleas. The language of the court is, (14 How. 208,) "That the defendants have failed to prove that Burden was not such first inventor; and, in our opinion, the evidence given by them on that point rather serves to establish the originality of the invention than to impair it. The appellants stand upon the patent, as the first which was granted for the bending lever; and they may well do so, until other evidence than that in this record shall be given to disprove its originality."

It is plain, therefore, that, under the guise of an appeal from the decree of the Circuit Court, this is an appeal, in fact, from the decision of this court. For there is no other decree existing in the case except the decree of this court. There must be an end of litigation some time. To allow a second appeal to a court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation. It is said by this court, in Martin *v.* Hunter, (1 Wheat. 355,) "A final judgment of the court is conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its judgment." See, also, Sibbald *v.* United States, 12 Pet. 488. It follows, therefore, that, when a complainant has a decree in his favor, but not to the extent prayed for in his bill, and the respondent appeals; if the complainant desires a more favorable decree, he must enter a cross appeal, that, when the decree comes before the appellate court, he may be heard. For, when the decree is either affirmed or reversed by the appellate court, it becomes the decree of that court, and cannot be the subject of another appeal. But, in this case, where the decree of the court below dismissed the bill, no appeal by the respondent was necessary. He had a full opportunity to urge every defence set up in his answer. The printed arguments show that the defence, for want of originality in the patent, was relied upon as a ground for affirming the decree of the court below, and, as we have already shown, was distinctly passed upon and overruled by this court.

A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error. But, on an appeal from the mandate, it is well settled, that nothing is before the court but the proceedings subsequent to the mandate. Whatever was formerly before the court, and was disposed of by its decree, is considered as finally disposed of. See Himely *v.* Rose, 5 Cranch, 313; Canter *v.* The Ocean Insurance Company, 1 Peters, 511; The Santa Maria, 10 Wheat. 431; Rice *v.* Wheatly, 9 Dana, 272.

Moreover, as it is admitted that the court below have not yet acted upon the mandate of this court, and entered a final decree in pursuance thereof, there is no final decree, from which only an appeal can be taken. See the Palmyra, 10 Wheat. 502; Chace v. Vasquez, 11 Id. 429.

There are, therefore, three conclusive reasons for dismissing the present appeal:

1. The appellants have already been heard in this court on a former appeal.

2. There is no such decree as that from which the appeal purports to be taken.

3. There is no final decree in the case, from which an appeal can be taken.

The appeal is therefore dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, dismissed, with costs.

THE UNITED STATES, PLAINTIFFS, v. JAMES L. DAWSON, AND JOHN R. BAYLOR.

In June, 1844, Congress passed an act, by virtue of which the Circuit Court of the United States for the District of Arkansas, was vested with power to try offences committed within the Indian country.

In July, 1844, it was alleged that a murder was committed in that country.

In April, 1845, an indictment was found by a grand jury, in the Circuit Court of the United States for the District of Arkansas, against a person charged with committing the murder.

In March, 1851, Congress passed an act erecting nine of the Western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a Circuit Court of the United States.

The residue of the State remained a judicial district to be styled the Eastern District of Arkansas.

This act of Congress did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending.

THIS case came up from the Circuit Court of the United States for the Eastern District of Arkansas, upon a certificate of division in opinion between the judges thereof.

The two following questions were certified, viz.

1st. Did the act of Congress, entitled "An act to divide the district of Arkansas into two judicial districts," approved the third day of March, in the year of our Lord one thousand eight hundred and fifty-one, whereby the Western District of Arkansas was created and defined, take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District of Arkansas, so that it cannot proceed to hear, try, and determine a prosecution for murder, pending against the prisoner, James L. Dawson, a white man and not an Indian, upon an indictment found, presented, and returned into the Circuit Court of the United States for the District of Arkansas, by the grand jury impanelled for that district, upon the 16th day of April, in the year of our Lord one thousand eight hundred and forty-five, against said James L. Dawson, a white man, for the felonious killing of Seaborn Hill, another white man and not an Indian, on the eighth day of July, A. D. 1844, in that country belonging to the Creek nation of Indians, west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of Arkansas by the act of Congress approved the seventeenth day of June, A. D. 1844, entitled "An act supplementary to the act entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, passed thirtieth June, one thousand eight hundred and thirty-four,'" in which cause, so pending, no trial has as yet been had.

2d. Can the District Court of the United States for the Western District of Arkansas take jurisdiction of the case aforesaid, upon the indictment aforesaid, so found in the year 1845, in said Circuit Court for the District of Arkansas?

Although the name of Dawson only was mentioned in the question certified, yet the record showed that Baylor was indicted at the same as aiding and abetting in the murder.

A motion was made in the Circuit Court to quash the indictment upon the ground that this honorable court has no jurisdiction or power to hear, try, or determine this case and prosecution, and that all its jurisdiction and power in that behalf ceased and was extinguished on the third day of March, 1851, when that part of the Indian country, in which the offence is charged to have been committed, was severed from this district, and made part of a new district, under the jurisdiction of the District Court of the United States, for the Western District of Arkansas."

It was upon this motion that the judges differed in opinion and certified the two questions, above stated, to this court.

The motion to dismiss the case was argued by *Mr. Lawrence* and *Mr. Pike*, for Dawson, and by *Mr. Cushing*, (Attorney-General,) for the United States.

Mr. Pike, in his brief, made the following argumentative statement of preëxisting laws upon the subject.

This is an indictment againt James L. Dawson for a murder alleged to have been committed at the Creek agency, in the Creek country, west of Arkansas, on the 8th day of July, A. D. 1844. The bill was found by the grand jury for the Arkansas district, at the April term, 1845, of the Circuit Court of the United States for the District of Arkansas.

At the April term, 1853, present Mr. Justice Daniel, and the honorable Daniel Ringo, district judge, a motion was made to quash the indictment for want of jurisdiction, on which motion the judges dividing in opinion, the prisoner was admitted to bail in an amount which he has been wholly unable to give; and upon a certificate of division of opinion the case has come into this court.

By the act of March 3d, 1817, (3 Stat. at Large, 383,) jurisdiction and power of trial, in cases where offences were committed in any town, district, or territory belonging to any nation or tribe of Indians, were given to the courts of the United States "in each territory and district of the United States in which any offender against this act shall be first apprehended or brought for trial."

The Constitution, art. III, sect. 2, No. 3, had provided that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

The States and people not thinking this a sufficient guaranty for a fair and impartial trial, art. VI. of the amendments to the Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The Intercourse Act of 30th June, 1834, (4 Stat. at Large, 733,) by the 24th section, after making divers provisions, defining the limits of the "Indian country," and imposing penalties for sundry offences, provides "that, for the sole purpose of carrying this act into effect," certain Indian country, bounded east by Arkansas and Missouri, west by Mexico, north by the Osage country, and south by Red River, "shall be, and hereby is annexed to the territory of Arkansas;" and by section 25 it was provided "that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United

States shall be in force in the Indian country; provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian." Power to apprehend offenders in the Indian country, and take them into "the judicial district having jurisdiction," was given by sec. 26.

Under this act the Superior Court of the Arkansas Territory took and exercised jurisdiction as to offences committed in the Indian territory so annexed to Arkansas.

But, by act of June 15th, 1836, (5 Stat. at Large, 50, 51,) Arkansas was admitted as a State; and sec. 4 provided "that the said State shall be one judicial district, and be called the Arkansas District, and a District Court shall be held therein, to consist of one judge, who shall reside in the said district, and be called a district judge." It was provided that he should hold semiannual sessions at Little Rock, and that he should "in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act entitled An act to establish the judicial courts of the United States."

That was the act of September 24th, 1789, (1 Stat. at Large, 73.) That act gave to the District Court of Kentucky the jurisdiction of a circuit court, except on appeals and writs of error, in addition to the ordinary district-court jurisdiction. Sec. 10, and sec. 29, provided that in cases punishable with death, the trial should be had in the county where the offence was committed; or, where that could not be done without great inconvenience, twelve petit jurors at least should be summoned from thence.

There was, in the act of 1836, no express repeal of so much of the act of 1834 as applied to Arkansas; but the legislature, by expressly limiting and defining the bounds of the Arkansas district, and making it to be composed of the State, cut away the Indian country, and severed its connection with Arkansas. It was therefore held by the District Court of Arkansas that it formed no part of the district, and that the court had no jurisdiction to try and determine cases upon indictments found in the Superior Territorial Court, for offences committed in the Indian country prior to the 15th June, 1836; and all prisoners so indicted were discharged.

To remedy this, by act of March 1, 1837, (5 Stat. at Large, 147,) it was provided, that the District Court of Arkansas should have "the same jurisdiction and power in all respects whatever that was given to the several district courts," by the intercourse act of March 30, 1802, "or by any subsequent acts of Congress, concerning crimes, offences, or misdemeanors, which may be committed against the laws of the United States in any town, set-

tlement, or territory, belonging to any Indian tribe in amity with the United States, of which any other district court of the United States may have jurisdiction."

Section 15 of this act of 1802, like the act of 1834, gave the jurisdiction of offences committed against its provisions to the territorial, circuit, and other courts of the United States, in each district in which the offenders should be apprehended, or into which, agreeably to the provisions of the act, they should be brought for trial. By sec. 19, persons apprehended in the Indian country were to be taken into one of the three adjoining States or districts for trial. If apprehended in any district, they were, by sec. 17, to be tried there.

By act of March 3, 1837, (5 Stat. at Large, 176,) the districts of Alabama, Mississippi, and Arkansas, and the Eastern District of Louisiana, were erected into the ninth circuit; and provision being made for holding a circuit court at Little Rock, it was further, by the third section, provided, that so much of any act or acts of Congress as vested in sundry district courts, including that of Arkansas, "the power and jurisdiction of circuit courts," should be, and was thereby repealed, and like jurisdiction was given to the Circuit Court of Arkansas as to other circuit courts, and to the District Court of Arkansas as to other district courts.

Under these acts it was held by the Circuit Court for the District of Arkansas, in 1842, I think, present Mr. Justice Daniel and the honorable Benjamin Johnson, district judge — that the court had no jurisdiction as to offences committed in the Indian country.

By act of August 23, 1842, (5 Stat. at Large, 517,) concurrent jurisdiction with the Circuit Court was given to the district courts in prosecutions for offences not capital.

And by act of June 17, 1844, (a few days before the day on which the offence in this case is charged in the indictment to have been committed,) 5 Stat. at Large, 680, the courts of the United States in and for the district of Arkansas were vested with the same power and jurisdiction, to hear, try, determine, and punish, all crimes committed within the Indian country designated in the 24th section of the intercourse act of June 30, 1834, and therein and thereby annexed to the territory of Arkansas, as were vested in the courts of the United States for that territory before it became a State; and the act went on to declare: "That for the sole purpose of carrying this act into effect, all that Indian territory heretofore annexed by the said 24th section of the act aforesaid to the territory of Arkansas, be, and the same hereby is annexed to the State of Arkansas."

Under this act, the Circuit Court assumed jurisdiction of

offences committed in the Indian country; and, among other indictments, this was found.

But on the 3d of March, 1851, a new act passed, (9 Stat. at Large, 594,) by which it was enacted — Sec. 1. That from and after the passage of this act, the counties of Benton, Washington, Crawford, Scott, Polk, Franklin, Johnson, Madison, and Carroll, and all that part of the Indian country lying within the present judicial district of Arkansas, shall constitute a new judicial district, to be styled 'The Western District of Arkansas;' and the residue of said State shall be and remain a judicial district, to be styled 'The Eastern District of Arkansas.'"

By sec. 2 of this singularly worded act, "the judge of the District Court of Arkansas" is directed to hold two terms "of said court" in each year, at Van Buren, in Crawford county, and special and adjourned sessions when needed.

By sec. 3 it is provided, that "the District Court of the United States for the Western District of Arkansas, hereby established," shall have, besides district-court jurisdiction, "within the limits of its respective district," circuit-court jurisdiction, except in cases of appeals and writs of error, and proceed like a circuit court, with right of appeal to the Supreme Court.

By sec. 4 a marshal and district-attorney "for said Western District of Arkansas," were provided for, and the district judge was empowered to appoint a clerk "of said court hereby established."

Since the passage of this act, and the establishment of the District Court for the Western District of Arkansas, that court has taken jurisdiction of indictments found there for capital offences committed in the Indian country prior to the passage of the act, and has tried, convicted, and sentenced the parties, and had them executed.

And at the same time a Circuit Court for the Eastern District of Arkansas has been opened and held, succeeding to the business of the Circuit Court for the District of Arkansas, and the cases pending there when the act passed had been proceeded in as still in the same court. Persons have been tried for offences committed in the Indian country, and upon indictments found in the Circuit Court for the District of Arkansas, prior to the passage of the act of 1851; and one, convicted of manslaughter, is still imprisoned under the sentence. But in the case of Dawson, the question of jurisdiction was formally raised, and comes up here for consideration.

At common law, in criminal cases, the venue was local, and matter of substance affecting the jurisdiction and power of the grand jury, who were to find the indictment or make the presentment, as well as of the court who were to try the cause and carry into effect the law. 1 Chitty, Cr. Law, 177, 190.

(After examining the English authorities upon this point, the counsel proceeded to the American.)

One of the grounds of complaint, set forth in the Declaration of Independence against the English king, was "for transporting us beyond seas to be tried for pretended offences."

After the Constitution was framed, it did not seem to the States and people that the rights of the citizen were sufficiently guarded by the provision which gave Congress, where an offence was not committed within any State, the power to direct, as well after as before the offence was committed, at what place the trial should be had. The objections to this were obvious. In every case where an offence was committed beyond the limits of a State, as on the high seas or in a territory, Congress might virtually decide the case against the accused by directing that he should be tried in a remote or unfriendly district. If the offence were a political one, especially, this was a power dangerous and odious in the extreme. The sixth article of the amendments wisely took away this whole power, and provided that the trial of all criminal prosecutions should be by an impartial jury of the State and district wherein the crime should have been committed, and required that such district should have been previously ascertained by law. It is obvious that the phrase means, previously to the commission of the offence, because, if Congress could create or ascertain the district after its commission, that was continuing their power to direct the trial to be had at whatever place they might think most apt and fit for the particular case.

It will occur to every one, that it would be intolerable if a power existed by which, if a man committed an offence in Oregon or Florida, Congress might, in order to strike him down with perfect certainty, attach the particular place where he committed the offence to the District of Maine, so as to carry him to Portland for trial; retaining, of course, the power to sever again from the district the country so attached, so soon as the political or other offender should be immolated, and the ends of public or party vengeance attained.

And it will also occur, that it would be equally dangerous to concede to Congress a power, when an offence has been committed, to sever the particular place at which it was committed from the district of which it then formed a part, and so, disenabling the court to send beyond its district for jurors, utterly deprive the accused of the right to a jury of the vicinage.

It was not intended by the amendment to leave the rights of the accused to be settled by the caprice or hostility of Congress, and by laws enacted on the spur of the moment, to suit the

particular occasion, reach the particular case, and strike the particular individual.

The amendment is, therefore, peremptory. No man can be tried, under any circumstances, elsewhere than in the State or district where he committed the offence. Nor can new districts be created, *ad libitum*, after the offence is committed, to carry the trial to whatever remote point Congress may please, for reasons of prejudice, ill will, or favoritism, in order to acquit or convict, as inward feeling or outward pressure may dictate, giving to the particular party, at the option of Congress, friendly or unfriendly juries and judges, and allowing or taking from him a jury of his vicinage. Such a power, in a free country, would be intolerable. Congress could acquit or condemn at its pleasure. The district within which the crime was committed must have been previously ascertained by law. Thus, and thus only, will a possibility of special legislation for the particular case be avoided, and this power of attainder in disguise taken away.

There have never been but two districts in which it could be said that the offence in this case was committed. The Eastern District of Arkansas is limited to certain specified counties of the State; and it is not the district within which the offence was committed. It was committed in the former District of Arkansas, and in what now forms a part of the Western District of Arkansas. If Dawson is now tried in the Eastern District, certainly he is not tried in the district within which he committed the offence.

The notion upon which the claim to jurisdiction appears to rest is, that the Circuit Court for the Eastern District is either the same court as the former Circuit Court for Arkansas, or its successor. But so is the District Court for the Western District its successor; for the judge of the District Court of Arkansas is to hold two terms of said court at Van Buren.

This idea does not even sound the question, to see how deep it is. To create a circuit or district court, and confer upon it all power to punish crimes within the power of Congress to bestow, would be wholly unavailing, until the territory was defined within whose limits its jurisdiction should operate. No jurisdiction whatever could be exercised until a district was established and defined. The continued existence of the court avails nothing, if its jurisdiction is compressed into narrower territorial limits. Its power shrinks within these limits at once. If the particular place in which the offence was committed is, after the commission of the offence, severed from the district, or left outside of the jurisdiction by the process of compression, and the offence is still tried in the court whose jurisdiction is so

narrowed, the offence, we may admit, would be tried in the same court as if it had been tried there before the excision of territory; but the fact still remains, that it will not be tried in the district, previously ascertained by law, in which the offence was committed.

It is said that it is the district in which the offence was committed. That is not so, because it is a new and different district altogether; the district in which the offence was committed no longer exists, but two new districts exist in lieu of it. It might as well be said that, if you sever a man in the middle, he still exists. Suppose, however, that the act had merely taken off from the Arkansas District the Indian country, and left the former district to stand with its old name, still the Arkansas District, as it was before—*totus teres atque rotundus*—still, although the Arkansas District, it would not be the district in which the offence was committed. If you cut off a man's hand, the man remains, identical and one, as before; because the man, the individual, the *me*, is something different and distinct from each of his members. You may even imagine that a particular faculty or part of the soul could be cut away, and yet the residue would continue the identical individual which existed before.

But if you cut a tract of land or country in two, you may call one half by the name previously borne by the whole, and for some purposes it may be the same tract or country; but for others it is not so. Take from Arkansas a county, or half a dozen counties, and in many senses the residue would be the same Arkansas that existed before. Suits in her favor would not abate, nor her contracts be annulled, because the sovereignty or municipal corporation which constitutes the State does not lose its individuality by parting with a portion of its territory.

But the word district does not mean a corporation, or a being, but a mere tract and extent of country; and, when it is divided, one half of it is no more the same district that existed before than the other is. A half is not the whole; nor can two halves continue to be each the previous whole.

This may be made more plain, and the fallacy of the notion more striking, by reflecting that it operates both ways; and, if the district remains the same when part of its territory is cut away, so it would if a vast extent of new territory was added. Suppose Congress had chosen to annex the Indian country to the District of Columbia, the argument would be thus: The crime was committed at the Creek agency; that is now made part of the District of Columbia by annexation. The District of Columbia is a corporation, one and identical, the same now as before; consequently, it is the District of Columbia in which

the offence was committed. On the other hand, it could be said the offence was committed in the District of Arkansas; the place where it was committed no longer forms part of that district; but the fact still remains, that the crime was committed in the District of Arkansas.

All the reason of the thing would be in favor of the District of Columbia; because the *locus* of the offence now forming part of that district, the accused might have a jury of the vicinage; while, if tried in the maimed District of Arkansas, he could not.

The truth is, that the continued existence and identity of the metaphysical *ens*, called district, territory, state, or of that other called the court, has nothing to do with the question. If it has, the right guaranteed amounts to nothing. The trial is to be in the district where the offence was committed, in order that the party may have, if not the reality, at least the possibility or fiction of a right to a jury of the vicinage. A constitutional provision, without a reason for it, would be a monster. The right is one that continues to the trial; it is, indeed, a right of the trial. The right is, that the identical place, and fixed solid ground, or unstable water, where the offence was committed, shall then be within the district in which the party is to be tried. If there is any district in which this person could now be tried, it is the Western District of Arkansas. The only way to avoid the difficulty would have been, as the cases we have cited show, for Congress to have declared the old district to continue, with its original territorial extent, for all the purposes of this and similar cases.

The courts of the United States have no jurisdiction, as to crimes, except such as is expressly conferred by statute. In such cases, they have no implied powers, nor any derived from the common law. Hudson *v.* Goodwin, 7 Cranch, 32; United States *v.* Worrall, 2 Dallas, 384; United States *v.* Coolidge, 1 Wheat. 415; 1 Kent, 337–8–9; United States *v.* Bevans, 3 Wheat. 336.

And it is equally indispensable that the law should put the place where the crime occurs within the jurisdiction of the court which is to try the case. United States *v.* McGill, 4 Dall. 426; United States *v.* Bevans, 3 Wheat. 336; Ex parte Bollman and Swartwout, 4 Cranch, 75, 131; United States *v.* Wiltberger, 5 Wheat. 76.

It is a well-settled principle, that where a statute creating an offence is repealed, and no provision is made for carrying forward prosecutions commenced under it, all such prosecutions are absolutely ended with the repeal of the law.

Such was decided to be the effect of the act repealing the

bankrupt act of 1803, in United States *v.* Passmore, 4 Dall. 372.

And the same decision was made in Miller's case, 1 W. Bla. 451. No proceedings are pursuable under a repealed statute, which commenced before the repeal.

These decisions, and others to which we shall refer, do not proceed upon any peculiar principle especially applying to penalties imposed by repealed acts, or to the destruction of the criminal character of acts done before the repeal, but upon a broad general principle of universal application.

And that principle is simply that stated by Lord Tenterden, in Surtees *v.* Ellison, 9 Barn. & Cresw. 752, where he said: "It has been long established that, when an act of parliament is repealed, it must be considered, except as to transactions passed and closed, as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the legislature. We are therefore to look at the statute, 6 Geo. 4, ch. 16, as if it were the first that had ever been passed on the subject of bankruptcy." His lordship felt the pressure of the consequences of the decision, but the law was too well settled to be disregarded; and he added: "It is certainly very unfortunate, that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. It is said that the last will of a party is to be favorably construed, because the testator is *inops consilii.* That we cannot say of the legislature; but we may say that it is '*magnas inter opes inops.*'" See also Dwarris on Statutes, 673, 676.

The counsel then proceeded to examine other analogous principles, which there is not room to insert.

Mr. Cushing, (Attorney-General,) insisted that the act of 3d March, 1851, has not taken away the jurisdiction of the Circuit Court to hear and determine the said indictment then found and pending.

The said act of 3d March, 1851, did not create a new Circuit Court. It created a new District Court, having the ordinary powers of the District Court of the United States within the territory assigned to it, with an anomalous increase of jurisdiction; but it left the then existing Circuit Court unrepealed, in being and activity.

The general powers of the then existing Circuit Court, remained unimpaired as to cases begun and pending; its future jurisdiction was limited to cases originating within a smaller territorial district. The territory within which the Circuit Court then existing should exercise its powers over new suits

and prosecutions thereafter to be instituted, was lessened; but the powers which belonged to it as a circuit court, and as common to all the other Circuit Courts of the United States, were not diminished.

The general rule is, that where the jurisdiction of a court over the subject-matter has once vested, it is not divested by a subsequent change of circumstance. United States v. Myers, 2 Brock. 516; Morgan v. Morgan, 2 Wheat. 290; Mollan v. Torrance, 9 Wheat. 537; Clarke v. Matthewson, 12 Peters, 165.

Thus, where the complainants, being citizens of a State other than Kentucky, sued citizens of the State of Kentucky in the Circuit Court of the United States for the Kentucky District, and pending the suit one of the complainants voluntarily removed to, and became a citizen of, the State of Kentucky, the Supreme Court of the United States decided unanimously "that the jurisdiction of the court having once vested, was not divested by the change of residence of either of the parties." Morgan's heirs v. Morgan, 2 Wheat. 293, 297.

There are no words in the act of 1851 to give it a retrospective effect, to make it retroact upon pending suits and prosecutions, rightfully commenced in the preëxisting and continuing Circuit Court. To give, by implication, a retrospective effect to the newly-created District Court, whereby to divest a preëxisting and continuing superior Circuit Court of its cognizance over suits, actions, and prosecutions rightfully begun therein, and undetermined, would violate the rules of just construction and right reasoning.

Heretofore when a circuit court has been established within a district wherein only a district court had been established with the powers of a district court and of a circuit court, in order to divest the District Court, of its cognizance of cases pending, which belonged to the proper cognizance and jurisdiction of a circuit court, and transfer them into the newly-created Circuit Court, or when new courts have been established, whether circuit courts or district courts, and it was intended by the Congress of the United States to transfer cases pending in the old or preëxisting courts into the newly-created courts, there to be heard, tried, and determined, it has been deemed necessary and proper to employ express and positive enactments to effect such purposes, and they have been used invariably to that end.

Thus in the act of Congress of 13th February, 1801, (2 Stat. at Large, 89,) two sections viz. sec. 20 and 24, were introduced as specially applicable. This act was repealed by 8th March, 1802, (2 Stat. at Large, 132,) and the preceding judicial system reinstated, and sections 4 and 5 introduced to provide for the case.

The act of 24th February, 1807, (2 Stat. at Large, 420,) established Circuit Courts and abridged the jurisdiction of the District Courts in the District of Kentucky, Tennessee, and Ohio, and sec. 3 provided for the transfer of cases.

The act of April 20th, 1818, (3 Stat. at Large, 462,) divided Pennsylvania into two districts, and sections 4 and 6, provided for the transfer of cases.

The act of March 10th, 1824, (4 Stat. at Large, 9,) divided Alabama into two districts, and sec. 5 made the necessary provisions.

The act of 3d March, 1837, (5 Stat. at Large, 176,) erected twelve new Circuit Courts. The third and fourth sections provided for this case.

In these six statutes, last quoted, we have examples of two classes, relative to the divisions of districts and the establishment of courts therein: one class containing enactments for transferring cases, begun and pending in one District Court, to another District Court, established in a part of the territory formerly composing one district; the second class containing express provisions to take away the jurisdiction of district courts, acting as circuit courts, over cases, civil and criminal, begun and pending in such inferior district courts, and to transfer the cognizance thereof to the superior circuit courts newly established in the same districts.

If positive enactments were necessary and proper to divest the jurisdiction of inferior district courts over causes, actions, and pleas rightfully begun and pending therein, and to transfer the cognizance thereof to superior circuit courts newly established in the same districts, *à fortiori*, express and positive enactment would be necessary to divest the jurisdiction of a superior court over cases rightfully begun and pending therein, and to transfer the cognizance thereof, from such existing continuing superior court, to an inferior district court newly established within the same territory which composed the district when the proceeding was instituted in the Circuit Court.

We have examples of legislation by Congress by which new judicial districts have been formed out of the old, with total silence as to the cognizance of actions or prosecutions pending in the old, viz.

The act of April 9th, 1814, (3 Stat. at Large, 120,) and the act of February 21st, 1823, (3 Stat. at Large, 726.) In these acts, cases were left to be heard, tried, and determined under the general rule that when once the jurisdiction of a court has rightfully attached by action, writ, or prosecution, instituted, it is not divested by change of circumstances, by mere implication, or otherwise than by express enactment.

The two acts of May 26th, 1824, (4 Stat. at Large, 50,) and May 26th, 1824, (4 Stat. at Large, 48,) took away certain counties and attached them to another district, and no special provision was thought necessary respecting cases then pending.

Furthermore, we have examples of the legislation of the Congress of the United States in dividing one judicial district, in the States of North Carolina, into three judicial districts; thereafter, in consolidating the three into one, and afterwards in dividing that one into three judicial districts, viz.

The act of 9th June, 1794, (1 Stat. at Large, 396); the act of 3d March, 1797, (1 Stat. at Large, 518); the act of 29th April, 1802, (2 Stat at Large, 156.) In these acts there are provisions that there shall be no failure of justice by abatement or discontinuance of the process or lapse of jurisdiction.

The act of 3d April, 1794, (1 Stat. at Large, 352,) transfers jurisdiction from one court to another and provides for the trial of cases.

The various acts of Congress for dividing judicial districts, and for taking off territories or counties from one judicial district and adding them to another, and for consolidation of judicial districts into one, and again for dividing that one into several, and for creating new courts by abolishing some preëxisting, and substituting others in their stead, when compared each with the others, evince, beyond doubt, that the legislature, in framing those statutes, understood and acted upon the following principles and rules of law, viz.

1st. That to abolish the jurisdiction of one existing and continuing court over any of the subjects originally committed to its cognizance, and to transfer such jurisdiction to another court, it was necessary and proper to use words aptly and clearly expressive of such intent.

2d. That when the jurisdiction of a court had once rightfully vested over a cause begun and pending, it was not divested by change of circumstance, but continued with the court, until plainly taken away by the legislature, or until the court itself was abolished.

By these rules the acts of the legislature are to be construed. Otherwise the most unexpected, inconvenient, nay, calamitous consequences would result, with miserable confusion of all justice.

If taking off territory from one judicial district and adding to another *ipso facto* abrogates the jurisdiction of the courts (district and circuit) holden for such diminished district over cases then pending and originated in such territory so taken from one judicial district and added to another, then the people of Virginia, of New York, and of Pennsylvania, would have been thrown into a strange predicament.

The statues before cited for dividing the judicial districts in Virginia, New York, and Pennsylvania, respectively, and afterwards for diminishing the one and enlarging the other in each State, made no special provision for, but were silent as to, cases then pending. The courts wherein they were pending, supposing their jurisdiction to have continued, went on to hear and determine them. But if the doctrine now contended for by the counsel for Dawson is to prevail, the said courts had no jurisdiction; their decisions are absolutely void, confer no right, bar no right, and all concerned in executing them were trespassers; for such are the consequences of decisions and sentences of courts not having jurisdiction. Elliot v. Piersol, 1 Peters, 340; Wise v. Withers, 3 Cranch, 337; Rose v. Himely, 4 Cranch, 269.

A question arose upon the before-mentioned act of 1824, May 26, taking away certain counties from the Eastern district of Pennsylvania and adding them to the western district, in an action of ejectment pending in the Circuit Court for the district of Pennsylvania, for land lying in Union county, one of the counties so taken from the eastern and added to the western district. The question was made at the first sitting of the Circuit Court for the district of Pennsylvania after the passage of the act of 1824, whether the said ejectment so instituted and pending at the passage of that act should be retained in the Circuit Court, or be sent to the western district court, acting as a Circuit Court. Upon argument, Mr. Associate Justice Washington and Judge Peters decided that the case should be retained; that the said act had not transferred it to the western district. Lessee of Rhodes and Snyder v. Selin, 4 Wash. C. C. Rep. 725.

To combat this decision, the counsel for the accused cites the cases of Picquet v. Swan, 5 Mason, 35, and Toland v. Sprague, 12 Peters, 300. The case of Piquet v. Swan is cited to prove "that title to real estate, by the general principles of law, can be litigated only in the State where the land lies, and where the process may go to find and reach the land and enforce the title of the party." This extract, quoted by the counsel for the accused, is connected with the next preceding and the next succeeding sentence, to actions, in their nature, "purely local;" and immediately afterwards Judge Story explains himself further, by saying "collateral suits for other purposes, binding the conscience, or controlling the acts of the party personally, may be brought and decided elsewhere." 5 Mason, 42. The case did not involve the question of a rightful jurisdiction vested, and sought to be divested by matter subsequent. It was a case brought in the federal court, and district of Massachusetts, by an alien, against a citizen of the United States, then out of the United States, but late of the city of Boston, by color of the

State law and a process called the trustee process, or foreign attachment, and returned by the marshal that he had attached the real estate of the defendant in the district of Massachusetts, summoned the supposed trustees and agent of the defendant, Swan, but that "the said Swan has not been an inhabitant or resident of this district (Massachusetts) for three years last past." Such a suit, Judge Story decided, could not be so commenced in the federal court contrary to the federal law, although allowed by the law of the State of Massachusetts.

In Penn *v.* Lord Baltimore, in the High Court of Chancery of England, respecting the title to land in Maryland, Lord Hardwick decided that it was no objection to the decree for settling the right between the parties, that the land was in Maryland, and not itself to be reached by the process of that court. Penn *v.* Lord Baltimore, 1 Ves. sen. 454, 455.

By the 6th section of the act of 3d March, 1797, (1 Statutes at Large, by L. & B., p. 515, chap. 20,) writs of execution, upon any judgment obtained for the use of the United States in one State, may run and be executed in any other State, or in any of the territories of the United States. Subpœnas for witnesses may run from one district to any other, by act of March 2, 1793, (1 Statutes at Large, by L. & B., p. 335, chap. 22, sec. 6.) And executions "upon judgments or decrees obtained in any of the district or circuit courts of the United States, in any one State, which shall have been, or may hereafter be, divided into two judicial districts, may run and be executed in any part of such State;" act of 20th May, 1826, (4 Statutes at Large, by L. & B., p. 184, chap. 123.) So that the question of jurisdiction was not involved in the case of Picquet *v.* Swan; but only the sufficiency of the process by foreign attachment against the absentee, not served personally with the process, to entitle the plaintiff to judgment by default.

The case of Toland *v.* Sprague, 12 Peters, 300, cited by the counsel of the accused, was not a case of jurisdiction once rightfully vested and sought to be divested by matter subsequent; but a question whether, according to the acts of Congress, a citizen of Pennsylvania could commence a suit in the Circuit Court of the United States for the Eastern District of Pennsylvania, by process of attachment of property within the State, (as authorized by a law of the State,) belonging to the absentee, who was a citizen of the State of Massachusetts. The defendant appeared and pleaded to issue, having moved to quash the process. The court below rendered judgment in chief for the plaintiff for his demand. This court decided that the process of attachment had issued improperly; but as the defendant had appeared and pleaded to issue, this court said:

"Now if the case were one of a want of jurisdiction in the court, it would not, according to the well-established principles, be competent for the parties by any act of theirs to give it. But that is not the case. The court had jurisdiction over the parties, and the matter in dispute; the objection was, that the party defendant not being an inhabitant of Pennsylvania, nor found therein, personal process could reach him; and that the process of attachment could only be issued properly against a party under circumstances which subjected him to process *in personam*. Now this was a personal privilege or exemption which it was competent for the party to waive, . . . and that appearing and pleading will produce that waiver." 12 Peters, 330, 331. And thereupon the judgment was affirmed.

These cases do not shake the opinion in the case of Rhodes *v.* Selin, 4 Wash. C. C. Rep. 725. The principle on which it stands, that a jurisdiction once rightfully vested, is not divested by after circumstances, but only by express transfer to some other tribunal, or by express repeal, is sustained by the case of Morgan's heirs *v.* Morgan, 2 Wheat. 297; Tyrell *v.* Roundtee, 7 Peters, 467, 468.

The conclusion in the case of Rhodes *v.* Selin, and which is here maintained, is not a novelty or anomaly, as seems to be assumed in behalf of the defendant; it is but a single instance of a general doctrine of statute construction, which is this:

If part of a defined territory, having functions or duties political, judicial, municipal, or other, be separated from it, either by annexion to another, or by being converted into a new political, judicial, municipal, or other entity, then the remaining part of the territory, or the former public body, retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some express provisions to the contrary be made by the act authorizing the separation.

The counsel for the accused relies upon the Constitution of the United States as amended, for an argument against the jurisdiction of the Circuit Court of Arkansas.

The Constitution, in art. 3, sec. 2, provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State, where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

This provision authorized the act of Congress, which prescribed that the trial of the crime charged in the indictment as committed in the Indian country, out of the limits of any State, should be had in the Circuit Court of Arkansas.

The 6th article of the amendments to the Constitution, that

"the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," does not conflict with the law for defining the place and district for the trial of Dawson. He committed the crime in no State. He was indicted within a district defined and ascertained by law before the crime itself was committed; therefore within the letter and within the spirit and meaning of the Constitution, howsoever the words — "which district shall have been previously ascertained by law" — may be construed to mean before the crime was committed, or before the trial. The Constitution does not intend that crimes committed by citizens of the United States on board of our vessels on the high seas, or out of any State, or in the Indian nations and tribes within the United States, should go unpunished.

This amendment of the Constitution applies only where the offence has been committed in a State. Then the trial must be in that State, and the district "previously ascertained by law" must be within that State. But where the crime is not committed in any State of this Union, the trial may be wherever within the jurisdiction of the United States the Congress shall by law direct.

Finally, it is insisted for the United States that the jurisdiction vested rightfully in the Circuit Court of Arkansas, by the indictment therein found; and as that court is in being, unrepealed, and continuing in full power and activity as a Circuit Court of the United States, that jurisdiction and cognizance to try the crime charged in the indictment continues; that it is neither abrogated nor transferred to any other tribunal by the said subsequent act of 1851. If the legislature had intended to transfer the cognizance of pending cases, civil or criminal, they would have used the express words and enactments to that end, which they had employed in so many previous like cases.

Mr. Justice NELSON delivered the opinion of the court.

The defendant was indicted, in the Circuit Court of the United States for the District of Arkansas, for the alleged murder of one Seaborn Hill, in the Indian country west of the State of Arkansas.

The defendant is a white man, and so was Hill, the deceased.

At a Circuit Court held at the city of Little Rock, on the 28th of April, 1853, the indictment came on for trial before the judges of that court; whereupon a motion was made, on behalf of the defendant, to quash the indictment, for want of jurisdiction of the court to try the same.

And, upon the argument, the judges being divided in opinion,

the following question was certified to this court for its decision.

1. Did the act of Congress entitled "An act to divide the District of Arkansas into two judicial districts," approved the 3d of March, 1851, by which the Western District of Arkansas was created, take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending against the prisoner, James L. Dawson, a white man, found in the Circuit Court of the United States for the District of Arkansas, by a grand jury impanelled on the 16th April, 1845, for feloniously killing Seaborn Hill, a white man, on the 8th of July, 1844, in the country belonging to the Creek nation of Indians west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of Arkansas, by the act of Congress approved on the 17th of June, 1844, "An act supplementary to the act entitled 'An act to regulate trade and intercourse with Indian tribes, and to preserve peace on the frontiers,'" passed 30th of June, 1834.

To state the question presented for our decision in a more simple form, it is this: At the time the State of Arkansas composed but one judicial district, in which the federal courts were held, the Indian country lying west of the State was annexed to it for the trial of crimes committed therein by persons other than Indians. In this condition of the jurisdiction of these courts, the crime in question was committed in the Indian country, and the indictment found in the Circuit Court, at the April term, 1845, while sitting at the city of Little Rock, the place of holding the court.

Subsequent to this, the State was divided into two judicial districts, the one called the Eastern, the other the Western District of Arkansas. The Indian country was attached to and has since belonged to the western district. The question presented for our decision is, whether or not the Circuit Court for the Eastern District is competent to try this indictment, since change in the arrangements of the districts.

By the 24th section of act of Congress, June 30th, 1834, (4 Stat. at Large, 733,) it was provided, that all that part of the Indian country west of the Mississippi river, bounded north by the northern boundary of lands assigned to the Osage tribe of Indians, west by the Mexican possessions, south by Red river, and east by the west line of the Territory of Arkansas, and State of Missouri, should be annexed to the territorial government of Arkansas, for the sole purpose of carrying the several provisions of the act into effect. And the 25th section enacted, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within

the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

The act of Congress, June 7th, 1844, (5 Stat. at Large, 680,) which was enacted after the Territory of Arkansas became a State, provided, that the courts of the United States for the District of the State of Arkansas, should be vested with the same power and jurisdiction to punish crimes committed within the Indian country designated in the 24th section of the act of 1834, and therein annexed to the Territory of Arkansas, as were vested in the courts of the United States for said territory before the same became a State; and that, for the sole purpose of carrying the act into effect, all that Indian country theretofore annexed by said 24th section to the said territory, should be annexed to the State of Arkansas.

As we have already stated, the crime in question was committed in this Indian country after it was annexed, for the purposes stated, to the State of Arkansas; and the indictment was found in the Circuit Court of the United States for the District of Arkansas, which, we have seen, was coextensive with the State. And, if no change had taken place in the arrangement of the district, before the trial, there could, of course, have been no question as to the jurisdiction of the court.

But by the act of Congress, 3d March, 1851, it was provided, that the counties of Benton and eight others enumerated, and all that part of the Indian country annexed to the State of Arkansas for the purposes stated, should constitute a new judicial district, to be styled "The Western District of Arkansas," and the residue of said State should be and remain a judicial district, to be styled "The Eastern District of Arkansas."

The 2d section provides, that the judge of the District Court should hold two terms of his court in this western district in each year at Van Buren, the county seat in Crawford county. And the third confers upon him, in addition to the ordinary powers of a district court, jurisdiction within the district, of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a circuit court of the United States. The fourth provides for the appointment of a district-attorney and marshal for the district, and also for a clerk of the court.

It will be seen, on a careful perusal of this act, that it simply erects a new judicial district out of nine of the western counties in the State, together with the Indian country, and confers on the district judge, besides the jurisdiction already possessed, circuit court powers within the district, subject to the limitation as to appeals and writs of error; leaving the powers and juris-

diction of the circuit and district courts as they existed in the remaining portion of the State, untouched. These remain and continue within the district after the change, the same as before; the only effect being to restrict the territory over which the jurisdiction extends. Hence no provision is made as to the time or place of holding the circuit or district courts in the district, or in respect to the officers of the courts, such as district-attorney, marshal, or clerk, or for organizing the courts for the despatch of their business. These are all provided for under the old organization. 5 Stat. at Large, 50, 51, 176, 177, 178.

We do not, therefore, perceive any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to affect it in respect to such cases, nor has it, in our judgment, necessarily operated to deprive them of it.

It has been supposed that a provision in the sixth amendment of the Constitution of the United States has a bearing upon this question, which provides, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The argument is, that, since the erection of the new district out of the nine western counties in the State, together with the Indian country, it is not competent for the Circuit Court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires the district within which the offence is committed, and the trial is to be had, must be ascertained and fixed previous to the commission of the offence.

But it will be seen from the words of this amendment, that it applies only to the case of offences committed within the limits of a State; and, whatever might be our conclusion if this offence had been committed within the State of Arkansas, it is sufficient here to say, so far as it respects the objection, that the offence was committed out of its limit, and within the Indian country.

The language of the amendment is too particular and specific to leave any doubt about it: "The accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall be committed, which district shall have been previously ascertained by law."

The only regulation in the Constitution, as it respects crimes committed out of the limits of a State, is to be found in the 3d art., sec. 2, of the Constitution, as follows: "The trial of crimes, except in cases of impeachment, shall be by jury, and such trial

shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may, by law, have directed."

Accordingly, in the first crimes act, passed April 30, 1790, § 8, (1 Statutes at Large, p. 114,) it was provided, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought."

A crime, therefore, committed against the laws of the United States, out of the limits of a State, is not local, but may be tried at such place as Congress shall designate by law.

This furnishes an answer to the argument against the jurisdiction of the court, as it respects venue, trial in the county, and jury from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offence.

These considerations have no application or bearing upon the question.

In this case, by the annexation of the Indian country to the State of Arkansas, in pursuance of the act of 1844, for the punishment of crimes committed in that country, the place of indictment and trial was in the Circuit Court of the United States for that State, in which the indictment has been *found*, and was pending in 1851, when the Western District was set off; and as that change did not affect the jurisdiction of the court, as it respected pending cases, but remained the same after the alteration of the district as before, it follows that the trial of the indictment in this court will be at the place and in the court as prescribed by law, which is all that is required in the case of an offence committed out of the limits of a State.

We shall direct, therefore, an answer in the negative, to be certified to the court below, to the first question sent up for our decision, as we are of opinion the court possesses jurisdiction to hear and give judgment on the indictment.

The second question sent up in the division of opinion is as follows:

Can the District Court of the United States, for the Western District of Arkansas, take jurisdiction of the case aforesaid, upon the indictment aforesaid, so found, in the year 1845, in said Circuit Court, for the District of Arkansas?

As our conclusion upon the first question supersedes the necessity of passing upon the second, it will be unnecessary to examine it, and shall, therefore, confine our answer and certificate to the court below to the first.

Mr. Justice McLEAN dissented.

Mr. Justice McLEAN,

The facts and law of this case, as I understand them, have led me to a different conclusion from that of a majority of the court. The twenty-fourth section of the act of the 30th June, 1834, after making various provisions, defining the limits of the Indian country, and imposing penalties for several offences by white persons, provides, "that for the sole purpose of carrying this act into effect, the Indian country, bounded east by Arkansas and Missouri, west by Mexico, north by the Osage country, and south by Red River, shall be, and hereby is, annexed to the Territory of Arkansas."

On the 8th of July, 1844, a murder was committed at the Creek agency, in the Creek country, west of Arkansas, for which the grand jury found a bill of indictment in the Circuit Court of Arkansas, at April term, 1845.

By an act of March 3, 1851, it is provided, "that from and after the passage of this act, the counties of Benton, Washington, Crawford, Scott, Polk, Franklin, Johnson, Madison, and Carroll, and all that part of the Indian country lying within the present judicial district of Arkansas, shall constitute a new judicial district, to be styled, the Western District of Arkansas; and the residue of said State shall be and remain a judicial district, to be styled, the Eastern District of Arkansas."

After the division of the district, Dawson, the defendant, was arrested for the alleged murder; and the question, whether the Circuit Court of the United States, sitting within the Eastern District, has jurisdiction to try the case, has been referred to this court.

When the offence was committed, and the indictment was found, the District of Arkansas included the State and the Indian country described; but when the defendant was arrested, and the case was called for trial, the district had been divided; and the question is raised in the Eastern District, the murder having been committed in the Western.

In the act dividing the district, Congress had power to provide that all offences, committed in the district before the division, should be tried in the Eastern District. But no such provision being made, the question is, whether the jurisdiction may be exercised in that district without it.

Since the division of the district, capital punishments have been inflicted in the Western District for offences committed before the division. This deprived the accused of no rights which they could claim under the Constitution of the United States, or the laws of the Union. The sixth article of the

amendment to the Constitution declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

As the State and district are connected by the copulative conjunction, in this provision, the case before us is not technically within it. The crime is alleged to have been committed within the Indian country, which the district includes, but it is not within the State. But the case appears to me to be within the policy of the provision. Nine counties of the State of Arkansas are within the district, and from which the jury to try the defendant might be summoned. This brings the case substantially within the above provision. Had the place of the murder been within one of the above counties, the constitutional provisions must have governed the case. All the rights guaranteed by the Constitution would have been secured to the criminal by a trial in the Western District; but those rights are not realized by him on a trial in the Eastern District. And that is made the place of trial because the alleged murder was not committed within the State.

In the 2d section of the 3d article of the Constitution, it is declared that "the trials of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but, when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The latter clause of this provision covers the case now before us. The crime charged was not committed within any State; but it was committed within a district, within which such offences are to be tried, as "directed by Congress." And there seems to me to be no authority to try such an offender in any other district, or at any other place. The act of 1834 provides that an offender, under the act, when arrested, should be sent for trial to the district where jurisdiction may be exercised.

The punishments inflicted in the Western District of Arkansas, for crimes committed before the division of the district, were in accordance with the above provision of the Constitution and the principles of the common law, both of which are opposed to a trial of the same offences in the Eastern District. The tribunal is the same in both districts, except the circuit judge may not be bound to attend the Western District; but the Western District includes the place of the crime, which, by the laws of England and of this country, is the criterion of jurisdiction in criminal cases. This is never departed from, where the limits of the jurisdiction are prescribed.

On what ground can jurisdiction be exercised in the Eastern District? Not, I presume, on the ground that the crime was committed before the district was divided. If this be assumed and sustained, the capital punishments which have been inflicted in the Western District, for similar offences, have been without authority. The offenders have been tried, and they have had, substantially, the benefits secured by the Constitution. They have had a jury from the district, and as near the vicinage as practicable. These privileges they would not have realized had they been tried in the Eastern District. If tried in the Eastern District, the jury must have been summoned from that district, and not from the district in which the offence was committed. The considerations in favor of the Western District, as the legal place of trial, greatly outweigh, it seems to me, any that can arise in favor of the Eastern District.

There is, however, a fact which may be supposed of great weight in deciding the question; and that is, the indictment was found before the division of the district. I will examine this. It is admitted the jurisdiction was in the Circuit Court for the entire district, when the indictment was found. This gave jurisdiction; but every step taken in the cause, subsequent to the finding of the bill, is as much the exercise of jurisdiction as the finding of the bill.

The establishment of the Western District, in effect, repealed the jurisdiction of the Eastern District, as to causes of action arising in the Western District, as fully as if the law had declared, "no jurisdiction shall hereafter be taken in any case, civil or criminal, which is of a local character, and arises in the Western District. Offences committed in that district are made local by the acts of Congress. This is not a case where, if jurisdiction once attaches, the court may finally determine the matter. There seems to me to be no reason for such a rule in a criminal case, especially when it is opposed to the policy of the Constitution and to the principles of common law.

A case lately decided in this court may have some bearing on this question. Under the fugitive slave law of 1793, certain penalties were inflicted for aiding a fugitive from labor to escape. A number of actions were brought in several of the States — in Ohio, Indiana, and Michigan — for the recovery of this penalty; but it was set up in defence, that this penalty was repealed by repugnant provisions in the law of 1850, on the same subject, and this court so held. The actions which had been pending for years were stricken from the docket. But it may be said the repeal, in the case stated, operated on the right of action. This is admitted. And so, it may be said, the Western District was repugnant to the Eastern, so far as causes of

local actions arise in the Western District; and is not this repugnancy as fatal to the trial, as the repeal of the penalty in the act of 1793?

All this difficulty arises from an omission of Congress to make, in the law dividing the district, the necessary provision; and it appears to me that we have no power, by construction or otherwise, to supply the omission. This could not be done in an action of ejectment. A writ of possession, in such a case, could not be issued to the Western District on a judgment entered in the Eastern. And if such a jurisdiction could not be sustained in a civil action, much less could it be sustained in a criminal case.

If a person guilty of a crime in the Indian country, before the division, could not be indicted and tried in the Eastern District, it follows, that the fact of the crime having been committed in the Indian country, can afford no ground of jurisdiction in the present case. It must rest alone, then, it would seem, for jurisdiction, on the ground that, the indictment having been found in the Eastern District, the same jurisdiction may try the defendants, and, if found guilty, sentence them to be executed. This view must overcome the locality of the crime, and the right which the defendants may claim, to have a jury as near the vicinage as practicable, at least a jury from the district where the crime was committed. These appear to me to be objections entitled to great consideration. A jurisdiction in so important a case should not be maintained under reasonable doubts of its legality.

The cases referred to in the argument to retain the jurisdiction, do not, as it appears to me, overcome the objections. Numerous instances are cited where the territory of a judicial district has been changed, provision being made in the act, that the jurisdiction should be continued where suits had been commenced. This shows the necessity of such a provision, and is an argument against the exercise of the jurisdiction, where no provision has been made. And in those cases, like the present, where a district has been changed, without any provision, as to jurisdiction, there is no exercise of it shown, in a criminal case, especially where the punishment is death.

Where jurisdiction attaches from the citizenship of the parties, a change of residence does not affect the jurisdiction. The case of Tyrell v. Roundtree, 7 Peters, 464, seems to have no bearing upon this question. That action was commenced by an attachment, which was laid upon the land before the division of the county; and this court said, the land remained in the custody of the officer subject to the judgment of the court. An interest was vested in him for the purposes of that judgment.

The judgment was not a general lien on it, but was a specific appropriation of the property itself. And they say the division of the county could not divest this vested interest, or deprive the officer of the power to finish a process, which was rightly begun.

There may be cases where counties have been divided after jurisdiction was taken in a local action, and the suit has been carried into judgment, but such cases afford no authority in the present case.

The case relied upon as in point in 4 Washington C. C. Rep. 725, the court said, "at the first or second session of this court, which succeeded the passage of the act of 1824, which added this and other counties to the western judicial district, we were called upon to decide, whether the present action, together with some others, then on our docket for trial, together with the papers belonging to them, should be sent to the Western District or retained here. After hearing counsel on the question, the opinion of the court was, that those cases were not embraced either by the word or by the obvious intention and policy of the act."

This does not appear to be a well-considered case. The counties were annexed to another jurisdiction, and yet the court speak of "the obvious intention and policy of the act," and on that ground entertain jurisdiction over cases pending in the former district. This was right in regard to transitory actions, but not where the actions were of a local character.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Eastern District of Arkansas, and on the points or questions, on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress, in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the act of Congress entitled "An act to divide the District of Arkansas into two judicial districts," approved the third day of March, in the year of our Lord one thousand eight hundred and fifty-one, whereby the Western District of Arkansas was created and defined, did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District of Arkansas, so that it can proceed to hear, try, and determine a prosecution for murder, pending against the prisoner, James L. Dawson, a white man and not an Indian, upon an indictment, found, presented, and re-

turned into the Circuit Court of the United States, for the district of Arkansas, by the grand jury impanelled for that district, upon the 16th day of April, in the year of our Lord one thousand eight hundred and forty-five, against said James L. Dawson, a white man, for the felonious killing of Seaborn Hill, another white man and not an Indian, on the eighth day of July, A. D. 1844, in that county, belonging to the Creek nation of Indians, west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of Arkansas by the act of Congress, approved the seventeenth day of June, A. D. 1844, entitled "An act supplementary to the act entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, passed thirtieth June, one thousand eight hundred and thirty-four,'" in which cause, so pending, no trial has yet been had. And that this answer to the first question supersedes the necessity of any answer to the second question.

Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

Thomas Kearney, Thomas Jordan, and Catherine his wife, Anastasia K. Thomas, Anne E. K. Cheeseborough, and Horatio N. Kearney, Appellants, v. John I. Taylor and others.

Where land was sold in New Jersey by order of the Orphans Court of one of the counties, the conveyance was made not to the actual bidders, but to a person whom they appointed to represent them.

Afterwards, the Supreme Court of the State having decided that such a practice was irregular, the legislature passed a law enacting that, upon proof of the absence of fraud, such deeds might be given in evidence. This cured the defect in the title.

The purchasers were a company organized for the purpose of improving the land, and in their purchase there was neither actual or constructive fraud.

The law examined with respect to the bidding of associations at sales by public auction.

In this instance the price obtained was greater than any previous estimate of the value of the property.

There was no constructive fraud because, according to the evidence, the guardian of the minor children and the commissioners who decided that the property ought to be sold, did not become interested in the company until some time after the sale.

The circumstance that these persons became interested in the company before the first half of the purchase-money was due, is not a sufficient reason for setting aside the sale.

According to the preponderance of the evidence, the grave charge that the auctioneer who made the sale was one of the company, is not sustained.

This was an appeal from the Circuit Court of the United

States for the District of New Jersey, sitting as a court of equity.

The bill was filed by by Thomas and Horatio Kearney, and their sisters, Catherine, Anastasia, and Anne, who were the children of Edmund Kearney, deceased. The complainants were citizens of several States, viz.: Thomas and Catherine of Mississippi, Anne of Connecticut, Anastasia of Michigan, and Horatio of Ohio. The defendants were all citizens of New Jersey, and were as follows, viz.: John I. Taylor, Edward Taylor, Isaac K. Lippincott, Ezra Osborne, John Hopping, Daniel Holmes, and also the heirs of the following persons, viz.: of Leonard Walling, of John W. Holmes, of James Hopping, and of Joseph Taylor.

The bill was dismissed by the Circuit Court, and the complainants appealed.

The case was this:

On the 30th of December, 1822, Edward Kearney, then of the county of Monmouth, in the State of New Jersey, died intestate, seised in fee of a tract of land situated in that county, called Key Grove, containing 781 acres. The land bordered upon Rariton Bay, at the foot of Staten Island, for a mile or more, with water of sufficient depth for the near approach of vessels.

At the time of his death Kearney left the following children: James Kearney, born in December, 1801; Horatio N. Kearney, born in October, 1803; John Kearney, born in November, 1805; Mary Kearney, born in November, 1808; Thomas Kearney, born in September, 1810; Anastatia Kearney, born in October, 1813; Catherine Kearney, born in June, 1816; Anne E. Kearney, born in June, 1818.

In May, 1828, James Kearney sold all his interest in the land to Daniel Holmes and John W. Holmes.

A law of New Jersey, passed in 1820, (Revised Statutes of New Jersey of 1821, page 776 *et seq.*) directs that upon application made by the heirs of a person dying seised of lands, or by any person duly authorized in their behalf, or claiming under them, a division may be ordered; and the 19th section authorizes a sale when the land is so circumstanced that, in the opinion of the commissioners, partition cannot be made without great prejudice to the owners, and upon satisfactory proof of that fact being made to the court.

On the 15th day of April, 1829, Daniel Holmes, on behalf of himself and John W. Holmes, filed a petition for partition in the Orphans Court for the county of Monmouth, at the April term, 1829, against the heirs of Edmund Kearney, setting forth their purchase of the undivided one seventh part of the estate from James P. Kearney; that by reason of the minority of some of

the tenants in common, no division could take place by agreement, and praying the court to order a division.

At the time of these proceedings, Joseph Taylor was the administrator upon the estate of Edmund Kearney and the guardian of all his infant children who resided in the State of New Jersey.

The court granted the petition, and appointed James Hopping, Edward Taylor, and Leonard Walling, commissioners.

The commissioners took the necessary oath to perform their duty faithfully, on the 2d of June, 1829.

On the 10th of July, 1829, the commissioners reported to the court that they had caused a survey and map of the premises to be made, and that in their judgment the said premises were so circumstanced that a division thereof could not be made without great prejudice to the interest of the owners.

At July term, 1829, the court passed an order that the commissioners should make the sale, at public auction, to the highest bidder, giving at least sixty days' notice of the time and place of such sale, by advertisements put up in five of the most public places in the county, and also in one public newspaper circulating in the same county.

In January, 1830, the commissioners reported that they had sold the land, as follows:

Lot No. one, containing $224\frac{82}{100}$ acres, to Isaac K. Lippincott, at $30 per acre . . .	$6,744.60
Lot No. two, containing $56\frac{42}{100}$ acres, to Thomas Carhart, for $28.25 per acre . . .	1,593.86½
Lot No. three, containing $32\frac{85}{100}$ acres, to Amos Walling, for $26.75 per acre	878.73¾
Lot No. four, containing $18\frac{43}{100}$ acres, to Jonathan Tilton, at $38.50 per acre . . .	709.55½
Lot No. five, containing $59\frac{52}{100}$ acres, to Ezra Osborn, Esq., for $22.50 per acre	1,339.20
Lot No. six, containing $56\frac{84}{100}$ acres, to Ezra Osborn, Esq., for $13.25 per acre	753.13
Lot No. seven, containing $48\frac{46}{100}$ acres, to Isaac K. Lippincott, for $25.25 per acre . . .	1,223.61½
Lot No. eight, containing $24\frac{11}{100}$ acres, to Richard S. Burrowes, for $43 per acre . . .	1,036.73
Lot No. nine, containing $7\frac{34}{100}$ acres, to Isaac K. Lippincott, for $18.50 per acre . . .	135.79
Lot No. ten, containing $16\frac{57}{100}$ acres, to Ezra Osborn, Esq., for $11.75 per acre	194.69¾
Lot No. eleven, containing $59\frac{13}{100}$ acres, to James Sproul, at $33.50 per acre . . .	1,980.85½

Lot No. twelve, containing $26\frac{02}{100}$ acres, to Thomas J. Walling, for $33 per acre . . .	858.56
Lot No. thirteen, containing $49\frac{42}{100}$ acres, to Amos Walling, for $29.50 per acre . . .	1,457.89
Lot No. fourteen, containing $40\frac{35}{100}$ acres, to Joseph Carhart, for $7 per acre	282.45
Lot No. fifteen, containing $61\frac{34}{100}$ acres, to Horatio Kearney, for $12.25 per acre . . .	751.41
	$19,941.19

Amounting, in all, to the sum of nineteen thousand nine hundred and forty-one dollars and nineteen cents, the one half of which, by the conditions of sale, was made payable on the first day of April next, when deeds were to be made, and possession given to the purchasers; the other half was made payable in one year from the first of April next, without interest, by the purchasers giving approved security for the payment thereof.

In witness whereof we have hereunto set our hands and seals, this twentieth day of January, in the year of our Lord one thousand eight hundred and thirty.

JAMES HOPPING, [L. S.]
EDWARD TAYLOR, [L. S.]
LEONARD WALLING. [L. S.]

The court ratified the sale, and ordered the commissioners to execute deeds to the purchasers accordingly.

The lots numbered 5, 6, 7, 8, 9, and 10, were the subjects of the present suit.

On the 1st of April, 1830, the commissioners executed a deed for the above lots to John I. Taylor, reciting that they did so at the request of Osborn, Lippincott, and Burrowes.

About the time of the sale, in the preceding November, a company was organized, under circumstances which will presently be explained, for the purpose of purchasing the above lots and laying out a town upon them. The company consisted of the following persons, viz. Joseph Taylor, administrator and guardian; John I. Taylor, his son; Leonard Walling, commissioner; David S. Bray; Ezra Osborn, son-in-law of Joseph Taylor; James Hopping, commissioner; John Hopping, his brother; Primrose Hopping, another brother and auctioneer; Isaac R. Lippincott.

The time, manner, and object of the formation of the company are thus stated, in the answers of some of the defendants:

And the said John I. Taylor, for himself, further saith, that some time after the said sale, and before the deed to him from

said commissioners was executed, but the precise time when, this defendant cannot now remember, he bought of Ezra Osborn the share of Richard C. Burrowes, by verbal agreement, the said Osborn having, as this defendant understood, bought out the said Burrowes, and he, the said J. I. Taylor, paid said Burrowes $40 for it, as an advance thereon. And the said John I. Taylor further says, that he has no recollection of any thing else relating to the purchase of said Key Grove property, until, as he thinks, the meeting of the surveyors to lay out roads, in February, 1830, when it was proposed, by some one interested, that the deed for lots 5, 6, 7, 8, 9, and 10, should be made to the said J. I. Taylor, as he was then young and unmarried, for the convenience of transfers and to save expense. And this defendant, in further answering, says, that he does not know, of his own knowledge, how the said Ezra Osborn, David S. Bray, John Primrose, and James Hopping, Isaac K. Lippincott, Leonard Walling, came to [be] interested in the property, but believes, and has always so heard and been informed, that on the second day of the sale, viz. the fourth November, 1829, Daniel Holmes, who was anxious, and whose interest it was to make the property bring as much as possible, prevailed upon several gentlemen to join for the purpose of bidding for lot No. 8, aforesaid, and that John Hopping, Ezra Osborn, Richard C. Burrowes, Isaac K. Lippincott, Horatio N. Kearney, Septimus Stephens, and Primrose Hopping, joined for that purpose; and this defendant believes, and so charges the truth to be, that the only object of said Holmes in getting up said company was to increase the price of the property by creating competition; and that, but for the said company, the lot No. 8 would have been struck off to persons interested against improvement in that neighborhood, for about twenty-nine dollars per acre. And this defendant, the said John I. Taylor, in further answering, says, that said lot number 8 was a poor, barren, sandy soil, with wood of but very little value upon it, scarcely of value enough to pay for its own cutting, and worth but little for agricultural purposes; and that, in the opinion of this defendant, no other plan could have been hit upon which would have made the said lots 5, 6, 7, 8, 9, and 10, bring as much as they did bring. And the said John Hopping, in further answering for himself, says, that so far as he is himself concerned, he did not combine with any person whatever to bring about a sale of the Key Grove property, nor does he know or believe that anybody else did; that this defendant did not attend the said sale on either day of the sale, and previous to the said sale he did not know and had not heard that any company had been or would be formed for the purchase or sale of said Key Grove property; nor had he any idea or be-

lief that the said Key Grove property could be converted into a seaport town. And the said John Hopping further says, that in the evening of the first day's sale, after the adjournment, or the morning of the next day, and before the sale commenced, in a conversation between this defendant and his brother, James Hopping, the said James Hopping told him that Daniel Holmes and Septimus Stevens talked of making up a company to buy the fishing point lot, viz. No. 8. This defendant then asked said James Hopping if he was going to take a share, to which the said James replied that he could not, as he was a commissioner; said James then said he expected that this defendant could have a share if he wished. This defendant then told him to tell Daniel Holmes that he would take a share; and this defendant, the said John Hopping, expects that his brother did so report him. And the said John Hopping, for himself, says, that the said James Hopping had no interest in said purchase of lots No. 5, 6, 7, 8, 9, and 10, at the time of said sale, nor until about three months after, when he consented to come in and advance a part of the purchase-money, at the instance and request of this defendant ana his brother Primrose. And this defendant, in further answering for himself, says, that neither the said commissioners, nor the said guardian, nor any or either of them, to the best knowledge or belief of this defendant, were interested, directly or indirectly, in said purchase at the time thereof, nor had he ever heard, until after the reading of the bill in this cause, that there had been any combination, unlawful or otherwise, to bring about a sale of said Key Port property. And these defendants, in further answering, say, that the said sale was in every respect fair, as far as these defendants know, and as they verily believe, and that they never heard of any allegation to the contrary, until about the time of the commencement of the suits in ejectment referred to in the bill of complaint; and this defendant, the said Ezra Osborn, answering for himself, absolutely denies that previous to said sale he combined with any person whatever to procure a sale of said property, nor did he ever know, hear, or believe, that such combination had been entered into by any person or persons whatever, nor did he know or believe at the time of said sale, nor does he now know or believe, that the said commissioners and guardian, or either or any of them, were at the time of said sale interested, directly or indirectly, in said purchase. And this defendant, Ezra Osborn, in further answering, says, that his object in attending said sale was to bid for lot No. 1, and that he did bid for it until it got up, in the opinion of this defendant, to its full value, when this defendant stopped bidding, and Isaac Lippincott bidding higher, it was struck off to the said Lippincott just before dinner on the

second day of sale. And this defendant, in further answering, says, that according to his best memory and belief, said lot No. 1 was adjourned on the first day of sale at twenty-three dollars per acre on this defendant's bid, and that he became acquainted with said Lippincott for the first time at said sale.

Lippincott, in his answer, thus describes the formation of the company.

And that this defendant, inasmuch as he had then become the purchaser of lot No. 1, and it was evidently his interest that lot No. 8 should not fall into the hands of persons whose interest were adverse to the Key Grove property, consented to be one of several others to join and buy said lot No. 8; that said Daniel Holmes then proceeded to hunt for others to join in the said purchase, and left us for that purpose, as he said; after a short time the said Holmes returned, and reported that he had found several who would join with us in buying said lot No. 8, and mentioned the names of Osborn and Burrowes; and in a consultation between the said Stephens, Holmes, Burrowes, Osborn, and this defendant, it was then agreed that lot No. 8 should be purchased on said joint account, and that said Burrowes should be the bidder.

And this defendant charges the truth to be, that said Holmes did not speak to either of the said commissioners or guardians to join in said purchase, or if he did, that they declined it, and that there was no understanding, directly or indirectly, that said commissioners or guardians should be interested in said purchase; or if there was, or if said Holmes spoke or agreed with either or any of them, this defendant expressly avers that it was without the knowledge and consent of this defendant.

And this defendant further says, that he was induced to join in said purchase by the said representation of said Holmes and Stephens, and that he did not want, and had no intention of bidding for or buying said lot No. 8, nor did he want it on his individual account, and should not have joined in it but for the said solicitation of said Holmes and Stephens.

And this defendant in further answering says, that according to the best of his recollection and belief, that upon said sale being re-opened in the afternoon of said 4th November, 1829, said Burrowes bid for said lot No. 8 in pursuance of said agreement, and that it was struck off and sold by the said commissioners, openly and fairly, to the said Burrowes, for the said sum of $43 per acre, as the highest bidder.

And as this defendant then thought and believes, and as he still thinks and believes, the said Burrowes was the only person then known to the commissioners as the purchaser; and this defendant charges that he was the only person legally re-

sponsible for the purchase-money, and amply able to pay the same.

Holmes, in his answer, thus speaks of it. And this defendant in further answering says, that after he got upon the ground, upon the second day of sale, he went to work, by going first to one person and then another, to get up a company to bid for said lot No. 8, in opposition to the persons who it was understood were bidding from Middletown Point; and finally, after lot No. 1 was struck off to I. K. Lippincott, and with considerable difficulty, the following persons agreed verbally to join with this defendant in purchasing said lot No. 8: Isaac K. Lippincott, Richard C. Burrowes, Horatio N. Kearney, Ezra Osborn, Septimus Stephens, and he thinks Primrose Hopping. And this defendant says that, after the adjournment of the first day of sale he spoke also to James Hopping, one of said commissioners, to be interested, this defendant not then knowing that there was any thing illegal in his becoming so, but the said James Hopping absolutely refused on account of his being a commissioner; this defendant then requested him to speak to his brother John Hopping, when he went home, and see if he would not come in. And this defendant says that some one, either James or Primrose Hopping, reported next day that John Hopping would come in, and he was accordingly considered as one of the company at the sale.

And this defendant in further answering says, that said company was got up by this defendant on the spur of the occasion, and for no other purpose whatever but to create competition and make property bring more, and extended originally only to lot No. 8. And this defendant in further answering says, that neither James Hopping, Leonard Walling, [n] or Joseph Taylor, were [was] at the time of the sale a part of said company, or interested in any way in the purchase of any part of said lots 5, 6, 7, 8, 9, and 10.

The evidence of Primrose Hopping was as follows:

Primrose Hopping being sworn, says: I was the crier of this vendue. I struck off No. 8 to Richard C. Burrowes. He was the highest bidder. William Walling and Richard C. Burrowes were the only two bidders some considerable time before it was struck off; one stood on my right hand and the other on the left. William Walling was on the left hand and Richard C. Burrowes on the right. They were bidding twenty-five or fifty cents per acre. William Walling was last bidder, except Richard C. Burrowes. Burrowes bid openly, and Walling by a wink. I had a timepiece, and gave warning that if I had not another bid I would strike it off to the highest bidder; and after I got a bid from Burrowes, I immediately turned to Wall-

ing to get a bid, and did this repeatedly; and dwelt an unusual time to get a bid, but could get none. I dwelt because he looked at me as if anxious, but never bid; and finally I struck it off to Richard C. Burrowes. I gave fair warning that I was going to strike it off. I think it was put up at the first day, but don't recollect the amount it bid up to. I had no instructions from commissioners to strike it off to Burrowes. I had instructions from Edward Taylor several times not to dwell so long upon the property. The whole farm was struck off to the highest bidder, to my certain knowledge. Neither of commissioners or Joseph Taylor were interested in this property at the time it was sold. I got the highest possible price for each section of the property. It was much better to have the property sold than partitioned. I did not consider myself interested in this property at the time it was struck off. I think Richard C. Burrowes spoke to me about it. I don't recollect what I said. I don't recollect what the precise words were. I don't think I gave him a decided answer.

I think Burrowes spoke to me on the second day of sale. I don't recollect that he told me who were concerned in the company. I can't say if any of the company lots had been sold when Burrowes spoke to me. I am not sure if Burrowes said it to me, or if it was the common talk to try to make a landing there. When Burrowes asked me, I think I did not *tell* Burrowes I would not join. I extended the time several times in the sale of No. 8. I gave further time after Burrowes' last bid, I think Walling was a little farthest off. I did not know Van Pelt as a bidder. Van Pelt claimed the bid. I requested the property to be set up again. That was my custom. It was referred to commissioners, and they decided that it was stricken off fair and should not be set up again. I did have an interest in company property afterwards. I never paid any of the purchase-money. James, and John, and self had two-thirds. They were my two brothers. My share was sold to Capt. Vanderbilt with the rest in 1839. I depended on my brothers. They made payments. Brothers received purchase-money, and accounted to me at our settlement after. There was a balance paid me. We had other dealings. I can't remember when I came in partner with them. I can't say whose share of these lots James and John got. I don't know which of my brothers I got the share of, John or James. I don't know when, or if before deed to John I. Taylor. I have no knowledge when I came in a partner. John I. Taylor gave me some land in exchange for lot No. 17, and some money. He and Joseph Taylor gave me 7½ acres back, next to Vandine's. The trade was made several years ago, before the commencement of suit, &c., &c., &c.

In April, 1830, twenty-four building lots were laid out upon part of lot No. 8, sixteen of which were distributed in severalty amongst the members of the company, and the residue left to be sold by John I. Taylor for their benefit. Other measures of improvement were adopted which it is not necessary to state particularly.

In the case of Doe *v.* Lambert, 1 Green's Law Reports, 182, the Supreme Court of New Jersey decided, that a deed made by the commissioners in partition proceedings to any other person than the one reported as purchaser, was void.

In consequence of this decision, the heirs of Edmund Kearney instituted actions of ejectment in the Circuit Court of the United States for the District of New Jersey, in order to recover the property; whereupon, the company applied to the legislature for relief.

In March, 1841, the legislature passed an act which recited that deeds were sometimes made to other persons than the reported purchasers, and then declared as follows:—

"Sec. 1. Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, that, upon proof being made to the satisfaction of the court or jury before whom any such deed or conveyance may be offered in evidence, that the lands or real estate therein mentioned were sold fairly and without fraud, and that such deed or conveyance was made and executed in good faith, and for a sufficient consideration, and with the consent of the person or persons reported to the court as the purchaser or purchasers, the said deed or conveyance shall have the same force and effect as though the same had been made and executed to the purchaser or purchasers reported to the court."

In October, 1841, the bill in this cause was filed by the heirs of Edmund Kearney, charging a fraudulent combination between Daniel Holmes, Joseph Taylor, Leonard Walling, James Hopping, John I. Taylor, and others named in the bill, for the purpose of bring about a compulsory sale of the Key Grove estate, with a view to establishing a seaport town on a part thereof; that, to that end, Holmes made the purchase of James P. Kearney, instituted the proceedings in partition, and, through the fraudulent coöperation of Joseph Taylor, the guardian, and Leonard Walling and James Hopping, two of the commissioners, and Primrose Hopping, the crier, and others confederating with them, wrongfully and fraudulently brought about, under pretext and color of law, a sale of the entire estate, under the proceedings in partition. The bill makes a case of fraud in fact, as well as of fraud in law, growing out of the fiduciary relations which the guardian and commissioners and auctioneer

respectively sustained to the estate and to the heirs to whom it belongs. The prayer is for an account of the proceeds of all wood and timber cut from the six lots conveyed by the commissioners to John I. Taylor; for an injunction to restrain waste; that the conveyance to John I. Taylor, and the sale of these lots by the commissioners, be declared void; and for other relief.

Extracts from the answers of the principal defendants have already been given.

In April, 1842, the trial at law of the ejectment came on before Judges Baldwin and Dickenson; and the court held that, under the provisions of the act of 1841, the defendant must prove that there was no fraud of any kind in the sale, in order to avail himself of the provisions of the act; but the jury not agreeing, no verdict was rendered in the case.

Whilst the present suit was pending, viz. on the 14th of February, 1844, the legislature passed a private act, entitled "An act to confirm the sales of the real estate whereof Edmund Kearney, deceased, late of the county of Monmouth, died 'seised.'"

This act recited the circumstances of the sale, and that doubts had arisen respecting the title to the lots, and then declared:

"Section 1. Be it enacted by the council and general assembly of this State, and it is hereby enacted by the authority of the same, that the several deeds, so given by the said commissioners for the said several lots, shall be deemed and taken, and the same are hereby declared to be valid and effectual in law, to convey the estate therein and thereby intended to be conveyed; and that the said deeds, or any of them, and all subsequent conveyances of the said estate, or any part thereof, shall not be impeached in any court whatever for any such alleged interest in the said commissioners, or any of them, in the property so sold by them, as aforesaid, or for any alleged defect or informality in the execution of the powers of the said commissioners, or in the proceedings of the said orphans' court; and that the said deeds, or any of them, shall not be invalidated or impeached upon any other ground than that of absolute, direct, and actual fraud on the part of the said commissioners."

The defendants then filed a supplemental answer, averring that there was no fraud, and praying to be allowed the benefit of this act; and also filed a cross bill, the proceedings under which it is not material to notice in this report.

In September, 1851, the Circuit Court decreed that the bill should be dismissed with costs, from which decree the complainants appealed to this court.

It was argued by *Mr. Converse* and *Mr. Ewing*, for the appellants, and by *Mr. Dayton* and *Mr. Johnson*, for the appellees.

The arguments of the counsel on both sides were directed, in a great measure to an examination of the facts in the case, as disclosed in the answers and evidence.

The points of law for the appellants were the following:

I. That the courts of the United States, having full jurisdiction of the case conferred on them by the Constitution, and the case being actually pending in the Circuit Court, the legislature of New Jersey had no power, by private act or special edict, enacted or pronounced while the case was so pending, to interfere with or to control the decision of the United States court therein. That it could not itself directly pronounce or dictate to the court what judgment it should pronounce in the case; nor could it, by changing the principles of law, or the rules of evidence governing it, by such special edict, indirectly make or control the judgment or decree of the court; and that, such being the purport and end of the act of February 14, 1844, the same is void.

II. That there was actual fraud by the commissioners in the execution of their trust, and that, if we admit the special act of February 14, 1844, to be valid, the sale and conveyance, made by the commissioners to themselves and their partners, are void under its provisions.

III. That material recitals, in the preamble to that act, appear to be false; and, it being a private act, and the legislature deceived, and induced by false pretences to pass it, it is void.

I. We contend, then, that the act of February 14, 1844, is void; and,

1st. Because it violates the 22d article of the constitution of New Jersey, which declares that the common law of England shall remain in force in that State, until altered "by a future law of the legislature."

This act is not a law, but a mere legislative edict interposed between two parties litigant, directing what manner of decree shall be made between them — a taking the property from one and giving it to the other. To be a law, it must be general — a rule affecting property, generally, in like circumstances. This act is in violation of the principles of the common law, and, not being itself a law, is therefore void. 1 Black. Com. 44, 138; Taylor *v.* Porter, 4 Hill, N. Y. Rep. 140; Regents of University of Maryland *v.* Williams, 9 Gill & Johns. 412; Ervine's Appeal, 16 Penn. State Rep. 257; McNutt *v.* Bland, 2 How. 16–17; Webster *v.* Cooper, 14 Id. 503; Proprietors of Kennebeck

v. Laboree et al. 2 Greenl. Rep. 288-295; Attorney-General *v.* Stevens, 1 Saxton's N. Jer. R. 369, 380. See further authorities, *post*, p. 23.

2d. It also violates that clause of the same article of the constitution of New Jersey which declares, "that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, for ever." Scudder *v.* Trenton Delaware Falls, 1 Saxton, N. Jer. 696, 726, 727; Arrowsmith *v.* Burlingim, 4 McLean, 489; Embury *v.* Conner, 3 Comstock, 511, 516, 517; Benson *v.* Mayor, &c. 10 Barbour, S. C. 223, 224; People *v.* White, 11 Id. S. C. 26, 30; Parkman *v.* Justices, 9 Georgia, 341, 349, 350, 351; McLeod *v.* Burroughs, 9 Id. 213, 215, 216; Vanzant *v.* Waddle, 2 Yerg. 260, 269, 270, 271; Walley *v.* Kennedy, 2 Id. 554, 555, 556; Jones *v.* Perry, 10 Id. 59, 71, 72; Holden *v.* James, 11 Mass. 396; Hake *v.* Henderson, 4 Dev. N. Car. 15; 2 Kent, 1-13 and note (b) p. 13, and note p. 4.

3d. This act, not being a law, is not to be regarded as a rule of decision in the courts of the United States, under the provisions of the 34th section of the judiciary act, even "in a trial at common law."

4th. It violates the 2d section of the 4th article of the Constitution of the United States, which declares, "that the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States."

This act is a special edict against citizens of States, other than New Jersey, divesting them of their inheritance, or laying down special rules applicable to their estate only, which may have that effect. If the act were general against all parties, citizens of other States, who might hold property so circumstanced, it would be clearly unconstitutional. We think the objection loses none of its force because the act is special, and applied to a single case. It declares that the property of these parties, who are citizens of other States, shall not be entitled to the protection which the laws of the State extend to the property of its own citizens. 4 Johns. Ch. Rep. 430.

5th. It is against the spirit, if not the letter, of the 2d section of the 3d article of the Constitution of the United States, which gives to the courts of the United States jurisdiction in all cases "between citizens of different States."

The national tribunal would be, in effect, ousted of its jurisdiction, and the citizens of other States deprived of its protection, if the State legislature could interpose, pending the case, and, by special edict, pronounce a decree, or lay down new principles of law and new rules of evidence for that case alone, which would dictate to and control the court in the decree it

should pronounce. This would defeat the end and purpose of this provision of the Constitution. For every one is aware that the citizens of other States are much safer from injustice and wrong where their rights are adjudicated by the judiciary, than the legislature of a State. United States v. Peters, 5 Cranch, 15; Ogden v. Blacklege, 2 Cranch, 194; Suydam v. Broadnax, 14 Pet. 67, 74, 75; Rhode Island v. Massachusetts, 12 Id. 751.

6th. The right to pass an act such as this is inconsistent with a republican, constitutional government, or any government with limited powers, for it deprives the citizen of one of his absolute rights — the possession and enjoyment of property. It is admissible only in a purely Asiatic despotism. People v. Supervisors of Westchester, 4 Barb. S. C. Rep. 64; Norman v. Heist, 5 Watts & Serg. 171; Bumberger v. Clippenger, 5 Id. 311; Ervine's Appeal, 16 Penn. State Rep. 257.

II. We contend that there was actual fraud by the commissioners in the execution of their trust; and if we admit the special act of February 14, 1844, to be valid, the sale and conveyance made by the commissioners to themselves and their partners are void.

A trustee who becomes a purchaser of the trust estate is, in the estimation of law, a fraudulent purchaser; and, because of the temptation and opportunity to commit fraud, and the ease with which he can cover it from detection, such purchase is of itself a fraud, and a title procured under it is void, at the option of the *cestui que trust.*

The special act of February 14, 1844, declares that this sale and the deeds made under it, "shall be valid in law," unless "impeached for absolute, direct, and actual fraud." It does not, however, require this court to change the rules of evidence applicable in all like cases, where the question is, whether there was or was not actual fraud on the part of the trustee in dealing with the property and funds of his *cestui que trust.* The special act merely relieves the trustee from the judgment of law consequent upon their purchase. It leaves all incidental questions open, to be dealt with according to general principles.

And the trustees stand in an inauspicious relation to the property; they are vendors of the estate of others, and they are purchasers for themselves; a court of equity will, therefore, examine their acts with jealous caution, and in dubious matters it can allow them the benefit of no favorable presumption. Michaud v. Girod, 4 How. 503.

And if the trustees have resorted to artifice or falsehood to conceal their interest; or if, contrary to their duty, they have retained the trust fund, and used it for their own benefit or that of their friends; or if they combined with others to prevent in-

vestigation, or to postpone accountability, they will be held chargeable with actual fraud.

1st. Two of the commissioners, Leonard Walling and James Hopping, were undoubted partners at the time the sale was reported to the court; if not so, by a secret understanding among themselves on the day of sale. But to cover and conceal their interest and that of the guardian, Joseph Taylor, they reported to the court that Ezra Osborn was the purchaser of lots 5, 6, and 10; Isaac K. Lippincott of lots 7 and 9, and Richard S. Burrowes of lot No. 8; which report was false.

And in the deed which they executed to John I. Taylor, April 1st, 1830, they recite that Osborn, Lippincott, and Burrowes, bid off lots 5, 6, 7, 8, 9, and 10, for John I. Taylor, as his agent, which recital was false, and, together with the conveyance to him, intended to conceal their interest in the purchase.

This falsehood and concealment was for their own advantage. Had they reported the sale and the parties in interest truly to the court, it could not have been confirmed.

2d. They retained the trust fund for a long time in their hands, and used it for the benefit of themselves and their families.

No costs appear to have been taxed in the case; and the amount is left to conjecture. We suppose that $341.19 will be more than sufficient to cover them. This deducted will reduce the net proceeds of sale to $19,600.

(The counsel then went into a long examination of the State of the accounts, which is omitted.)

3d. In order the better to secure to themselves the use of the trust fund, and to enable them to purchase and improve a portion of the estate with its proceeds, the commissioners associated themselves, and combined with Joseph Taylor, the guardian of four of the minor children and heirs, and through his connivance and participation avoided investigation and postponed accountability.

The record shows that, from April 1st, 1830, to April 1st, 1831, there was in the hands of the commissioners and guardian, of the funds of the estate $6,025.29
From April 1st, 1831, to April 1st, 1832 . . . . 10,017.56

There is no evidence in the record that any part of this fund passed out of the hands of the members of the partnership prior to the 7th of April, 1837. The record shows that there did certainly remain in their hands, until the last named date, at least $7,994.59.

The estate was thus made to pay for itself and improve itself; and it is not surprising that one of the partners (Primrose Hopping) testifies that he never paid any thing on his purchase, and that John Hopping does not know when, where, or to whom he paid.

It is not at all probable that either of the commissioners, or their brothers, or the guardian, his son, or son-in-law, ever paid a dollar towards their purchase.

The proceeds of the estate could not have been thus held to pay for the estate without combination between the commissioners and guardian.

4th. We will endeavor to show, that the report of the commissioners that the premises could not be divided without great prejudice to the interest of the owners was untrue, and induced by a purpose to possess themselves of a portion of the property. There were seven shares. The commissioners divided the property into fifteen parts before making their report that it could not be divided.

5th. There was a controversy at the bidding, which was first decided by Primrose Hopping, a secret partner; and afterwards, on appeal, by the commissioners, (two of them, as we think we have shown,) also secret partners. It was decided in their own favor.

III. The recitals of the act of February 14th, 1844, show that the legislature was decided, and passed the act under a mistake as to the facts. McIntire Poor School v. Zanesville Canal and Manuf. Co. 9 Hammond's Ohio Rep. 289-290; 2 Black. Com. 345-6.

1st. The act contemplates that the deed which it confirms had been made to a party to whom the interest in the property had been transferred, for a valuable consideration — not to a person who received the conveyance to conceal the interest of others.

2d. The combination between the commissioners and the guardian to unite in the purchase of the estate — a combination fraudulent in itself — was not made known to the legislature.

3d. The sale and conveyance by the commissioners were not made in good faith. There were *suppressio veri* and *suggestio falsi* in all their several papers relating to both.

4th. The purchase-money was not honestly and fully paid to the persons entitled.

The counsel for the appellees bestowed a great deal of attention upon the act passed by the legislature of 1844. Having given the views of the opposite counsel upon this point, it is proper to state also the views taken by the counsel for the appellees.

The act of March, 1841, required proof, to the satisfaction of the court or jury, that the lands were sold fairly and without fraud — that the deed was executed in good faith, for a sufficient consideration, and with the consent of reported purchasers.

The obvious meaning of this act, as we contended, was actual

fraud, actual good faith. It was so understood by the legislature, and so understood by the remonstrants, who opposed it to the last.

Yet Judge Baldwin ruled, in effect, that our condition was made worse rather than better by this act. He said, first, that the act was a legislative recognition of Doe *v.* Lambert; second, that we must convince both court and jury that there was no fraud; third, that the act did not designate the character of fraud, which was to affect such deeds; that in consequence, all fraud, actual or legal, would vitiate the deed; that if the commissioners were interested in the sale, (before their duties were discharged,) however innocent or ignorant, or however large the price and fair the sale, it was a fraud in law, and vitiated the deed.

This opinion of Judge Baldwin, involved a necessity for further legislation. Notice of application for a private law, was published six weeks in the Monmouth Democrat, (in the county where the lands lie,) under a rule of the house. The bill, after such notice, was introduced and passed into a law, 14th February, 1844.

First. Does that act conflict with the Constitution of New Jersey or the United States?

Second. Was there "absolute, direct, and actual fraud on the part of said commissioners?"

Another point is made by the answer to the cross bill, to wit:

Third. Was the act of 1844 a fraud on the legislature, and can it be avoided for that cause?

1. Does the act of 1844 violate the Constitution of New Jersey?

The act is purely remedial. It relieves against a technical exception, to wit, the making of a deed to a person other than the bidder; and it relieves from a legal or constructive fraud, (if there be any,) though not from actual fraud. It is important to remember that even if the commissioners did become interested (which is expressly denied) the deed was not void, but voidable only by the heirs, and them only. Den *v.* McKnight, 6 Hal. R. 386. And equity even then would put them on terms.

Our constitution, July 2d, 1776, gives plenary powers of legislation. Nothing is reserved from their power except the rights of conscience and trial by jury.

New Jersey had no bill of rights. Her constitution did not even separate the legislative and judicial departments of government. There was no provision against interference with vested rights or against retrospective laws. 1 Kent's Com. 448; 3 Story on Cont. 266; Bennett *v.* Boggs, 1 Bald. C. R. 74; Bonaparte *v.* C. & A. R. R. Co. Id. 220. Under her constitution of 1776 her

courts and jurists have even held her power of legislation absolute, as of British Parliament. So much of the common and statute law of England was adopted as theretofore in use in the province, and until changed. Sec. 22 of constitution of 1776.

The act of 1844 did not violate the common law. Private acts are a common-law assurance or conveyance. So treated in British legislation. 5 Cruise Dig. p. 1 to 15; title "Private Acts." It shows that Parliament legislated by private acts as extensively as we do.

But if the common law were otherwise, the constitution of New Jersey adopted so much thereof only as had been in use in the province. This principle had not been in use.

Where a power to legislate and cure defects has been long exercised, as in the past history of New Jersey, it is the strongest evidence of its existence. Briscoe *v.* Bank of Kentucky, 11 Pet. 257; State *v.* Mayhew, 2 Gill, 487.

Commencing after the surrender by the proprietors of New Jersey of the powers of government in 1702, we have a series of these remedial acts of the most extended character.

The following public acts are still on the statute book.

(Then followed a reference to fifty-nine private acts.)

This long list of private acts shows the constant exercise of legislative power over wills, deeds, partitions, trusts, and other cases. They do not cure the evidence merely, but in many cases make the law to meet the case; affecting legal interests vested in minors, married women, and others, in various forms and without assent. I may add here that all the adjoining States and Congress itself has passed many such remedial acts, confirming land titles, &c. 14 Pet. 353, 382.

3. The restriction in the constitution in behalf of trial by jury is not violated. The object of this act was to cure a mere legal fraud, (if any) not that actual fraud, or fraud in fact, of which the jury is the judge. It determines a principle, not a fact, and it leaves trial by jury as it was.

Further, "trial by jury," spoken of in that constitution, refers only to such trial by jury as had been theretofore practised in the colony. It is evident, from previous as well as subsequent legislation herein before referred to, that trial by jury must have been ever held in this colony, subject to such power of legislation. There are many cases of civil right where trial by jury is directly taken away; as in appraisement of lands taken for public purposes; it was so before the adoption of the constitution of 1776. It was so under the proprietary government. Leam & Spi. 440. Also under the royal government. Allison's Laws of New Jersey, 273, sec. 3. Also since the constitution of 1776. Saxton Ch. R. 694. Scudder *v.* Trenton Delaware Falls Co. and cases cited there.

4. This law does not encroach on the judicial department, (if it shall be thought that by the theory of our government, without constitutional provision, these departments are distinct.) The act does not declare what the law was theretofore, but what it shall be in future, and it applies such law to existing cases, or in other words, affects existing rights. It comes back to the same question, viz. the power of the legislature as respects rights vested in law, though subject to certain equities. It is not a judicial act to rectify a bad sale. Wilkinson *v.* Leland, 2 Peters, 660.

All that class of laws which are held void as encroachments on the judicial departments of government, are aside the question. But aside from this, where there is no constitutional restriction, as in New Jersey, the legislature may, in some qualified degree, exercise judicial power, &c. 2 Root, 350; 3 Dal. 386; 3 Greenl. 334, and the acts hereinbefore cited, shows that New Jersey has always done so. There is nothing in the Constitution of the United States against it. 3 Story on Cont. 266, 267.

5. The next and a principal point is, as to the question whether the act conflicts with the Constitution of the United States. Does it destroy the obligation of a contract?

All else ends in arguments looking to the propriety of such special legislation.

The object of this law is not to disturb or impair contracts, but enforce them. The commissioners who sold, were the agents of the court. They sold and received the purchase-money in full, and made a deed. This law is to enforce that contract. It confirms existing rights only in favor of the purchaser, who paid his money.

The heirs became seised, it is said, by reason of the defective character of the proceedings; but such seisin was subject to an equity, which this act recognizes and enforces. 1 Kent, Com. 455; Goshen *v.* Stonnington, 4 Conn. R. 209; Langdon *v.* Strong, 2 Vermont R. 234; 3 Story on Cont. 267; Underwood *v.* Lilly, 10 Serg. & Rawle, 97; Beade *v.* Walker, 6 Conn. R. 190; Booth *v.* Booth, 7 Ib. 350; 3 McLean, 212; 7 Blackf. 474; 8 Mass. 472-9; Ib. 360; 2 Harr. & Johnson, 230; 6 Gill & Johnson, 461; 3 Scammon, 443.

A court of equity often exercises this power in favor of him who pays the purchase-money. This law does no more. It only says, a deed made by request of the purchasers to John I. Taylor, as their agent, shall be good.

Legislation often does what a court of equity may do; and to control property of infants, and order sale of their estates and deeds therefor, is or was of constant occurrence. See acts hereinbefore cited, and 15 Wend. 436; 20 Wend. 365.

There were many such acts before the adoption of the Constitution of the United States; and that instrument did not mean to destroy remedial State legislation. We must look to the history of the times for its meaning, if doubtful. Rhode Island v. Massachusetts, 12 Peters, 557.

The Supreme Court of the United States has repeatedly held such acts valid, and that too even after judgment. Satterlee v. Matthewson, 2 Peters, 380; Wilkinson v. Leland, 2 Ib. 657, 661; Calder and wife v. Bull and wife, 3 Dallas, 386; Watson et al. v. Mercer, 8 Peters, 98, 108; Charles R. Bridge v. Warren Bridge, 11 Ib. 420; Watkins v. Holman, 16 Ib. 62; 3 Story's Com. on C. 266, collects cases up to 2 Peters; Bennett v. Bogs, Baldwin's R. 74; Fletcher v. Peck, 6 Cranch, 67, 134.

Dicta in this case reviewed in later cases above cited.

Second Point. Was there "absolute, direct, and actual fraud on the part of said commissioners?"

Outside of the pleadings, this had been heretofore scarcely pretended. The evidence is all the other way.

The charges of fraud in the original bill are of the grossest character. The answers, which are directly responsive, are evidence.

Edward Taylor is the only surviving commissioner. He has answered fully, and been likewise sworn as a witness. He denies all fraud on the part of the commissioners, and says the property brought more than it was worth, in his judgment, and more than it would bring in the same condition at that time (April, 1844.)

The company who bought the lots in question, were Daniel Holmes, Ezra Osborn, Isaac K. Lippincott, Richard C. Burrowes, Horatio N. Kearney, Septimus Stephens.

They all answer, expressly denying all fraud, except Stephens, who declined his share, and died before any question. Horatio N. Kearney was the brother and one of the heirs, and has answered, disclaiming any knowledge of fraud at the time.

The answers and evidence show, in brief, this state of facts.

Edward Kearney died in 1822. His whole personal estate was but $1,080.33. His real estate was 781 acres of light sandy land, 431 of which only were cleared — which had been in possession of himself and ancestors for many years.

In 1829, there were living six children, I think, interested in the estate, of whom three or four were minors, and three of these minors were girls, with no means of support.

One of the children had sold his entire share (one seventh) to Daniel Holmes, for $1,600.

The highest price any witness has put on the whole real estate was $15,000. It rented for many years prior to the sale for $260 to $300 only.

Holmes applied for a partition, and commissioners having reported it could not be divided without prejudice, they were ordered to sell.

The laws of New Jersey required only that the commissioners should advertise in one newspaper in the county where the lands lie. They did, in addition, advertise in two newspapers in the City of New York, and had 100 large puffing handbills set up, showing the advantages of the property. There was a large attendance on the sale, and the property brought $19,941.19.

The money was paid, and the heirs have had the benefit of it.

Every witness who had been examined says the sale was fair, and the price much exceeded public expectation, and was more than Horatio Kearney, one of the heirs, said it was worth.

The judgment of the company, who bought lots 5 to 10, inclusive, may be gathered from the disposition they made of their shares at different times afterwards. Holmes, the prime mover, sold his interest to Joseph Taylor for a net profit of $25. Burrowes sold his to Osborn for $40. Horatio Kearney sold his to Bray for $40. Stephens backed out, and Lippincott says the company have saved themselves from actual loss on the purchase only by the earnings of certain vessels they have since run in connection.

Yet after the gross charges of fraud and speculation *in their* bill, made without knowledge, were fully met both by answers and by evidence, these same charges are recklessly repeated, again and again, in the answer to the cross bill, but without the slightest evidence to sustain them.

I cannot, in the mere statement of points, comment on the evidence in detail, but commend this part of the case to the careful examination of the court. It will show clearly there was no actual fraud on the part of the commissioners.

Third Point. Was the act of 1844, a fraud on the legislature?

1. The first answer is, if it were so, the party can't get clear of it in this way. No case can be found, to show by evidence *aliunde* a law void because the legislature did not know what it was about.

2. The legislature understood the whole question. Six weeks' notice of the application was given.

The evidence of Mr. Sullivan shows his remonstrance was read and filed, with all its charges of fraud, before the act in the House of Assembly was referred to the judiciary committee. Yet afterwards the act passed unanimously. And a reference to the legislative journal of council of same year, shows it passed the other branch of the legislature, also upon the ayes and noes, unanimously.

Besides this, Mr. Sullivan immediately filed his petition for repeal, and it was at once referred to the judicary committee. The council journal shows, after full consideration, it was unanimously denied.

No private law has ever passed our legislature after a more full and thorough discussion. The minutes of these bodies are referred to as evidence by Mr. Sullivan, the witness, counsel, and attorney at law, and in fact, on part of the complainants.

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 New Jersey.

The bill was filed in the court below by the heirs of Edmund Kearney, deceased, against the defendants, to set aside a sale of a part of a farm descended to them, situate on Raritan Bay, in New Jersey, under an order of the Orphans' Court in that State, in a case of partition, a sale having been ordered upon the ground that partition could not be made without prejudice to the interest of the heirs. The farm, consisting of some seven hundred and eighty-one acres, was divided by the commissioners into fifteen allotments, preparatory to the sale, and which sold for the aggregate price of $19,941.19. The bill seeks to set aside six of these allotments, Nos. 5, 6, 7, 8, 9, and 10, embracing about two hundred and eleven acres, and which sold for the aggregate sum of $4,683.15. At the time of the application to the Orphans' Court for the partition, April term, 1829, there were seven surviving heirs of the estate, four of whom were minors. Daniel and John W. Holmes, who had purchased some year previously the interest of James P. Kearney, one of the heirs, made the application for the partition. The act of New Jersey, conferring the powers upon the Orphans' Court, provides that the application may be made by the heirs, for any person claiming under them, and further, that if, in the opinion of the commissioners, partition cannot be made without great prejudice to the owners, and on satisfactory proof to the court of the same, a sale of the premises shall be ordered.

It is not material to refer particularly to the proceedings before the Orphans' Court, as we do not understand that any serious question has been made upon them. It has, indeed, been objected that no personal notice of the application, or of any of the proceedings before the court, was given to the heirs, whether adults or minors; and also, that no guardian *ad litem* was appointed for the latter. But, it is conceded, neither of these steps, however judicious, and proper for the purpose of protecting the interest of the parties concerned, are required by the statute of New Jersey or practice of the court.

The main ground relied upon for setting aside the sale, is to be found in the allegations and proofs of fraud in the proceedings that took place at the commissioners' sale of the premises, under the order of the court. It is claimed that this sale is void, and should be set aside, on the ground of either actual or constructive fraud, or both. This sale took place in November, 1829, and was confirmed by the court on the report of the commissioners the January term following.

Deeds of conveyance were made of the premises sold in the month of April thereafter, when one half of the purchase-money was paid; the remaining half has been since paid in pursuance of the conditions of sale, and order of the Orphans' Court; and the whole of the purchase-money received by the heirs. All of them, except three, became of age as early as at, or before, September, 1831. Another became of age in 1834. This bill was filed October, 1841, some twelve years since the sale took place, and eleven since most of the purchase-money was paid. Actions of ejectment had been brought in the early part of that year, the precise date is not given.

The case has increased very much in importance since the sale by the commissioners in 1829, on account of the large and valuable erections and improvements made upon that part of the premises which is sought to be recovered. A town has sprung up on the bay, called Key Port, containing a population of several hundred inhabitants, with their dwellings, public edifices, docks, or wharves; and a great portion of the property has passed into the hands of *bonâ fide* purchasers.

These six lots were purchased at the commissioners' sale by a company organized pending the sale, and who made the purchase with a view to the laying out and establishment of a town at that point on the bay; and after the confirmation by the court in the name of the bidders, it was agreed between all persons interested in the purchase, and the commissioners, that these lots should be conveyed to John I. Taylor, one of the company, in trust for the owners, on account of the greater convenience in granting town lots, after the town should be laid out and these lots put into the market. The deed was executed accordingly. But, it appears that some two years subsequent to this conveyance, it was decided by the Supreme Court of New Jersey, (1 Greene's R. 182,) that a deed made by the commissioners in partition to any one, other than the person reported as the purchaser, was void. The law was supposed to be otherwise in New Jersey down to this decision, as it is in several of the States. 5 Page, 620; 1 Dana, 261; 2 Dev. & B. 103; 11 Id. 616. The title was first attacked solely on account of this flaw. It led to the institution of the actions of ejectment. The

defendants, however, applied to the legislature for relief, and in March, 1841, a general act was passed, providing, upon proof being made to the satisfaction of the court or jury before whom such deed was offered in evidence, that the lands were sold fairly, and without fraud, and the deed executed in good faith, and for a sufficient consideration; and with the consent of the persons reported as purchasers, the deed should have the same effect as though it had been made to the purchaser.

This act, as is admitted, is unobjectionable, and cured this defect in the deed; and the case, therefore, is brought down to the simple question of fraud, actual or constructive, at the commissioners' sale.

The whole of the evidence to be found in the record, except what may be derived from the pleadings, bearing upon this question, consists in notes of the testimony taken by the counsel in two trials in the ejectment suits, the one in October, 1842, and the other, in April, 1844. These notes, being an abridgment of the testimony of the witnesses at these trials, are not always free from obscurity and doubt as to the meaning, and having been taken by the opposing counsel are, in some instances, inconsistent, and contradictory. But, upon an attentive examination of them, and making all due allowance for the circumstances under which they were taken, we are satisfied, the clear weight of the evidence is against the charge of actual fraud in the proceedings before the Orphans' Court, or in the commissioners' sale.

An attempt was made on the argument to impeach the good faith of the report of the commissioners, which recommended a sale of the property instead of making partition. But it is not pretended, that the report contained any facts bearing upon this question which were untrue or had the effect to mislead the judgment of the court. The law authorizes a sale, when the land is so circumstanced, that, in the opinion of the commissioners, partition cannot be made without great prejudice to the owners, and upon satisfactory proof of that fact being made to the court. The commissioners caused a survey, and map of the premises to be made which accompanied their report, and they express the opinion, after an examination of the same, the partition could not be made without injury to the owners. We may presume the judges had satisfactory evidence before them that this opinion was well founded before they granted the order of sale; for, until some facts are shown going to impeach it, and with which the commissioners or parties interested were privy, such is the legal effect of the order.

Besides, if this question could be regarded as an open one now, in the absence of any evidence going to impeach the order

of the Orphans' Court, the result would not be changed; for every witness examined on the subject concurs in the opinion that the farm could not have been divided among the heirs without great prejudice to their interest.

By the law of New Jersey, and the order of the court, the commissioners were required to give sixty days' notice of the sale, by posting advertisements in five of the most public places, and publishing the same in one newspaper in the county. The commissioners, in conjunction with Joseph Taylor, the guardian of the infant children, in addition to this notice, caused the sale to be published in two newspapers in the city of New York, and also published and circulated some one hundred handbills throughout the country. The greatest pains seem to have been taken to give the widest publicity of the day and place of sale, and to secure the fullest attendance of bidders. The farm was divided into fifteen allotments, and, according to the evidence, in the most judicious manner for the purposes of the sale, and which were struck off, not only at full prices, but at prices considerably exceeding the highest estimate of those well acquainted with the premises. On this subject the evidence is all one way. Every witness, to whom the question is put, affirms the fact. The highest estimate of value is $15,000. The sales amounted to $19,941.19. The highest rent the farm had previously brought was $300 per annum, for most of the time it had been rented for $260. The soil was light, sandy, and unproductive, and it is agreed, by all the witnesses who speak on the subject, that, independently of the improvements made since the sale, it would not, at the time they were speaking, sell for more, if for as much, as it had brought at the commissioners' sale.

This may account for the circumstance, that the bill of complaint is not filed to set aside the sale of the entire farm, but only as to that portion of it upon which the large and valuable improvements have been made, and the parts connected with it; as, independently of these, there can be no inducement to disturb the sale. Success would be rather a misfortune.

The reason why the premises sold for some $5000 over the estimates and expectations of those best acquainted with them, was owing to the fact, that some enterprising men in the neighborhood foresaw that the Raritan Bay, at that point, was capable of being made a port of some business; and that, by an expenditure of sufficient capital to accomplish this, a town might be built up, which would afford a remuneration for the outlay, and the port afford convenience and facilities to the people of that neighborhood, as well as, probably, add something to the value of their property. The practicability of this scheme was the inducement held out by the commissioners and guardian of

the infants, and persons immediately interested in the property, to the purchasers; and, as is manifest upon the proof, furnished the leading motive for competition in the biddings at the sale. This enterprise, however, required a considerable outlay of capital in the construction of docks, or wharves, and in the erection of a warehouse, and other edifices, for the accommodation of the public, beyond the means of any individual in that somewhat retired locality, or of any one who might be inclined to take an interest in it. To overcome this difficulty, those interested in the sale, and who were desirous the property should bring the highest price, exerted themselves to form an association or company, composed of persons in the neighborhood who had a common and general interest in the object in view, viz. the building up of this little port and town, for the purpose of bidding in the property, and engaging in the enterprise. Holmes, the owner of one seventh, H. N. Kearney, one of the heirs, and Joseph Taylor, the guardian of the minors, were more or less active in getting up this association, and no doubt with the knowledge and approbation of the commissioners.

There was, also, another circumstance that operated in the formation of this company. A little port and town had sprung up at a neighboring point on the bay called Middletown point; and it was given out that the people of this town had associated to bid off the site of this new one at the sale, in contemplation and with a view to prevent a rival place of business in that vicinity.

Under these circumstances, the company in question was formed, and bid at the sale in competition with the Middletown point association; and, being the highest bidders, the property was struck off to them.

There are some cases deriving their principles from the severe doctrines of Bexwell *v.* Christie, Cowp. 396, and Howard *v.* Castle, 6 T. R. 642, to be found in books of high authority in this country, that would carry us the length of avoiding this sale, simply on the ground of this association having been formed for the purpose of bidding off the premises, for the reason that all such associations tend to prevent competition, and thereby to a sacrifice of the property. 3 Johns. Cases, 29; 6 Johns. Rep. 194; 8 Id. 444; 13 Id. 112; 2 Ham. 505; 5 Halst. 87; 2 Kent, 539; 1 Story's Eq. Jur. § 293. Later cases, however, have qualified this doctrine, by taking a more practical view of the subject and principles involved, and have placed it upon ground more advantageous to all persons interested in the property, while at the same time affording all proper protection against combinations to prevent competition. 2 Dev. 126; 3 Metc. 384; 25 Maine Rep. 140; 2 Const. Rep. (S. C.) 821; 3 Ves. 625; 12 Id. 477; 11 Serg. & Rawle, 86.

It is true that in every association formed to bid at the sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all. The property at stake might be beyond the means of the individual, or might absorb more of them than he would desire to invest in the article, or be of a description that a mere capitalist, without practical men as associates, would not wish to encumber himself with. Much of the property of the country is in the hands of incorporated or joint-stock companies; the business in which they are engaged being of a magnitude requiring an outlay of capital that can be met only by associated wealth. Railroads, canals, ship channels, manufacturing establishments, the erection of towns, and improvement of harbors, are but a few of the instances of private enterprise illustrating the truth of our remark. It is apparent that if, for any cause, any one of these or of similar masses of property, should be brought to the stake, competition at the sales could be maintained only by bidders representing similar companies, or associations of individuals of competent means. Property of this description cannot be divided, or separated into fragments and parcels, so as to bring the sale within the means of individual bidders. The value consists in its entirety, and in the use of it for the purposes of its original erection; and the capital necessary for its successful enjoyment must be equal not only to purchase the structures, establishments, or works, but sufficient to employ them for the uses and purposes for which they were originally designed.

These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders.

We must, therefore, look beyond the mere fact of an association of persons formed for the purpose of bidding at this sale, as it may be not only unobjectionable, but oftentimes merito-

rious, if not necessary, and examine into the object and purposes of it; and if, upon such examination, it is found, that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it, to participate in the biddings, the sale should be upheld—otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the property at a sacrifice.

Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each.

Applying these principles to the sale before us, it is quite clear, upon the evidence, that it should be maintained. The leading motive of the association, and purchase, was the construction of a little port and town upon the bay in their neighborhood, which, it was believed, besides the convenience afforded to their business transactions, would tend to enhance the value of the property in the vicinity. The association was composed, chiefly, of the farmers in the neighborhood, who had not the means individually to meet the expenses of the enterprise, as the necessary outlay, to afford any chance of success, would be considerable. Hence the agreement to join in the purchase and in the expense. From ten to twelve thousand dollars were, in point of fact, laid out by the company at an early day, in the construction of a dock, warehouse, and tavern-house, with a view to the encouragement of the settlement of the town. The members composing it did not regard the purchase as a speculation of any great value at the time, as three of them sold out their interest soon afterwards at an advance only of from twenty-five to forty dollars each, and others withdrew from it. Holmes, one of the most active in getting it up, sold his interest for $25, and H. N. Kearney, one of the heirs, his, for $40. And, as appears from the evidence, none of the parties concerned in the purchase, and in the building up of the town, have made profits of any account out of the enterprise. It has been, as a whole, rather an unfortunate concern, aside from the costs of this litigation, and the chances of losing the town itself, with all its erections and improvements, as the final result of it.

The only fortunate parties concerned, are the heirs, who have realized a very large price for their property—a price which, it is admitted upon the evidence, it would not sell for at the present time, aside from the new and expensive improvements. They had rented it, for a series of years, at $260 a year. The proceeds of the sale, at interest, produces nearly $1400 per annum. Each heir had been in the receipt of less than $40 a year, as his or her share of the rent since the sale, nearly

$200 each, thus receiving an annual income equalling almost, if not quite, the net entire income of the seven.

We are satisfied that no actual fraud has been shown in the case, and that the sale cannot be disturbed on this ground.

Then, is the sale void, and liable to be set aside on the ground of constructive fraud?

It is said that the commissioners, and guardian of the minor children, were interested in it, and that from the relation in which they stood to the property, and to the heirs, this interest infected the purchase with illegality as matter of law, so as to compel a court of equity to set it aside. Admitting the facts to be true, the conclusion is not denied. But the answer is, the proofs fail to make out the allegation. Taylor, the guardian, and two of the commissioners, James Hopping and Leonard Walling, took an interest in the company some three months and more after the sale, namely, in the February following. Taylor bought out the interest of Holmes, for which he gave him an advance of forty dollars. Leonard Walling took the interest of Stevens, and James Hopping of another of the members, at the same time. The company were then about commencing the improvements with a view to the laying out of the town and construction of the dock or wharf. This is the first time these persons are spoken of in the evidence as having any interest in the concern, and these are the circumstances under which it was taken. The three died some years before the institution of this or of the ejectment suits, and we have not, therefore, the benefit of their explanation. Taylor, the guardian, died in 1836, and Hopping and Walling, the two commissioners, a year or two later. Edward Taylor, the only surviving commissioner, was examined as a witness in the ejectment suit, and expresses his confident belief that neither of these persons had any interest in the purchase at the time of the sale, and has again affirmed the same in his answer to this bill. The fact is denied in the answers of all the defendants; and there is not only no proof to contradict it, but affirmative evidence, as we have seen, sustaining the answers in this respect. Doubtless, if these persons were living, and we could have had the benefit of their own account of the matter, the explanation would have been more full and satisfactory. But the circumstance should not operate to the prejudice of the defendants. The delay in the commencement of the litigation and in the impeachment of the conduct of three of the principal parties to the transaction, until after their decease, is alone attributable to the complainants. It would be unjust to indulge in presumptions against the fairness of their conduct under such circumstances.

It has been said, also, that inasmuch as the trust imposed upon

these commissioners had not expired at the time they became interested in the company in February, 1830, even admitting their interest then commenced, the case is still within the principle, forbidding the trustee to purchase. The one half of the purchase-money was to be received from the purchasers on the first of April thereafter; and the security to be taken for the remainder. But, we think this conclusion would carry the application of the principle beyond the reason upon which it is founded. The only consequence of the interest taken in the purchase by the commissioners at this period was to subject themselves personally to the first payment of the purchase-money, which we do not see could operate prejudicially to the heirs.

It is also said that Primrose Hopping, the auctioneer at the sale, was interested in the company, and hence a purchaser, and, that for this reason the sale should be set aside. We are free to admit, if it clearly appeared that he was one of the association, who bid off the property at the time of the sale, there would be very great difficulty in upholding it, even in the absence of any actual fraud in the case. The reasons for this conclusion are too obvious to require explanation. We have accordingly looked with some care and interest into the record, for the purpose of ascertaining whether this allegation is well founded, and although we regard this as the most doubtful and unsatisfactory portion of the defence, and one upon which different minds might arrive at different results, in this very complicated and confused mass of pleadings and of proofs, yet, the inclination of our mind after the most attentive examination is, that he was not a member of the association, and had no interest in it at the time the sale took place. Primrose himself was a witness in the ejectment suits and denies his interest, and this is substantially confirmed by Holmes, the most active man in getting up the company. Some of the answers admit, upon information and belief, others more directly, while some deny, that Primrose was a member of the company. The truth is, the association was got up suddenly by a mere verbal understanding at the time, and no one seems to have known with any certainty the exact number or persons comprising it. Hence scarcely any two of the defendants in their answers, or witnesses agree, as to the individuals engaged in it. Mr. Lippencott, who appears to have been one of the most intelligent and responsible members, says, in his answer, that the particular persons concerned in it were not finally settled upon or fixed until about the time the first payment of the purchase-money in April; and this is the first time he mentions Primrose as having become a member. As we have already said, the evidence in the case consisting of the

notes of the opposite counsel in the ejectment suits, is very much abridged, and some parts of it of doubtful meaning, and frequently inconsistent and contradictory; but we think the fair construction and weight of it confirms the testimony of Primrose himself. It is very probable, and indeed is virtually admitted by himself, that he was aware at the time of the sale, he could have an interest in the company if he wished; and, if this was a case that fairly admitted the question of actual fraud to be raised, this expectation, or contemplation of a possible future interest, would be entitled to great weight. But, in the absence of actual fraud, and with the admitted fact, that the property was sold not only for a full, but, for a very large price, and which the heirs have received, and been in the enjoyment of for the last eight or ten years, we think it would be pressing the principle of constructive fraud to a refinement in its practical application, beyond the reason of it, as it certainly would be in utter subversion of the justice in the particular case, to concede to it the effect claimed.

The conduct of the auctioneer is also impeached in respect to the biddings upon lot No. 8, one of the most valuable lying on the bay, and in striking it off to the bidder on behalf of this company. But nearly all the witnesses examined on this subject concur in disproving the charge.

Taylor, the only surviving commissioner, and who has never had any interest in the premises in dispute, and was superintending the sale at the time, says the lot was cried audibly several times to get another bid after the bidding had ceased; and that, after it was thus cried, timely notice was given by the auctioneer, that if none other was made, it would be struck off.

It is also said that, after bids had been made upon this lot the first day of the sale, the sale was stopped, and adjourned until the next day. But all the witnesses agree, that this was for the purpose of preventing a sacrifice of the property, and to secure greater competition. The bid was at twenty-eight dollars per acre when the adjournment took place. The next day it sold for forty-three dollars per acre.

Without pursuing the case further, we are satisfied that the decree below in favor of the defendants is right, and should be affirmed.

Mr. Justice McLEAN, Mr. Justice WAYNE, and Mr. Justice CURTIS dissented.

Order.

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

from the Circuit Court of the United States for the District of New Jersey, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

AUGUSTE F. DELAURIERE, PLAINTIFF IN ERROR, *v.* THOMAS EMISON.

The several acts of Congress, passed in relation to claims to land in Missouri, under Spanish concessions, reserved such lands from sale from time to time. But there was an intermission of such legislation from the 29th of May, 1829, to the 9th of July, 1832; and, during this interval, lands so claimed were upon the footing of other public lands, as to sale, entry, and so forth.

By an act of the 6th of March, 1820, (3 Stat. at Large, 545,) Congress gave a certain amount of land to the State of Missouri, to be selected by the legislature thereof, on or before the 1st of January, 1825; and by another act, passed on the 3d of March, 1831, (4 Stat. at Large, 492,) the legislature were authorized to sell this land.

Before the 1st of January, 1825, the legislature selected certain lands, which were then claimed under Spanish concessions, and reserved from sale under the acts of Congress first mentioned.

In November, 1831, the land so selected was sold by the legislature, in conformity with the act of Congress of the preceding March.

This sale having been made in the interval between May, 1829, and July, 1832, conveyed a valid title, although the claimant to the same land was subsequently confirmed in his title by Congress, in 1836.

THIS case was brought up from the Supreme Court of the State of Missouri, by a writ of error issued under the 25th section of the judiciary act. It was an action of ejectment brought by the plaintiff in error, Delauriere, against Emison. Both parties claimed titles under acts of Congress. The case was carried to the Supreme Court of Missouri, where the decision was against Delauriere, and he sued out a writ of error to bring the question before this court.

Delauriere claimed under a Spanish concession, granted by Delassus, and subsequently confirmed by Congress; and Emison, under an act of Congress granting certain land to Missouri, and sold by that State. The history of the laws relating to the adjustment of land titles in Missouri is given with great particularity in the report of the case of Stoddard *v.* Chambers, 2 How. 285. The following is the history of the two titles in this case, as exhibited in the court below:

Plaintiff's Title.

The plaintiff claimed title by virtue of a concession from Carlos Dehault Delassus, Lieutenant-Governor of Upper Louis-

iana, to Louis Labeaume and Charles Fremon Delauriere, for 10,000 arpens of land, at a place called *La Saline Ensanglantee* (The Bloody Saline.) The tract was surveyed by James Rankin, Deputy Surveyor, and certified by Antonio Soulard, Surveyor-General. Fremon Delauriere and his family resided upon the land, and made salt upon it in 1800, and for several years afterwards. The claim was filed with the Recorder of Land Titles, before the 1st July, 1808, and was reserved from sale by the acts of 3d March, 1811, and 17th February, 1818. It was confirmed to the claimants, or their legal representatives, by the act of the 4th July, 1836. Louis Labeaume conveyed his interest in the land to Fremon Delauriere, by a deed dated 15th July, 1806, and the present plaintiff purchased the entire interest of Fremon Delauriere at sheriff's sale.

Defendant's Title.

The defendant set up a title derived from the United States, as follows:

By the 6th section of an act of Congress, approved March 6, 1820, entitled "An act to authorize the people of Missouri Territory to form a constitution," &c., it was enacted that certain propositions be, and the same thereby were offered to the convention of said Territory of Missouri, when formed, for their free acceptance or rejection, which, if accepted by the convention, should be obligatory upon the United States.

Among said propositions was one, as follows, viz. "That all salt-springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to said State, for the use of said State, the same to be selected by the legislature of said State, on or before the 1st day of January, in the year 1825; and the same, when so selected, to be used under such terms, conditions, and regulations as the legislature of said State shall direct: Provided, That no salt-spring, the right whereof now is, or hereafter shall be, confirmed or adjudged to any individual or individuals, shall by this section be granted to said State.

And provided, also, "That the legislature shall never sell or lease the same, at any one time, for a longer period than ten years, without the consent of Congress." Story's Laws, vol. 3, 1762, (U. S. Stat. Large, vol. 3, p. 545.) This, with all the other propositions, was duly accepted by said convention of Missouri, by an ordinance adopted July 19, 1820. Laws of Mo., (by Edwards,) vol. 1, p. 632. Six of said salt-springs, with the sections of land adjoining, were selected by the Legislature of Missouri, on or before the 12th day of January, 1822. The seventh, with the land adjoining, (six sections,) was selected December 14, 1822, by said legislature, as appears by an act approved

that day. Laws of Missouri of 1822, p. 59; Edwards's edition, vol. 1, p. 83.

Under this last act, and another approved the day next previous, commissioners were appointed for the purpose of selecting the remaining, with the six sections of land adjoining to each, to which the State was entitled under said act of Congress. Laws of Mo. (by Edwards,) vol. 1, p. 981.

These acts made it the duty of the commissioners to select five springs and adjoining lands, and make their report to the legislature at the next session, to commence the third Monday of November, 1824. They also made it the duty of the commissioners to file with the register of the land office of the district, where any salt-spring might be selected, a notice of the same, and of the land adjoining each spring, describing as precisely as practicable the locality of the same. See § 4, Act December 13, 1822.

The commissioners were required to meet in the town of Franklin on the first Monday in September, 1823, or as soon thereafter as might be, and from thence proceed to select the five salt-springs and land adjoining. Laws of Missouri, 1822, p. 57, Edwards's ed. vol. 1, p. 983.

Said commissioners made the selections and reported to the next session of the legislature, as required, after which, but during that session, by an act approved January 14, 1825, it was enacted as follows: "That the following salt springs, with the lands adjoining to each, as hereinafter mentioned, are hereby declared to be selected and accepted for the use of this State, under the provisions of an act of the Congress of the United States, entitled "An act to authorize the people of the Territory of Missouri to form a constitution," (giving the full title of the act,) approved the 6th day of March, in the year one thousand eight hundred and twenty, that is to say, "First Section." Then follows, in regular order, an enumeration and description of the entire twelve springs and the lands adjoining each, which had been selected at various times, as before stated.

The land in controversy in this suit, is a part of that selected through the commissioners appointed under said acts of 1822.

By an act of the Legislature of Missouri, approved January 15, 1831, entitled "An act to provide for the sale of the saline lands," it was enacted, so soon as Congress should raise the restriction thereon, and assent to the sale for the benefit of the State, the twelve salt-springs, together with six sections of land attached thereto, obtained from the United States for the benefit of the State, the whole of the said lands should be offered for sale in a manner particularly described in said act. Laws of Missouri, (by Edwards,) vol. 2, p. 179.

By the 8th section of an act of Congress, approved March 3, 1831, entitled "An act to create the office of surveyor of public lands for the State of Louisiana," it was enacted that the legislature of said State of Missouri shall be, and is hereby, authorized to sell and convey in fee-simple all or any part of the salt-springs, not exceeding twelve in number, and six sections of land adjoining to each, granted to said State, by the United States, for the use thereof, and selected by the legislature of said State on or before the 1st day of January, 1825." Story, Laws, vol. 4, 2259; Stat. at Large, vol. 4, p. 493, 494.

On the 29th day of November, 1831, the land in controversy was, in the mode prescribed by said act of the legislature, of January 15, 1831, sold to James Emison, under whom the defendant holds, and patents therefor, from the State of Missouri, dated April 26, 1832, were duly executed to said Emison. The plaintiff asked for the following instructions, which the court refused to give, and to which refusal the plaintiff excepted:

1st. That if the land in controversy had been, before the 20th day of December, 1803, conceded by the Spanish government to Fremon Delauriere and Louis Labeaume, and that said land had been surveyed before the 10th day of March, 1804, and that said Delauriere and Labeaume, or their legal representatives, had filed with the Recorder of Land Titles, prior to 1st of July, 1808, notice of said claims; then said claim was reserved, and could not be lawfully selected by the State of Missouri, under provisions of the act of Congress of the 6th March, 1820, provided said claim of Fremon Delauriere and Louis Labeaume has since been confirmed.

2d. That, by the act of Congress of the 6th of March, 1820, the legislature of Missouri could not lawfully select any land which had been, or was thereafter, confirmed or adjudged to any individual or individuals.

3d. That, unless the legislature of the State of Missouri made its selection of the land in question, on or before the 1st of January, 1825, it was illegal, and is not a valid title against a confirmation under the act of the 4th of July, 1836.

4th. That the act of Congress of the 3d March, 1831, conveys no title in any lands to the State of Missouri; said act only authorizes said States to sell, absolutely, lands already granted by the act of the 6th of March, 1820.

The defendant asked, and the court gave, the following instructions to the jury, to the giving of which the plaintiff excepted. The defendant, by his counsel, first moves the court to instruct the jury:

1st. That if they believe, from the evidence in this cause, that the State of Missouri selected the land, on or before the 1st day

of January, 1825, under the 2d clause of the 6th section of an act of the Congress of the United States, entitled "An act to authorize the people of the Missouri Territory to form a constitution, &c., approved the 6th of March, 1820;" and that said State of Missouri sold and patented the said land in controversy in fee-simple to the said defendant, after the 3d day of March, 1831, and before the 9th day of July, 1832, they should find for the defendant.

2d. That, if they shall believe from the evidence, that said land was selected by the State of Missouri, under said act, on or before the 1st of January, 1825, and that said State afterwards, and between the 3d of March, 1831, and the 9th of July, 1832, sold and patented the said land to the defendant, they ought to find for the defendant, although they may believe the said land was confirmed to the plaintiff's landlord by the act of July 4, 1836.

The jury found a verdict for the defendant, which the court refused to set aside, to which refusal the plaintiff excepted. The judgment of the Circuit Court was affirmed by the Supreme Court of the State of Missouri, and the case was removed thence to this court by writ of error.

It was submitted upon a printed brief by *Mr. Wells*, for the plaintiff in error, and argued by *Mr. Geyer*, for the defendant in error.

Mr. Wells, for the plaintiff in error, made the following points:

1. The plaintiff in error says that the Circuit Court erred in refusing the first instruction asked by him.

That instruction asserts the principle, that if the land had been by the Spanish government granted to Labeaume and Delauriere prior to the 20th December, 1803, and surveyed prior to the 10th March, 1804, and a notice of the claim filed with the recorder of land titles on or before the 1st July, 1808, that it was reserved from sale and could not have been lawfully selected by the State under the act of 6th March, 1820.

The first branch of the proposition is true beyond all doubt. That these circumstances would bring the claim within the provisions of the acts of 1811 and 1818, and entitle it to be reserved from sale, will not be controverted. The question is, if reserved, could the State lawfully select it under the act of March 6th, 1820. That claims of this description were protected by the treaty of 1803, has long since been settled by this court. See Delassus v. United States, 9 Peters, 130; and also 12 Peters, 410. And that the acts of 1811 and 1818 were intended to carry out this provision of the treaty is clear. When the act

of 6th March, 1820, passed, the act of 1818 was in full force. Could the act of 1820 have operated to repeal the act of 1818? In the case of the United States *v.* Gear, 3 Howard, 131, this court says: "The rule is, that a perpetual statute, (which all statutes are, unless limited to a particular time,) until repealed by an act professing to repeal it, or by a clause or section of another act bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered to be still the law in force, as to the particulars of the subject-matter legislated upon — a power to sell all lands, given in a law, subsequent to another law expressly reserving lead-mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In the present case there are two laws — the first a general one, reserving lands of this class from sale — the second a special one, not referring to the former, and not necessarily conflicting with it. Each can be enforced without affecting the other. In 6 Porter's Alabama Reports, 231, the court remarks: "The law never favors the repeal of a statute by implication, unless the repugnance be quite apparent." In this case there is no repugnance whatever. The State might have selected its salt-springs without interfering with private claims. The act of 1818 reserved private claims "until after the *final* decision of Congress thereon." This final decision was provided for by the act of 26th May, 1824, and that act repealed the reesrvation. The land in question, then, being reserved land when the State appropriated it, the appropriation was unlawful: and, according to the doctrine of this court in the cases of Stoddart's Heirs *v.* Chambers, 2 Howard, 318, and of Bissell *v.* Penrose, in 8 Howard, the location was not protected by the 2d section of the act of 4th July, 1836.

The doctrine of those decisions is, distinctly, that to save a location by virtue of the act of July 4, 1836, it must have been made in conformity to law.

2d. The court erred in refusing to give the plaintiff's second instruction.

This instruction asserts that it was not lawful for the State to select any lands which had been or were thereafter confirmed to an individual. These are the terms of the proviso of the very act which made the grant to the State. The act of 1820 not only did not repeal the laws reserving private claims, but it in express terms protected those reservations from the operations of the act. If the act of 1820 had declared to the State of Missouri, that it should not appropriate Labeaume and Delauriere's claim — that if it did select it, and the claim should ever there-

after be confirmed, that the State should get no title, the act could not have been more plain and explicit: "Provided, that no salt-spring, the right whereof now is or hereafter shall be, confirmed or adjudged to any individual or individuals, shall, by this section, be granted to said State." This is a part of the grant itself — a part and parcel of the very act upon which the State claim is founded. Does it mean any thing? Does it protect claims which had been confirmed? It equally in its terms extends to those which might afterwards be confirmed! The language is the same as to both. If it has any effect at all, it must protect all private claims, whether confirmed before or after the act of 1820. I cannot enforce this proposition by argument. It is a simple question, whether this proviso shall be held valid or void. The Circuit Court held that the grant was made good to the State by the 2d section of the act of 4th July, 1836. That decision is at open war with the decisions of this court already cited, in which it is distinctly held, that to bring a location within the saving of that section, it must have been made in conformity to law. So far from this location having been made in conformity to law, it was made in open and direct violation of an express and positive law. The State selects Fremon's lick by name.

3d. The court erred in refusing plaintiff's third instruction. The law of 1820 required that the legislature of the State should make its selection on or before the 1st January, 1825. The third instruction asked the court to decide that, unless the selection was made within this time, it was void as against the plaintiff's confirmation. This the court refused to do. The rule for construing powers, whether derived from an act of the legislature or from a private instrument, is the same. They must be strictly construed. No further or greater power must be exercised than has been given. Any other principle of construction would render all limitations of power nugatory. To say that a grant of power to the State, to be exercised within a specified time, amounts to a grant to be exercised without limit of time, is repugnant to all ideas of limited powers. The Legislature of Missouri had full power to act up to the 1st January, 1825. After that time the power had ceased; any act done afterwards was wholly unauthorized and void. See 4 Pick. 45-47, 156; 6 T. R. 320; 2 Burr. 219. In the last case the court says: "The proviso is a limitation of power, and amounts to a negation of all authority beyond its prescribed and clearly defined limits. It cannot be that the proviso is directory merely, for that would be to set at naught all the guards provided by the legislature against the abuse of authority conferred by the act."

If, then, the selection was made after the power to make it had ceased, it was not made in conformity to law, and is therefore not protected by the 2d section of the act of the 4th July, 1836.

But it is said that the approval of the selection by the Secretary of the Treasury cured all these defects in the State title. To this it may be answered, 1st, that the act of Congress gave to the secretary no power whatever over the subject. His action in the matter was wholly unauthorized by law. 2d. His approval, even if he had the power to approve, came too late. It was made on the 22d August, 1837, after the confirmation of the plaintiff's title; and it was obviously made to heal the defects in the title of the defendant. Its only effect is to render those defects the more conspicuous.

4th. The Circuit Court erred in refusing the plaintiff's 4th instruction.

That instruction simply requested the court to decide that the act of the 3d March, 1831, conveyed no title to the State.

It will be seen that the act of 1820, making the grant to the State, prohibited the State from selling the land, or leasing it for a longer period than ten years. The 8th section of the act of 3d March, 1831, (Land Laws, 491,) removes this restriction, and authorizes the State to sell, in fee-simple, the lands granted to the State, "and selected by the legislature of said State on or before the 1st day of January, 1825,—another evidence that Congress did not regard that provision as nugatory, for the power to sell, like the original grant, was confined to lands selected within the time prescribed. This is the whole scope of this act, and it would be a perversion of its meaning and design to attach to it any other.

5th. The Circuit Court erred in permitting the defendant to read from the journals of the Senate of Missouri a report of commissioners appointed under an act of the legislature of 1822, to make a selection of salt-springs for the use of the State.

It was allowed to be read, for the purpose of showing that the selection by the State had been made within the prescribed time. It was illegal evidence, 1st, because the law required the legislature to make the selection, and that was a power which the legislature could not delegate to commissioners. The rule of law is the same when a power is conferred upon a legislative body, as if conferred on an individual person. The power conferred cannot be delegated.

2d. The report had no date, and therefore did not tend to show, even when they, the commissioners, made the selection. 3d. It was the journal of one branch of the legislature only, and could furnish no evidence of legislative action. 4th. It

was not an authentic copy of the original report. The journals of the senate are only evidence of the action of the senate. But, 5th, the legislature did, by an act approved February 14, 1825, make the selection of the land in question, and this was the best and only legal evidence of the action of that body. See Revised Laws of Missouri of 1825, vol. 2, pages 697 and 700.

6th. The court erred in refusing to grant a new trial. The new trial should have been granted, because the action of court in refusing the plaintiff's, and in giving the defendant's instructions, was contradictory. In refusing the plaintiff's 3d instruction, the court decided that it was not material that the selection should have been made on or before the 1st January, 1825. In giving the defendant's, it assumed that it was necessary. Again — the court, in giving the defendant's instructions, held that if the defendant obtained his title from the State, between the 3d of March, 1831, and the 9th July, 1832, it made his title good. Upon what principle this instruction was founded it is difficult to perceive. The question here is not whether the defendant had obtained a good title from the State, but whether the State had any title to convey. If the State obtained a title under the act of 1820, it is sufficient to defeat the plaintiff. But if the selection of the State was void, and the State got no title thereby, it could never, at any time, convey a good title to the defendant. What magic there was in the particular period that elapsed between these two acts, that enabled the State, when it had no title to convey a good one to the defendant, it would, I think, be difficult to show.

It was decided by this court in Barry v. Gamble, that a patent issued to a tract of land after the reservation had been removed, was valid. But this was a patent emanating from the general government, in whom the title was. In this case the patent comes from the State, and it is the title of the State that is questioned. It is clearly a misapplication of the principle invoked, and in this the court erred.

Mr. Geyer, for the defendant in error, contended,

That the selection by the State of Missouri of the land in controversy, on or before the 16th day of January, 1825, and the sale and conveyance thereof by the said State, after the 3d day of March, 1831, and before the 9th day of July, 1832, vested in the purchaser a title valid against the United States, which has not been divested by the subsequent confirmation of a claim embracing the same land, by the act of 4th July, 1836, although the same may have been reserved from sale by the act of 3d March, 1811.

1st. The 2d clause of section 6, of the act of 6th March, 1820,

and the ordinance of the Convention of Missouri, of 19th July, 1820, operate as a grant to the State of Missouri of the number of salt-springs and quantity of land therein mentioned, leaving the selection of the springs and land to the State legislature.

No act of the Federal Government was necessary to locate or designate the granted lands, the selection by the legislature within the time prescribed, severed the land selected from the domain, and vested the title in the State of Missouri.

2d. The act of the 6th March, 1820, does not except from the grant to, or selection by the State, the lands reserved from sale by the act of 1811. By the terms of the grant, lands embraced by claims, of which notice had been filed, are subject to appropriation by the State, as well as those embraced by claims of which no notice had been filed, or to which there was no claim whatever.

The reservation by the act of 1811, vested no title in any person; it suspended the authority of the executive officers to sell, but did not affect the power of Congress over the subject; the land belonged to the domain, notwithstanding the reservation, and was subject to disposition by law.

3d. The confirmation of the claim embracing the land in controversy, after the selection by the State, and especially after the 3d March, 1831, neither vested a title in the claimant nor divested that of the State of Missouri or her vendee.

The first proviso excepts from the grant any salt-spring, the right whereof was, at the date of the act, or should be before the grant was completed by the selection, confirmed or adjudged to an individual or individuals. It does not except the adjoining lands, nor does it contemplate that the selections shall be subject indefinitely to defeat by confirmations of claims, whether there had been a reservation of the land from sale or not.

4th. The act of Congress of 3d March, 1831, (Stat. at Large, vol. 4, p. 494,) authorizing the State to sell and convey in fee-simple the salt-springs and lands granted by the act of 1820, and selected on or before the 1st January, 1825, is a confirmation of the selection made; and the sale and conveyance by the State vested the title in the purchaser, even if the land was not subject to selection, by reason of the reservation from sale by the act of 3d March, 1811.

The act authorizing the State to sell was passed, and the land in controversy sold and conveyed after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832. The title of the defendant is therefore valid as against the confirmation. Stoddard *v.* Chambers, 2 How. 285; Mills *v.* Stoddard, 8 How. 345.

5th. The act 4th July, 1836, conferred no title to the land in controversy as against the purchaser from the State of Missouri, by virtue of the act of Congress of 3d March, 1831, because the title of such purchaser was vested prior to the 9th day of July, 1832, and could not be divested by any subsequent act of Congress, and because the land in controversy had been located and appropriated by the State of Missouri, and surveyed and sold under and in conformity with the laws of the United States. Any appropriation of land in conformity with a law of the United States, is a location under a law of the United States, and protected against a confirmation by the act of 1836. Les Bois *v.* Brammell, 4 How. 449, 456.

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us on a writ of error to the Supreme Court of Missouri, under the 25th section of the judiciary act.

The plaintiff claims title by a Spanish concession to Lewis Labeaume and Charles Fremon Delauriere, for ten thousand arpens of land, at a place called La Saline Ensanglantee. The tract was surveyed and regularly certified by the Surveyor-General. The plaintiff resided upon the land in 1800, and for several years afterwards.

The claim was filed with the Recorder of Land Titles before the 1st of July, 1808, and was reserved from sale by the acts of 3d March, 1811, and the 17th February, 1818. It was confirmed to the claimants, or their legal representatives, by the act of the 4th of July, 1836. Louis Labeaume conveyed his interest in the land, to Fremon Delauriere, by a deed dated 15th July, 1806; and the present plaintiff purchased the entire tract of Fremon Delauriere at sheriff's sale.

The defendant claims under an adverse title, derived from the State of Missouri. By an act of Congress, approved the 6th of March, 1820, entitled "An act to authorize the people of Missouri Territory to form a State Government, and for its admission into the Union," it was among other things provided — that all salt-springs not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said State, the same to be selected by the legislature of the State, on or before the first day of January, 1825; and the same so selected, to be used under such terms, conditions, and regulations, as the legislature of such State shall direct, &c.

By another act of Congress, approved 3d March, 1831, the Legislature of the State of Missouri were authorized to sell, in fee-simple, the lands granted by the above act. Under this act the State sold the land in controversy to the defendant.

The questions arise under instructions prayed for by the plain-

tiff, and refused by the court; and also the instruction given on the prayer of the defendant.

"1. That if the land in controversy had been, before the 20th day of December, 1803, conceded by the Spanish Government to Fremon Delauriere and Louis Labeaume, and that said land had been surveyed before the 10th March, 1804, and that said Delauriere and Labeaume, or their legal representatives, had filed with the Recorder of Land Titles, prior to the 1st July, 1808, notice of said claim, then said claim was reserved, and could not lawfully be selected by the State of Missouri under the provisions of the act of Congress of the 6th March, 1820, provided said claim of Fremon and Labeaume has since been confirmed.

"2. That by the act of Congress of the 6th March, 1820, the Legislature of Missouri could not lawfully select any land which had been, or was thereafter, confirmed or adjudged to any individual or individuals.

"3. That unless the Legislature of the State of Missouri made its selection of the land in question on or before the 1st of January, 1825, it was illegal, and is not a valid title against a confirmation under the act of the 4th July, 1836.

"4. The act of Congress of the 3d of March, 1831, conveys no title to any lands to the State of Missouri. Said act only authorizes the State to sell, absolutely, lands already *granted by* the act of the 6th of March, 1820."

"The defendant, by his counsel, moves the court to instruct the jury that if they believe, from the evidence in this cause, that the State of Missouri selected the land in controversy on or before the first day of January, 1825, under the second clause of the 6th section of an act of the Congress of the United States, entitled 'An act to authorize the people of the Missouri Territory to form a Constitution,' &c., approved 6th March, 1820, and that said State of Missouri sold and patented the said land in controversy, in fee-simple, to the said defendant, after the 3d day of March, 1831, and before the 9th day of July, 1832, they should find for the defendant. That if they shall believe, from the evidence, that said land was selected by the State under said act on or before the first day of January, 1825, and that said State afterwards, and between the 3d of March, 1831, and the 9th July, 1832, sold and patented the said land to the defendant, although they may believe the said land was confirmed to the plaintiffs' landlord by the act of the 4th July, 1836."

And this instruction was given by the court.

We think the court did not err in refusing the instructions prayed by the plaintiff, nor in giving that, which was asked by the defendant.

Notice of the plaintiff's claim was, on the 30th of June, 1808, given to the Recorder of Land Titles for the Territory of Louisiana, and the grant, survey, and title papers, were filed with the recorder and duly recorded.

On the 27th of December, 1811, the claim was taken up for consideration by the board of commissioners for the adjustment of land titles, under the act of March 2d, 1805, and rejected.

The claim was again presented to the board of commissioners, organized in pursuance of the act of Congress of July 9th, 1832; and afterwards, on the 13th of November, 1833, the board were unanimously of the opinion, that the claim ought to be confirmed to the said Charles F. Delauriere and L. Labeaume, or their legal representatives, according to the concession.

This proceeding of the commissioners was reported to the Commissioner of the General Land Office; and on the 18th of January, 1834, it was communicated to Congress; and the decision was confirmed by the act of Congress of July 4th, 1836.

By the act of 2d March, 1805, all persons claiming land under the French or Spanish government, were required to file their claim in the land office — and by the act of 3d March, 1807, the time was extended to 1st July, 1808. By the act of 15th February, 1811, the President was authorized to have the lands which had been surveyed in Louisiana, offered for sale — reserving those tracts for which claims had been filed in the land office, as above required, till after the decision of Congress thereon. The same reservation was contained in the act of the 17th February, 1818.

The act of 26th of May, 1824, authorized claimants, under French or Spanish grants, concessions, warrants, or orders of survey," in Missouri, issued before the 10th of March, 1804, to file their petitions in the district courts of the United States, for the confirmation of their claims. And every claimant was declared by the same act to be barred, who did not file his petition in two years. By the act of the 24th May, 1828, the time for filing petitions was extended to the 26th of May, 1829. On the 9th of July, 1832, an act was passed, "for the final adjustment of land titles in Missouri, which provided that the Recorder of Land Titles, with two commissioners, to be appointed, should examine all the unconfirmed claims to land in Missouri, which had heretofore been filed in the office of the said recorder, according to law, prior to the 10th of March, 1804.

On the 29th of November, 1831, the land in controversy was, in the mode prescribed by act of the Legislature of Missouri, of the 15th January, 1831, sold to Emison, under whom the defendant holds, and a patent was duly issued by the State.

The reservation under the act of 1811, was extended by the

act of the 17th of February, 1818, to the act of 26th of May, 1824; which authorized claimants to file a petition in the district court — and this right was limited to two years; it was afterwards extended to the 26th of May, 1829. The reservation then expired, or in other words, the bar to the right was interposed. On the 9th of July, 1832, a further provision was made for the adjustment of such claims. But after the interposition of the bar, and before the passage of the act of 1832, the land in controversy was purchased from the State of Missouri, and a patent obtained. During this period there was no protection to the inchoate right of the original claimants. When the State of Missouri selected the land it was reserved from sale, but that impediment was removed, when the limitation expired in 1829.

The confirmation of the claim by Congress, in 1836, had relation back to the origin of the title; but it could not impair rights which had accrued, when the land was unprotected by a reservation from sale; and when, in fact, the right of the claimant was barred. This point was settled in the cases of Stoddard v. Chambers, 2 Howard, 285; and of Mills v. Stoddard, 8 Ib. 345.

As the instructions prayed by the plaintiff in the State court, were in conflict with the law as above stated, they were properly overruled; and as the instruction given, at the instance of the defendant, was substantially in accordance with the above views, it was correct. The adjustment of the State court is, therefore, affirmed with costs.

Order.

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

James Adams, Plaintiff in Error, v. Philip Otterback.

Where a note was given in the District of Columbia on the 11th of March, payable sixty days after date, and notice of its non-payment was given to the indorser on the 15th of May, (being Monday,) the notice was not in time.

Although evidence was given that since 1846, the bank which was the holder of the note, had changed the preëxisting custom, and had held the paper until the fourth day of grace, giving notice to the indorser on Monday, when the note fell due on Sunday. This was not sufficient to establish an usage.

An usage, to be binding, must be general, as to place, and not confined to a particular bank, and, in order to be obligatory must have been acquiesced in, and become notorious.

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 of assumpsit brought by Adams, the plaintiff in error, upon a promissory note drawn by Haw, Yellott & Company, in favor of Philip Otterback, the defendant in error, and discounted by the Bank of Washington. The proceeds of the discounted note were paid by the bank upon the check of Otterback. After the note had been protested for non-payment, and notice of protest had been given to the indorser, it was assigned to Adams, the plaintiff in error.

On the trial of the cause the plaintiff gave in evidence the note, the handwriting of drawers and indorser being admitted, and proved that the note was discounted on the 11th of March, 1848, the day of its date, and the proceeds paid on defendant's check; that the note (which was payable at sixty days) was unpaid at maturity, and was delivered to George Sweeny, a notary, on Monday, the 15th day of May, 1848, after 3 o'clock, who on that day demanded payment, which was refused, and thereupon, on the same day, he delivered a notice for the indorser at his dwelling.

The plaintiff also gave in evidence by the teller and bookkeeper of the bank, that after the decision of the case of Cookendorfer v. Preston, and about two years prior to the date of the note in controversy, the bank changed the custom which had previously prevailed in regard to the demand and protest of negotiable discounted notes held by the bank, and that in all cases of discount they had up to that time held the paper until the fourth day of grace; and by the change, if that fourth day of grace happened to fall on Sunday, it became the custom of the bank to retain them till Monday, and on that day deliver the same to the notary to demand payment and give notice. And on cross-examination it appeared that only four instances of practice under this custom were shown.

Upon this state of facts the court instructed the jury that if they should "find the whole evidence aforesaid to be true, yet the plaintiff has not thereby shown that he has used due diligence in demanding payment, and giving notice of the non-payment of said note, and is not entitled to recover in this action.

To this instruction the plaintiff excepted, and the case was now to be argued upon it.

It was argued by *Mr. Lawrence*, for the plaintiff in error, and *Mr. Bradley*, for the defendant in error.

Mr. Lawrence, for the plaintiff in error, contended that the instruction was erroneous. It is difficult to understand the ground upon which the instruction was bottomed; whether, in the opinion of the court, the plaintiff could not recover admitting the custom to be proved, because the plaintiffs had not conformed to it; or whether, in the opinion of the court, the custom itself was not, as a fact, proved by the evidence; or whether, lastly, it was not legally competent for the bank to change an ancient custom and introduce a new one. Upon one or other of these grounds the instruction must have been given, and upon either of them it was erroneous.

1. That the court may instruct the jury that the plaintiff cannot recover against the indorser of a promissory note *if they* believe the evidence, and that evidence proves a particular custom, and at the same time proves that the plaintiff did not conform to that custom, we are not called upon to deny, because such is not the case here. The evidence clearly proves that the demand of payment and the notice of protest were in conformity with the altered usage, if that altered usage is itself established.

2. If the meaning of the instruction was that the custom itself, as alleged, was not proved by the evidence in the cause, then it was erroneous, because it was an invasion of the province of the jury. There was certainly evidence tending to prove that the old custom had been changed, and the new custom introduced. Whether that evidence did prove it, was for the jury to determine. It was not one of those cases in which a demurrer to evidence would lie, upon the ground that the quality of the evidence was not such as is required by law, whatever might be its tendency. For, in all the cases in this court, it has been held that it was competent to prove the custom of a bank by parol evidence. Renner *v*. Bank of Columbia, 9 Wheat. 587, 588; Mills *v*. Bank of United States, 11 Wheat. 431.

Nor was the instruction proper upon the ground that the

number of instances which had occurred within the two years since the adoption of the new custom were not sufficient in number to prove a new custom, or to bring it to the knowledge of the defendant. Because, if it be admitted that a custom may be changed, there must be a time when the change must commence, and there must be a first and single instance of the new custom; and in the case of Mills *v.* Bank of United States, and Bank of Washington *v.* Triplett and Neale, 1 Pet. 25, this court has already decided that it is not necessary that a custom should have actually been brought to the notice of an indorser. But on the contrary, it is the duty of the indorser to acquaint himself, by inquiry, with the custom of the bank with which he deals.

3. It was competent for the bank to change its custom whenever in its discretion the interests of the bank should require it. There is no inexorable rule of law which binds down such an institution to one eternal routine of business, notwithstanding the changing interests of commerce may demand a modification. On the contrary, this court has held that which the sound principles of commercial business dictate, viz. that a bank may change its custom, and may prove that change in the same manner as they may prove the original custom. Cookendorfer *v.* Preston, 4 How. 326.

The plaintiff in error would therefore submit, that if it is competent for a bank to change its usages; if there is evidence in the case tending to prove such change; if there is evidence in the case tending to show that the bank had made demand and given notice in accordance with such altered usage, then the instruction, that if the jury find the whole evidence of the plaintiff to be true, yet he was not entitled to recover, was erroneous.

Mr. Bradley for defendant in error.

This case turns upon the right of a bank, without notice, public or otherwise, given to the persons dealing with it in the way of discounting negotiable paper, to change the usage and custom of the bank in respect to the demand of payment of the notes, and giving notice to the indorsers, so as to bind the indorsers by such change. In other words, to maintain the plaintiff's case, it must appear that when a man procures a note to be discounted by a bank, by that act alone, the usage and custom of that bank are incorporated into the contract of discount, and become a constituent part of that contract between the parties to that note and the bank. And this is the case, although the parties never before had dealt with that bank; the paper was not made payable or negotiable at the bank; the usage and custom of that bank differed, in that respect, from those of all the other

banks in the same community; and this particular usage and custom had been introduced by that bank within a short period, without notice, public or otherwise, and was unknown to the parties to the note; and before such change, that bank had conformed to the usage and custom of the other banks in that community; or, in other words still, a party applying to a bank to discount for him negotiable paper, is bound to inquire, if he does not know, the special usage of that particular bank in respect to negotiable paper discounted by it, at the time of such discount, and he is not to rely either on the known and established usage and custom of all the other banks in the same community, or upon the particular usage of that particular bank up to the day before such discount, but he must ascertain if any change has been made in such usage, as he will be bound by it whether he knows it or not.

It is conceded by the defendant in error —

That a custom or usage of a bank, brought home to the knowledge of a person dealing with the bank, in respect to the discount of negotiable paper, enters into the contract, becomes a constituent part of it, and must have its due weight in the exposition of it. Bank of Columbia v. Magruder, 6 Har. & J. 180.

This knowledge may be proved directly, or may be implied from the dealings of the parties.

It may be inferred from persons dealing with the bank, which has a well-established usage. Lincoln & Kennebec Bank v. Page, 9 Mass. 155; Same v. Hammatt, Ib. 159; Smith v. Whiting, 12 Mass. 8.

From the parties being accustomed to transact business of that kind with the bank. Blanchard v. Hilliard, 11 Mass. 88; Jones v. Fales, 4 Mass. 252; Widgery v. Munroe, 6 Mass. 450; Bank of Columbia v. Fitzhugh, 1 Har. & G. 239; Hartford Bank v. Stedman, 3 Conn. 489; City Bank v. Cutter, 3 Pick. 414; Bank of Columbia v. Magruder, 6 H. & J. 172; Whitwell v. Johnson, 17 Mass. 452.

From the negotiable paper being made payable or negotiable at the particular bank. In addition to the cases cited, see also Yeaton v. The Bank of Alexandria, 5 Cranch, 52; Renner v. The Bank of Columbia, 9 Wheat. 585; Brent's Executor v. The Bank of the Metropolis, 1 Pet. 93; Mills v. Bank of United States, 11 Wheat. 431.

But it is contended by the defendant:

I. In all cases the usage to bind the parties must be a known, established, and invariable usage. See all the cases cited.

II. It is not strictly a rule of judicial decision, but is compounded of law and fact, and is admissible in evidence to show the contract of the parties, and their assent to such usage. See

11 Mass. 88; 4 Mass. 252; 6 Mass. 450; 1 Har. & Gill, 239; 3 Conn. 489; and the cases in this court above cited, and those cited by plaintiff in error.

III. A usage may be changed; Cookendorfer *v.* Preston, 4 How. 317. But the knowledge of that change must be brought home to the party to be affected by it. This may be in any of the modes already mentioned, or in some other mode from which it may justly be inferred that the party knew or ought to have known it.

IV. In this case it is admitted that, by the usage of the bank, existing up to the spring of 1846, the demand and notice set up in this action would have been insufficient. It is admitted that no notice, public or otherwise, was given of the alleged change; it is not shown how the change was made; and there are but three instances of practice under the alleged change, all of which were in the spring of 1848.

It is not pretended that defendant ever had any dealings with the bank prior to this time; the note was not made payable or negotiable at the bank; and the court is now asked to go, for the first time, the length of saying that every man to whose credit a note is discounted by a bank, is bound by all the usages of that bank in regard to demand and notice of that note, although he has never dealt with the bank before, and the note was not made negotiable or payable there, and there is no fact or circumstance in the case from which it can legally be inferred that he knew the said usage.

It will not do to say he received the avails. If the law binds him it binds all the intermediate parties between him and the maker. Nor does it follow, that because the avails ostensibly went to his credit, that he derived any benefit from them. He was the payee, and last indorser. They must have gone to his credit. But the money was on the same day paid to bearer on his check. It may well be inferred that it was paid to the makers; that the note was made for their benefit, to be discounted wherever they could get it done, having no reference to this particular bank, or it would have been made payable and negotiable there. The check also is for "proceeds of" this note, discounted this day for $800, the usual form in which the proceeds of a discounted note would pass to the credit of the maker.

Nor will it do to say that it was discounted on his credit. He then stood in the condition of a surety. As surety he is not to be bound beyond the terms of his contract. His contract was made with reference to the existing and well-known commercial usage, and the banking usage of the community in which he lived. It is a general note, so to speak — not a note payable or negotiable at any particular bank, or having any reference to

any particular or special usage. His contract bound him to the general usage on its face, and as surety he is entitled to all the benefits of that general usage. It was, that if the maker did not pay at maturity he would, provided demand was made on the maker, and notice given to him as indorser, according to the general usage.

The plaintiff sets up another contract, not apparent on the face of the paper, nor to be inferred from any dealings, nor exhibited in any knowledge brought home expressly or by any recognized implication, to the defendant.

It is submitted that the Circuit Court was right in giving the instruction.

Mr. Justice McLEAN delivered the opinion of the Court.

This was a writ of error to the Circuit Court of the United States for the District of Columbia.

This action was brought on a promissory note dated the 11th March, 1848, given by George W. Yellett, Henry Haw, and William B. Scott, in the name of Haw, Yellett & Co., in which they promised to pay to Philip Otterback, Esquire, or order, sixty days after date, the sum of eight hundred dollars, for value received; which note, before it became due, was assigned to the plaintiff.

The general issue was pleaded, and the cause was tried by a jury.

The note was discounted by the Bank of Washington, the proceeds of which were drawn by the defendant.

The following facts appear in the bill of exceptions. The note was unpaid at maturity, and on Monday, the 15th of May, after three o'clock of that day, was delivered by the bank to George Sweeny, the notary employed by said bank to demand payment thereof, and for protest if not paid. The notary stated that he demanded payment at the United States Hotel, and was answered, "neither of the proprietors are within, and it cannot be paid." On the same day notice was left at the dwelling of the indorser.

The witness further stated, that he had been teller of the bank since the year 1836, and that after the decision of the case of Cookendorfer *v.* Preston, by the Supreme Court, in 1846, the said bank changed the usage and custom which had theretofore prevailed therein, in regard to the demand and protest of negotiable paper held and discounted by it; and in all cases of discount they thereafter held the paper until the fourth day of grace; and if the said fourth day fell on Sunday, it was under the said change the custom of the bank to retain it until Monday, and on that day to deliver the same to the notary to

demand payment and give notice; and Sylvester B. Bowman, bookkeeper of the bank, states that since the decision of said case, the usage had been changed by the bank, as above stated.

No notice of such change had been given, so far as the witness knew; and it was further stated, that four cases had occurred in which the notes becoming due on Sunday, the notice was given on Monday. On the evidence, this court instructed the jury that the plaintiff had not used due diligence in demanding payment and giving notice of non-payment to the indorser — to which the plaintiff excepted.

This court, by several decisions, have sanctioned the usages of banks in this district, in making demand and giving notice of non-payment, varying from the law merchant. Renner *v.* Bank of Columbia, 9 Wheat. 587-588; Mills *v.* Bank of the United States, 11 Wheat. 430; and in some instances where, in this respect, notes left in a bank for collection, have been placed on a different footing from notes discounted. Cookendorfer *v.* Preston, 4 Howard, 324.

But these usages had been of long standing and of general notoriety. Rights had grown up under them which could not be disregarded without injury to commercial transactions. In the case before us the usage relied on, and under which notice to the indorser was given, had been adopted by the bank two years before the note in question was discounted, but it seems only four cases had occurred under it. No public notice was given at the time of its adoption, and no presumption can arise from the facts stated, that the indorser could have had notice of the usage.

It is said, if a bank may establish a usage, it may change it; and that there must be a beginning of acts under it. This may be admitted, but it does not follow that a usage is obligatory from the time of its adoption. To give it the force of law, it requires an acquiescence and a notoriety, from which an inference may be drawn that it is known to the public, and especially to those who do business with the bank. It is unnecessary to consider whether a usage adopted might acquire force from public notices generally circulated. No such notice was given in this case.

But to constitute a usage, it must apply to a place, rather than to a particular bank. It must be the rule of all the banks of the place, or it cannot, consistently, be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement.

In this country and in England, three days of grace are given by the general commercial law, and the day the note matures

is not one of them. In Hamburg, the day the bill falls due makes one of the days of grace. Notice must be given to the drawer or indorser on the day the dishonor takes place, or on the next day. If notice be given through the post-office, it must be forwarded by the first mail after the demand of payment. If the note fall due on Sunday, under the general law, the demand of payment must be made on Saturday.

The usage is not proved in this case. Four instances, in the course of two years, are insufficient to establish a usage. Such a rule would, in effect, abolish the commercial law, in regard to demand and notice on promissory notes and bills of exchange. There is ground to doubt whether any deviation from the general law has not been productive of inconvenience.

No explanation is given, why the demand of payment on the note was made at the United States Hotel, in this city. Such a demand would seem to be insufficient.

We are, therefore, of the opinion, that there was no error in the instructions of the court to the jury; the judgment of the Circuit Court is therefore affirmed.

Order.

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

WILLIAM LIVINGSTON AND EBENEZER N. CALEF, APPELLANTS, v. WILLIAM W. WOODWORTH, ADMINISTRATOR OF WILLIAM WOODWORTH, DECEASED, JAMES G. WILSON, ARTEMAS L. BROOKS, AND IGNATIUS TYLER, APPELLEES.

Where the assignors of a patent-right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late.

Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted.

That consent having been given, however, to a decree by which an account should be taken of gains and profits, according to the prayer of the bill, the defendant was not precluded from objecting to the account upon the ground that it went beyond the order.

The report having been recommitted to the master, with instructions to ascertain the amount of profits which might have been realized with due diligence, and the mas-

ter having framed his report upon the theory of awarding damages, this report, and the order of the court confirming it, were both erroneous.

Under the circumstances of this case, the decree should have been for only the actual gains and profits during the time when the machine was in operation, and during no other period.

THIS was an appeal from the Circuit Court of the United States for the District of Massachusetts.

All the facts of the case are stated in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Schley*, for the appellants, and by *George. T. Curtis*, for the appellees.

Mr. Schley made the following points:

1. The account ought not to have been taken from the date of the patent. The title of the complainant, Tyler, was not complete until 1st July, 1848, nor the title of Brooks until the 10th May, 1848. At the furthest, the account ought not to have been taken from a period prior to the latter day.

2. The account ought not to have been continued beyond the time of the filing of the bill. There are cases, undoubtedly, in which the account is continued to the date of the report; but this is not such a case.

3. It was clearly erroneous to allow interest, from the day of filing the bill, on the whole amount; as part of the amount accrued after that date.

4. Upon the case, as it stood in court, actual "gains and profits," and nothing more, ought to have been charged against the defendants. If damages, beyond actual gains and profits, were asked, the complainants should have sought another forum. Curtis on Patents, § 348; Hindmarsh on Patents, 361-365; Crossley v. The Derby Gas Light Company, 3 Mylne & Craig, 428, 433; Bacon v. Spotswood, 1 Beav. 387; Colborn v. Simms, 2 Hare, 560; 2 Eden on Injunctions, 251; Phillips on Patents, 457; Webster on Patents, 119, 168, 238; Lee v. Alston, 1 Ves. Jr. 82.

5. The allowance of one dollar per thousand was not warranted by the evidence in the cause; even if, in other respects, the decree was right. The allowance was excessive, upon the merits, as disclosed in evidence.

The points made by *Mr. Curtis*, for the appellees, were the following:

I. The first point that will be submitted, on behalf of the appellees, will be, That this being a bill for an injunction and an account, and a decree having been entered by consent of par-

ties, (Record, p. 68,) that the complainants were entitled to the injunction and account prayed for in the bill, an appeal does not lie from the final decree, which merely ascertains the items of the account which the appellants consented should be taken.

That an appeal cannot be taken from a decree entered by consent, counsel will cite 2 Daniel's Ch. Pr. 1179, 1180; Bradish *v.* Gee, Amb. 229; Harrison *v.* Rumsey, 2 Ves. 488; Atkinson *v.* Marks, 1 Cow. 693; Corning *v.* Cooper, 7 Paige, 587.

There is a case in Ohio which is otherwise, founded on the peculiar provisions of the statute allowing appeals. Brewer *v.* The State of Connecticut and others, 9 Ohio R. 189.

But there is nothing in the provisions of the judiciary act of 1789, or in the act of March 3, 1803, § 2, allowing and regulating appeals in equity, to prevent the application by this court of the rule, that when a decree has been taken by consent, it cannot be disturbed by an appeal or a rehearing. The object of the act of 1803 is stated in the case of the San Pedro, 2 Wheaton, 141, 142. The only question in this case is, whether the consent decree, entered May term, 1849, (p. 18,) does not render the final decree (p. 51, 52) a decree by consent also. It will be contended that it does:

1. Because, by the first decree, the appellants consented that the appellees were entitled to the perpetual injunction, and "the account prayed for in the bill;" and all that remained to be done was to ascertain what account was prayed for in the bill.

2. Because, by the first decree, it was expressly declared, that the parties consented to have the account commence at such a time as should be found by the master, and be confirmed by the court — a stipulation as binding on both parties as if they had made the same point the subject of arbitration.

But if the appeal was rightly taken, counsel for the appellees will contend,

II. That the second decretal order to the master, by which he was directed to ascertain "the amount of profits which may have been, or, with due diligence and prudence, might have been, realized by the defendants for the work done by them" with the machine complained of, taken in connection with the principles laid down by the court in their opinion, (see appendix to this brief,) stated the true rule for this case.

1. It appears, by an account filed with the master at the first hearing, that the appellants had been using the machine complained of from July, 1845, to July, 1848, and had planed therewith 3,962,760 feet of boards during that time.

It also appears that they had received an average of $2 per thousand feet for this work; and in their answer they state, that this work was done at an average expense of $1.50 per thou-

sand feet, leaving 50 cents, only, as the net profit actually realized on a thousand feet. But they do not profess to do this with entire accuracy, but as an "approximate estimate."

In this state of the facts, the master, assuming that he was to find only the actual net profits realized, heard evidence on the part of the complainants which tended to show that a thousand feet of boards could be planed for a less cost; and, also, evidence on the part of the respondents, tending to show that it would cost as much as they had stated in their answer; but he held, that the result of the whole evidence did not authorize the conclusion that the respondents had not truly stated the actual cost, and, accordingly, he reported $1.50 as the cost per thousand, leaving an actual profit of 50 cents only.

As it stood on the master's first report, therefore, there was evidence tending to show that, in charging $1.50 per thousand as the cost of planing, the respondents had conducted the business with less skill and prudence than it might have been conducted. The master's conclusion was based wholly on the idea that the actual net profits furnished the rule, and that the evidence did not control the statement of the answer as to the amount of such actual profits.

An exception being taken and argued, it appeared to the court that here was a state of facts which required the application of a different rule, and the cause was recommitted to the master, by the second decretal order, and the accompanying instructions.

The rule announced was, that the master was to report the profits which the respondents might have made with due diligence and prudence; and the principle adopted by the court was, that the respondents were to be charged as involuntary trustees, accountable, like mortgagees in possession and other similar trustees, for the profits which might have been received with due care and prudence.

To apply this rule rendered it necessary to hear evidence on both sides, and to take the average given by all the testimony of what it would cost to plane 1,000 feet. The result of the whole evidence, given to the master at both hearings, may be thus stated.

(The counsel then went into some long calculations respecting the cost of planing.)

2. There is no technical difficulty in a court of equity in adopting and applying such a rule as that directed by the 2d decretal order to the master.

Where the court has jurisdiction to give the principal relief sought, it will make a complete decree, and give compensation for the past injury. As in bills for specific performance. New-

ham v. May, 13 Price, 749; Nelson v. Bridges, 2 Beavan, 239; Phillips v. Thompson, 1 Johns. Ch. R. 150; Parkhurst v. Van Cortlandt, Ibid. 273; Pratt v. Law & Campbell, 9 Cranch, 456; Cathcart v. Robinson, 5 Peters, 269; 2 Story's Eq. Jurisp. § 796. So also in injunction bills for waste. Jesus College v. Bloom, 3 Atk. 262; Garth v. Cotton, Ibid. 751; Lee v. Alston, 1 Bro. Ch. R. 194.

The jurisdiction in equity conferred upon the circuit courts in patent causes, by statute, contemplates full power to give the plaintiff as ample redress as he could have at law, except that the damages cannot be trebled. Patent Act of July 4th, 1836, § 17, 14.

3. There being no technical difficulty in applying a rule that involves elements of computation, and gives an approximate compensation to the party injured, the question is simply one of principle, viz. What rate of profits shall a party, who has long infringed a patent, be required to account for in equity?

The court below did not direct the master to find damages, nor did he go into that inquiry. He inquired, as he was directed to do, whether the profits actually made by the respondents were as large as they might have been with the exercise of due care and prudence.

a. Any other rule, in a case of this kind, would put the patentee entirely in the power of the trespasser, and enable the latter to fix the rate at which he should account for the use of the machine.

b. The rule applied in this case by the court below was correct in principle. It was to hold the party accountable, as an involuntary trustee, for what the patentee might have realized by the same exercise of the right, the evidence showing that he had made the cost of the work excessive. The principle is well settled, that a court of equity sometimes forces the character of a trustee upon an intruder, or wrongdoer, or one who is in possession under color of right, and who takes rents or profits which belong to another, or might have taken them.

The particular class of trustees referred to in the opinion of the court below are mortgagees. The following authorities show the application of the rule. Anonymous, 1 Vernon, 45; Chapman v. Tanner, Ib. 267; Coppring v. Cooke, Ib. 270; Jenkins v. Eldredge, 3 Story, 325, 329, 330, 331; Dexter v. Arnold, 2 Sumner, 108, 130.

c. This is a case of first impression. All the authorities and precedents which declare that the infringer is to account in equity for the "profits" made by the unlawful use of the invention, contemplate a case where the actual profits are all that could have been made, or else that question has not been raised.

This is a case where the evidence shows that the respondents so conducted their business that the actual profits were less than half what might have been realized by the patentee from the same business.

III. The objection that the account ought not to have been taken from the date of the (reissued) patent, viz., July 8th, 1845, but should have commenced May 20th, 1848, (the date of Wilson's deed of confirmation to Brooks, one of the complainants,) is now too late. By consent of parties, the account was to commence at such time as should be found by the master and confirmed by the court. (P. 18.) The master found the facts, and the court directed the account to commence at the date of the reissued patent. No appeal lies from the decree thus consented to.

Besides, the bill was brought in the name of the original owner of the reissued patent, Woodworth's administrator, Wilson, his assignee, and Brooks & Tyler, the sub-assignees; and by consent, the respondents admitted the right to the injunction and account prayed for.

IV. If the appeal can open this question, it is submitted that the decree was right.

The first patent to Woodworth, the inventor, was granted December 27th, 1828. November 16th, 1842, Woodworth's administrator obtained from the commissioner, under the statute of 1836, § 18, an extension for seven years from December 27th, 1842. December 7th, 1842, the administrator granted to Brooks an exclusive territorial right for the residue of the extended term, viz., to December 27th, 1849.

January 11th, 1844, the administrator conveyed all his interest to Wilson.

July 8th, 1845, the administrator surrendered the renewed patent granted to him by the commissioner, and obtained a reissue under the act of 1836, § 13, on account of a defective specification.

July 20th, 1847, Brooks assigned to Tyler one half of his territorial right.

May 20th, 1848, Wilson, by his deed, confirmed Brooks's title, and Brooks, by his deed dated July 1st, 1848, confirmed his previous grant to Tyler.

The bill was filed July 10th, 1848, in the name of the administrator, Wilson, Brooks, and Tyler, to obtain an account for infringements commenced at least at the date of the surrender and reissue, and steadily continued to the time of filing the bill. The court directed the account to commence with the date of the reissued patent.

Three positions will be maintained:—

1st. That the complainants, who sought this redress, jointly

represented the whole legal and equitable title, and were jointly entitled to the relief from the date of the reissued patent. Even if it were true that a reissue does not give a legal title to the assignee whose grant was taken before the reissue, (which is not admitted,) it still leaves his equitable title, as against strangers and trespassers, as valid as it was before.

2d. An assignee of the whole existing interest under a patent has the same legal title in the reissued patent, granted under the act of 1836, § 13, for a defective specification, which he had before the reissue, without any confirmatory grant from the patentee. Woodworth *v.* Stone, 3 Story's R. 749; Woodworth *v.* Hall, 1 Woodb. & Minot, 248.

The two cases of Wilson *v.* Rousseau, 4 How. 646; and Bloomer *v.* McQuewan, 14 How. 539, deny to previous assignees a legal title under an extension, and recognize only their right to continue the use of the specific machines purchased.

They admit, therefore, that the extension is a grant of a new estate to the patentees. A reissue under the 13th section of the statute is not a new grant in any sense, but merely the correction of errors or omissions in the specifications; and the statute merely restricts the right of recovery to infringements committed after the correction has been made.

3. If the complainants, Brooks and Tyler, needed any confirmation of their title, they had it before the bill was filed, and it relates back to the earliest period when the statute will permit recovery for infringements under a reissued patent.

V. The objection that the account ought not to have been taken beyond the time of filing the bill, covers the work done in the course of fifteen days. The bill was filed July 10th, 1848, and the account covers the work done to July 25th. It appears that the injunction was served on the last-mentioned day. (Record, pp. 13, 14.) The amount planed in the month of July, was 73,821 feet; so that, at the rate of 4,200 feet per day, the respondents must have worked their machine more than seventeen days in the month of July — that is to say, they did more than seven days' work after the bill was filed. (Record, p. 19.) It does not appear precisely why the master took the account to the 25th of July, but probably it was because the respondents rendered it to that time, they not having stopped before. After the bill was filed they had notice of the complainant's rights, and on their own admission they were infringers and bound to account. To allow the present objection to prevail would be to say, that in a suit for an injunction and account, the right being admitted, the respondent may go on working after the bill is filed, and the complainant must file another bill to recover for what is done after the first bill is filed, and before the account

is taken. There is no technical necessity for this, and it would be most onerous, as leading to endless litigation.

VI. The objection as to the interest allowed on the items which accrued after the filing of the bill, assumes that work was done by the respondents after the bill was filed. By their own admission they had no right to use the machine. The master brought the account down to the time when the respondents rendered it, July 25th; and if a part of the items thus covered accrued after the respondents were notified, those items must, in contemplation of law, be treated as if they had already accrued when the bill was filed, in taking a continuing account.

Mr. Justice DANIEL delivered the opinion of the court.

The appellees, on the 24th of July, 1848, obtained from the court above mentioned an injunction to restrain the appellants from using or vending one or more planing machines substantially the same in construction and mode of operation as the machine which had been patented to William Woodworth, deceased.

In their bill they allege the originality of the invention of the patentee, the extension of the patent after his death for the space of seven years beyond its original limitation to the appellee, William W. Woodworth, as administrator of the inventor, and the grant by said administrator to the appellee, Brooks, of the exclusive right to construct and use the invention within certain specified limits for the entire period of that extension. The bill further alleges a second extension by act of Congress of the patent to the said administrator for the term of seven years from the 27th day of December, 1849; but states that in consequence of doubts entertained as to the correctness of the specification, and of the fact of said letters-patent having been found to be inoperative, they were duly surrendered, and new letters-patent bearing date on the 8th day of July, 1845, were issued to the appellee, William W. Woodworth and his assigns, for the residue of the term of 28 years from 27th of December, 1828; that subsequently to this last renewal the appellee, William W. Woodworth, had granted to the appellee, Wilson, and to his assigns, all the right and title acquired by him by the issue of the last letters-patent with the amended specification. That the appellee, Brooks, by his deed of the 20th of July, 1847, had granted and assigned to the appellee, Tyler, one half Brooks's right in the patent to Woodworth for the term ending on the twenty-seventh of December, 1849, to be used within the town of Lowell, and not elsewhere. That the appellee, Wilson, by deed of the 20th of May, 1848, assigned and confirmed to Brooks and his assigns, the exclusive right of constructing and using

twenty planing machines according to the letters-patent with the amended specification, and gave authority to Brooks, in Wilson's name, to execute all such deeds of confirmation to the assignees of any rights and privileges within the county of Middlesex as he should deem fit, and that in virtue of this power and authority, he, Brooks, did by his deed of July 1st, 1848, grant and confirm to the appellee, Tyler, in the name and behalf of the said Wilson, as well as in his own name, all the rights and privileges described in the deed from Brooks to Tyler of the 20th of July, 1847. The bill further alleges that the appellants were then using, and for some time had used, within the city of Lowell, one of the machines substantially the same in construction and mode of operation as the planing machine in the said last mentioned letters-patent described, the exclusive right to make, use and vend which, is by law vested in the appellees. The bill also charges that theretofore two actions at law had been instituted in that court, the one against a certain James Gould, and the other against Rodolphus and James, Edwards and Cyrus Smith, for the violation of the exclusive privileges granted to the plaintiffs in those actions under patent last aforesaid, by using a machine substantially the same with the said planing machine invented by the said William Woodworth, and that, upon issues made up in both these actions, the jury found that the defendants had infringed the patent, and subjected them to the payment of damages. It avers the use, as before stated by the appellants of their machine, to be an infringment of the Woodworth patent, and a violation of the exclusive rights and privileges of the appellees; and concludes with a prayer that the appellants may be decreed to account for and pay over to the appellees all gains and profits which have accrued from using their said machines since the expiration of the said original patent; that they may be restrained, by injunction, from using or vending any one or more of said machines; that the machine or machines, in the possession or under the control of the appellants, may be destroyed or delivered over to the appellees, who ask also for general relief.

The appellants, by their answer state, that during a part of the time which has elapsed between the autumn of 1841 and April 1st, 1844, they have used in their mill at Lowell a single planing machine constructed according to a patent granted to James H. Hutchinson on the 16th of July, 1839, which machine, in some of its combinations, substantially resembles the machine specified in the patent granted to Woodworth in 1845, but is unlike any machine specified in the patent to Woodworth in 1828. They aver, also, that the planing business had been carried on as aforesaid, in virtue of the Hutchinson machine, at

Lowell, with the full knowledge of the appellee, Brooks, and without objection from him until within a short time previously; and that they had no knowledge or belief of any infringement by them of the patent to Woodworth, until after the decision in Gould's case; after which decision, they were informed that the patent to Woodworth had been surrendered and reissued with a new specification, the validity of which reissued patent had not, within their knowledge or belief, been established until the decision of the suit against the said Edwards and Smith. The answer denies the originality of Woodworth's claim, by averring that James, Joseph, Aaron, and Daniel Hill, and Leonard Gilson, in the District of Massachusetts, as early as 1827, and John Hale of Bloomfield, in the State of New York, in the year 1828, had knowledge of and had made and used planing machines essentially the same and prior to the pretended invention of William Woodworth, deceased.

At the May term of the court, 1849, this cause coming on to be heard upon the bill, the answers, replications, and exhibits, by the consent of the parties it was decreed by the court, that the appellees (the complainants below) were entitled to the perpetual injunction and to the account prayed for by the bill; said account to commence at such time as shall be found by the master, and be confirmed by the court. The decree proceeds that, the master in taking said account shall have power to require the parties to produce before him, on oath, all books and papers relating thereto, and to hear such oral evidence as either party may produce, and on the motion of either of the parties, to examine either of the other parties, upon interrogatories. And all farther directions are reserved until the coming in of the master's report.

In pursuance of this decretal order, upon the examination of the parties on oath, and upon evidence produced *aliunde*, the master reported that the amount of gains and profits received by the defendants below upon 3,962,700 feet of plank, the number of feet planed by them, was at the rate of fifty cents per thousand feet, no exception being taken to the amount of the work stated to have been done by the said defendants, or to the gross amount at which the work was charged by them per thousand, but exception being taken to the report of the master upon the ground that the rate of profit charged to the defendants below should have been one dollar instead of fifty cents per thousand, the court by a farther decretal order recommitted the report to the master, with instructions to ascertain the amount of profits which may have been, or with due diligence and prudence might have been, realized by the defendants, for the work done by them or their servants, by the machines de-

scribed in the complainant's bill, and that the account of profits should commence from the date of the letters-patent issued with the amended specifications. In obedience to the decretal order last mentioned, the master made a second report, by which he charged the defendants for profits on the work done by their machine at the rate of one dollar per thousand feet, instead of fifty cents, as in his former report, from the 8th day of July, 1845, the date of the reissued patent. He says it is true that the rate of profit adopted by him is conjectural, "but that he does not think he has infused into the case any element too unfavorable to the defendants. That by the decision of the court they were trespassers and wrongdoers, in the legal sense of the words, and were consequently in a position which might make them liable to be mulcted in damages greater than the profits they have actually received; the rule being not what benefit they have received, but what injury the plaintiffs have sustained." To this second report of the master, exceptions were filed by the appellees, the plaintiffs below, founded upon the departure of the master from the safe and just rule of actual profits, as prayed for by the bill, and the adoption of a rule of proceeding which was vague and conjectural, and unsustained by the evidence in the cause. At the May term, 1851, the Circuit Court decreed that this report of the master, except so far as interest is thereby disallowed, should be confirmed, and that the appellants should, within ten days, pay to the appellees the sum of $3,962.96, with interest thereon from the day of filing the bill, with costs. It is this decree, founded upon the antecedent proceedings herein adverted to, that we are to review; and it may here be remarked, that the statement of those proceedings has been unavoidably protracted from the necessity for considering two questions of a preliminary character raised in the argument, and which it is proper to dispose of before deciding upon, and before reaching the merits of, this cause. 1st. It has been insisted, on behalf of the appellants, that the appellee, Tyler, claiming as assignee under Woodworth, Wilson, and Brooks, and asserting a title complete in himself, within a certain locality, could not regularly unite in his bill those persons whom he had shown had no title within the same locality, and who could not therefore be embraced in a decree in his favor; a decree which, in its terms and effect, must exclude every kind of interest in those co-plaintiffs within the same limits. It is true, as a rule of equity pleading, that none should be made parties, either as complainants or defendants, who have no interest in the matters in controversy, or which can be affected by the decree of the court. Vide Story's Equity pleading, ch. 4, § 231; so too in § 232 of the same work

it is said: "In cases where the want of interest applies, it is equally fatal when applicable to one of several plaintiffs as it is when applicable to one of several defendants. Indeed, the objection in the former case is fatal to the whole suit, whereas, in the latter case, it is fatal (if taken in due time) only as against the defendant improperly joined." In the same work, § 544, it is said that, "In cases of misjoinder of plaintiffs, the objection ought to be taken by demurrer, for if not so taken, and the court proceeds to a hearing on the merits, it will be disregarded, at least if it does not materially affect the propriety of the decree." The language of Lord Langdale, in the case of Raffity *v.* King, as reported in the Law Journal, vol. 6, p. 93, is very clear upon this question, where he says, "As to the objection to John Raffity being made a plaintiff, I am not satisfied it would, under any circumstances, be considered of such importance as to deprive the other plaintiffs of the relief they are entitled to. There have been cases, in which the court, with a view to special justice, has overcome the difficulty occasioned by a misjoinder of plaintiffs;" and in the case of Morley *v.* Lord Hawke, cited in 2 Younge & Jervis, 520, before Sir William Grant, the rule is thus stated as to the misjoinder of plaintiffs. "The defendant objected to any relief being granted in that state of the record; and, without determining the effect of the objection if brought forward earlier, I think it is now too late. If the objection had been stated in the answer, the plaintiffs might have obtained leave to amend their bill, and might have made John Raffity a defendant instead of a plaintiff, for which there is an authority in the case of Aylwin *v.* Bray, (2 Younge & Jerv. 518, note,) and in such a case as this, where the objection is reserved to the last moment, I think it ought not to prevail."

In the case before us the objection of misjoinder of the plaintiffs nowhere appears upon the pleadings, nor, for aught that is disclosed, was it insisted upon even at the hearing: it is urged for the first time after the hearing and after a final decree, and to allow this objection at so late a stage of the proceedings, would be a surprise upon the appellees, and might operate the most serious mischiefs. In this case, and at this time, the allowance of such an objection would be peculiarly improper, for here the objection cannot be viewed as having been merely waived by reasonable and ordinary implication, but the defendants have expressly consented to a decree between the parties as they were then arrayed upon the record. As to this objection, therefore, we think it comes too late to be of any avail, and should not affect the cognizance of the court either as to the parties or the subject-matter of the controversy. 2d. On the part of the appellees

(the complainants in the Circuit Court,) it has been insisted, that the decretal order, made in this cause by consent, covered and ratified in advance all the subsequent proceedings on the part of the court, rendering those proceedings inclusive of the final decree, a matter of consent, which the appellants could have no right to retract, and from which, therefore, they could not legally appeal. In order to try the accuracy of this argument and of the conclusions sought to be deduced therefrom, it is proper to examine the order which is alleged in support of them. The words of that order are as follow:

"This cause came on, &c.—and by consent of parties it is declared by the court"—what? "That the complainants are entitled to the perpetual injunction and the account prayed for by the bill." It seems to us incomprehensible, that by this consent of the defendant below, he had consented to any thing precise and unchangeable beyond the perpetual injunction, much more so that he had thereby bound himself to acquiescence in any shape or to any extent of demand which might be made against him under the guise of an account. Indeed the complainants below, and the Circuit Court itself, have shown by their own interpretation of this decretal order, that they did not understand it to mean, as in truth by no just acceptation it could mean, any thing fixed, definite and immutable; for the complainants below excepted to the report of the master, and the court recommitted that report with a view to its alteration. Nor can we regard the reference to the master as in the nature of an arbitration; for if so deemed, the award of that officer must have been binding, unless it could be assailed for fraud, misbehavior, or gross mistake of fact. In truth, the account consented to was the account prayed for by the bill, and in the plain words of the bill, viz., "that the defendants may be decreed to account for and pay over all such gains and profits as have accrued to them from using the said machines since the expiration of said original letters-patent." This language is particularly clear and significant—such gain and profits, and such only, as have actually accrued to the defendants; and we are unable to perceive how, by such an assent, the appellants, the defendants below, could have been concluded against exceptions to any thing and every thing which might have been evolved by that report, however illegal or oppressive.

Considering next the decretal order for the recommitment of the first report, the second report, made in obedience to that order, and final decree founded upon the second report, we are constrained to regard them all as alike irreconcilable with the prayer of the bill, with the just import of the consent decree, and with those principles, which control the action of courts of

equity. In the instructions to the master it will be seen, that he is ordered "to ascertain and report the amount of profits which may have been, or with due diligence and prudence might have been, realized, by the defendants for the work done by them or by their servants by means of the machines described in the complainant's bill, computing the same upon the principles set forth in the opinion of the court, and that the account of such profits commence from the date of the letters-patent issued with the amended specification." The master, in this report made in pursuance of the instructions just adverted to, admits that the account is not constructed upon the basis of actual gains and profits acquired by the defendants by the use of the inhibited machine, but upon the theory of awarding damages to the complainants for an infringement of their monopoly. He admits, too, that the rate of profits assumed by him was conjectural and not governed by the evidence; but he attempts to vindicate the rule he had acted upon by the declaration, that he was not aware that he had "infused into the case any element too unfavorable to the defendants. That by the decision of the court they were trespasers and wrongdoers, in the legal sense of these words, and consequently in a position to be mulcted in damages greater than the profits they have actually received: the rule being not what benefit they have received, but what injury the plaintiffs have sustained." To what rule the master has reference in thus stating the grounds on which his calculations have been based, we do not know. We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts; but upon this principle of chastisement the master admits that he has been led, in contravention of his original view of the testimony, and upon conjecture as to the realty of the facts, and not upon facts themselves, to double the amount which he had stated to be a compensation to the plaintiffs below, and the compensation prayed for by them, and the Circuit Court has, by its decree, pushed this principle to the extreme by adding to this amount the penalty of interest thereon from the time of filing the bill to the date of the final decree.

We think that the second report of the master, and the final decree of the Circuit Court, are warranted neither by the prayer of the bill, by the justice of this case, nor by the well-established rules of equity jurisprudence.

If the appellees, the plaintiffs below, had sustained an injury to their legal rights, the courts of law were open to them for redress, and in those courts they might, according to a practice, which however doubtful in point of essential right, is now too inveterate to be called in question, have claimed not compensation merely, but vengeance, for such injury as they could show that they had sustained. But before a tribunal which refuses

to listen even to any, save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal.

There they will be allowed to claim that which, *ex æquo et bono*, is theirs, and nothing beyond this.

In the present case it would be peculiarly harsh and oppressive, were it consistent with equity practice, to visit upon the appellants any consequences in the nature of a penalty. It is clearly shown that the appellants, in working their machine, were proceeding under an authority equal to that (the same indeed) which bestowed on Woodworth and his assignees the right to their monopoly. The appellants were using a machine patented by the United States to Hutchinson, and might well have supposed that the right derived to them from such a source was regular and legitimate. They were, then, in no correct sense, wanton infringers upon the rights of Woodworth, or of those claiming under him. So soon as the originality and priority of the Woodworth patent was ascertained by law, the appellants consented to be perpetually enjoined from the use of their machine, (the Hutchinson machine,) and to account for whatever gains and profits they had received from its use. Under these circumstances, were the infliction of damages, by way of penalty, ever consistent with the practice of courts of equity, there can be perceived in this case no ground whatever for the exercise of such a power.

On the contrary, those circumstances exhibit, in a clearer light, the propriety of restricting the account, in accordance with the prayer of the bill, to the actual gains and profits of the appellants, (the defendants below,) during the time their machine was in operation and during no other period. We are therefore of the opinion, that the decree of the Circuit Court is erroneous, and should be, as it is hereby, reversed, with costs; and that this cause be remanded to the Circuit Court, with instructions to proceed therein in conformity with the principles ruled in this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

INDEX

OF THE

PRINCIPAL MATTERS.

APPEAL.

1. Where the respondent in a chancery suit in the Circuit Court took two grounds of defence, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, he cannot appeal from this as a part of the decree. *Corning et al.* v. *The Troy Iron and Nail Factory*, 451.
2. The decree was in the respondent's favor, dismissing the bill with costs, and no appeal lies from an opinion expressed by the judge upon the facts of the case, not affecting the decree. *Ibid.*
3. Moreover, the decree complained of has already been argued before this court upon the appeal of the other party, and both grounds of defence decided to be insufficient, and the decree reversed. There is, therefore, no such decree as that appealed from. *Ibid.*
4. Besides, the court below has not acted upon the mandate and entered a final decree; therefore there is no final decree to appeal from. *Ibid.*

ARKANSAS.

See CONSTITUTIONAL LAW.

1. In June, 1844, Congress passed an act, by virtue of which the Circuit Court of the United States for the District of Arkansas, was vested with power to try offences committed within the Indian country. *United States* v. *Dawson*, 467.
2. In July, 1844, it was alleged that a murder was committed in that country. *Ibid.*
3. In April, 1845, an indictment was found by a grand jury, in the Circuit Court of the United States for the District of Arkansas, against a person charged with committing the murder. *Ibid.*
4. In March, 1851, Congress passed an act erecting nine of the Western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a Circuit Court of the United States. *Ibid.*
5. The residue of the State remained a judicial district to be styled the Eastern District of Arkansas. *Ibid.*
6. This act of Congress did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending. *Ibid.*

ATTORNEY.

1. Where a contract was made with an attorney for the prosecution of a claim against Mexico for a stipulated proportion of the amount recovered, and services were rendered, the death of the owner of the claim did not dissolve the contract, but the compensation remained a lien upon the money when recovered. *Wylie* v. *Coxe*, 415.
2. A court of equity can exercise jurisdiction over the case if a more adequate remedy can be thus obtained than in a court of law. *Ibid.*

AWARD.

1. In the settlement of complicated partnership accounts by means of an arbitrator, Bispham was charged with one half of certain custom-house bonds, which Archer, the other partner, was liable to pay, and which obligations had been incurred on partnership account. *Bispham* v. *Price*, 162.

AWARD (*Continued.*)

2. There was a reservation in the settlement as to certain liabilities, but this one was not included. *Ibid.*
3. Archer's estate was afterwards exonerated from the payment of these bonds by a decision of this court, reported in 9 Howard, 83. *Ibid.*
4. A bill cannot be brought by Bispham against Archer's executor, to refund one half of the amount of the bonds, upon the ground that Archer had never paid it. *Ibid.*
5. The reference to an arbitrator was lawful, and his award included many items which were the subject of estimates. It was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of Archer. *Ibid.*
6. No fraud or mistake is charged in the bill; and if an error of judgment occurred, by which the chance was overrated, that the custom-house bonds would be enforced against Archer, this does not constitute a ground for the interference of a court of equity. *Ibid.*
7. The statute of limitations, also, is a bar to the claim. *Ibid.*

BALTIMORE.

For McDONOGH'S WILL, see "WILLS."

BILL OF EXCEPTIONS.

1. In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. *Phelps* v. *Moyer*, 160.
2. The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge who authenticates it, to have been so taken. *Ibid.*
3. Hence, when the verdict was rendered on the 13th December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs. *Ibid.*

BONDS.

1. When the bonds of collectors of the customs begin to be effective, see *Broome* v. *United States*, 143.
2. Where a clerk of a court was sued upon his official bond, and the breach alleged was, that he had surrendered certain goods without taking a bond with good and sufficient securities, and the plea was, that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond,—this plea was sufficient, and a demurrer to it was properly overruled. *Bevins* v. *Ramsey*, 179.

CHANCERY.

1. Where a widow filed a bill in chancery, complaining that, immediately upon the death of her husband, the son of that husband, together with another person, had imposed upon her by false representations, and induced her to part with all her right in her husband's estate for an inadequate price, the evidence in the case did not sustain the allegation. *Eyre et al.* v. *Potter et al.* 42.
2. It is not alleged to be a case of constructive fraud, arising out of the relative position of the parties towards each other, but of actual fraud. *Ibid.*
3. The answers deny the fraud, and are made more emphatic by the complainants having put interrogatories to be answered by the defendants, and the evidence sustains the answers. *Ibid.*
4. It will not do to set up mere inadequacy of price as a cause for annulling a contract made by persons competent and willing to contract; and, besides, there were other considerations acting upon the widow to induce her to make the contract. *Ibid.*
5. The testimony offered to prove the mental imbecility of the widow, should be received with great caution, and is not sufficient. *Ibid.*
6. In the settlement of complicated partnership accounts by means of an arbitrator, Bispham was charged with one half of certain custom-house bonds, which Archer, the other partner, was liable to pay, and which obligations had been incurred on partnership account. *Bispham* v. *Price*, 162.
7. There was a reservation in the settlement as to certain liabilities, but this one was not included. *Ibid.*

CHANCERY (*Continued.*)

8. Archer's estate was afterwards exonerated from the payment of these bonds by a decision of this court, reported in 9 Howard, 83. *Ibid.*
9. A bill cannot be brought by Bispham against Archer's executor, to refund one half of the amount of the bonds, upon the ground that Archer had never paid it. *Ibid.*
10. The reference to an arbitrator was lawful, and his award included many items which were the subject of estimates. It was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of Archer. *Ibid.*
11. No fraud or mistake is charged in the bill; and if an error of judgment occurred, by which the chance was overrated that the custom-house bonds would be enforced against Archer, this does not constitute a ground for the interference of a court of equity. *Ibid.*
12. The statute of limitations, also, is a bar to the claim. *Ibid.*
13. The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter. *Northern Indiana Railroad Company* v. *Michigan Central Railroad Company*, 233.
14. Another company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States for the District of Michigan, against the Michigan Company, praying an injunction to prevent the construction of the road under the above agreement. *Ibid.*
15. The Circuit Court had no jurisdiction over such a case. *Ibid.*
16. The subject-matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo*. *Ibid.*
17. Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present. *Ibid.*
18. Black, as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee, until it came, through mesne assignments, into the hands of Miller and others. *Garrow* v. *Davis*, 272.
19. Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract, and by virtue of a clause contained in it, the contract became void. *Ibid.*
20. In this state of things, Miller employed one Paulk to ascertain from Black the lowest price that he would take for the land, and then to sell to others for the highest price that he could get. *Ibid.*
21. Paulk sold and assigned the contract to Davis for $1,050. *Ibid.*
22. Upon the theory that Paulk and Davis entered into a fraudulent combination, still, Miller and others are not entitled to demand that a court of equity should consider Davis as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor any thing but a good will, which alone was the subject-matter of the fraud, if there was any. *Ibid.*
23. But the evidence shows that this good will did not exist; for Black was not willing to sell to Miller and others for a less price than to any other person. *Ibid.*
24. Although Paulk represented himself to be acting for Miller and others, when in reality he was representing Davis, yet he did not obtain the land at a reduced price thereby; but, on the contrary, at its fair market value. *Ibid.*
25. The charges of fraud in the bill are denied in the answers, and the evidence is not sufficient to sustain the allegations. *Ibid.*
26. Where the respondent in a chancery suit in the Circuit Court took two grounds of defence, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, he cannot appeal from this as a part of the decree. *Corning* v. *Troy Iron and Nail Factory*, 451.
27. The decree was in the respondent's favor, dismissing the bill with costs, and no appeal lies from an opinion expressed by the judge upon the facts of the case, not affecting the decree. *Ibid.*
28. Moreover, the decree complained of has already been argued before this court upon the appeal of the other party, and both grounds of defence decided to be insufficient, and the decree reversed. There is, therefore, no such decree as that appealed from. *Ibid.*

CHANCERY (*Continued.*)

29. Besides, the court below has not acted upon the mandate and entered a final decree; therefore there is no final decree to appeal from. *Ibid.*
30. Where land was sold in New Jersey by order of the Orphans' Court of one of the counties, the conveyance was made not to the actual bidders, but to a person whom they appointed to represent them. *Kearney* v. *Taylor*, 494.
31. Afterwards, the Supreme Court of the State having decided that such a practice was irregular, the legislature passed a law enacting that, upon proof of the absence of fraud, such deeds might be given in evidence. This cured the defect in the title. *Ibid.*
32. The purchasers were a company organized for the purpose of improving the land, and in their purchase there was neither actual or constructive fraud. *Ibid.*
33. The law examined with respect to the bidding of associations at sales by public auction. *Ibid.*
34. In this instance the price obtained was greater than any previous estimate of the value of the property. *Ibid.*
35. There was no constructive fraud because, according to the evidence, the guardian of the minor children and the commissioners who decided that the property ought to be sold, did not become interested in the company until some time after the sale. *Ibid.*
36. The circumstance that these persons became interested in the company before the first half of the purchase-money was due, is not a sufficient reason for setting aside the sale. *Ibid.*
37. According to the preponderance of the evidence, the grave charge that the auctioneer who made the sale was one of the company, is not sustained. *Ibid.*
38. Where the assignors of a patent-right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late. *Livingston* v. *Woodworth*, 546.
39. Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted. *Ibid.*
40. That consent having been given, however, to a decree by which an account should be taken of gains and profits, according to the prayer of the bill, the defendant was not precluded from objecting to the account upon the ground that it went beyond the order. *Ibid.*
41. The report having been recommitted to the master, with instructions to ascertain the amount of profits which might have been realized with due diligence, and the master having framed his report upon the theory of awarding damages, this report, and the order of the court confirming it, were both erroneous. *Ibid.*
42. Under the circumstances of this case, the decree should have been for only the actual gains and profits during the time when the machine was in operation, and during no other period. *Ibid.*

COMMERCIAL LAW.

1. Where a note was given in the District of Columbia on the 11th of March, payable sixty days after date, and notice of its non-payment was given to the indorser on the 15th of May, (being Monday,) the notice was not in time. *Adams* v. *Otterback*, 539.
2. Although evidence was given that since 1846, the bank which was the holder of the note, had changed the preëxisting custom, and had held the paper until the fourth day of grace, giving notice to the indorser on Monday, when the note fell due on Sunday. This was not sufficient to establish an usage. *Ibid.*
3. An usage, to be binding, must be general, as to place, and not confined to a particular bank, and, in order to be obligatory must have been acquiesced in, and become notorious. *Ibid.*

CONSTITUTIONAL LAW.

1. In 1836, the Legislature of Arkansas incorporated a bank, with the usual banking powers of discount, deposit, and circulation, the State being the sole stockholder. *Curran* v. *State of Arkansas*, 304.
2. The bank went into operation, and issued bills in the usual form, but in November, 1839, suspended specie payments. *Ibid.*
3. Afterwards, the legislature passed several acts of the following description:
1843, January, continuing the corporate existence of the bank, and subjecting

CONSTITUTIONAL LAW (*Continued.*)
its affairs to the management of a financial receiver and an attorney, who were directed to cancel certain bonds of the State, held by the bank, for money borrowed by the State, and reduce the State's capital in the bank by an equal amount. *Ibid.*

1843, February, directing the officers to transfer to the State a certain amount of specie, for the purpose of paying the members of the legislature. *Ibid.*

1845, January, requiring the officers to receive the bonds of the State, which had been issued as part of the capital of the bank, in payment for debts due to the bank. *Ibid.*

1845, January, another act, taking away certain specie and par funds for the purpose of paying members of the legislature, and placing other funds to the credit of the State, subject to be drawn out by appropriation. *Ibid.*

1846, vesting in the State all titles to real estate or other property taken by the bank in payment for debts due to it. *Ibid.*

1849, requiring the officers to receive, in payment of debts due to the bank, not only the bonds of the State, which had been issued to constitute the capital of the bank, but those, also, which had been issued to constitute the capital of other banking corporations, which were then insolvent. *Ibid.*

4. Upon general principles of law, a creditor of an insolvent corporation can pursue its assets into the hands of all other persons, except *bonâ fide* creditors or purchasers, and there is nothing in the character of the parties in the present case, or in the laws transferring the property, to make it an exception to the general rule. For the Supreme Court of Arkansas has decided that the State can be sued in this case. *Ibid.*
5. The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, impaired the obligation of this contract. *Ibid.*
6. Nor does the repeal or modification of the charter of the bank by the legislature prevent this conclusion from being drawn. But in this case the charter of the bank has never been repealed. *Ibid.*
7. Besides the contract between the bill-holder and the bank, there was a contract between the bill-holder and the State, which had placed funds in the bank for the purpose of paying its debts, and which had no right to withdraw those funds after the right of a creditor to them had accrued. *Ibid.*
8. The State had no right to pass these laws, under the circumstances, either as a creditor of the bank, or as a trustee taking possession of the real estate for the benefit of all the creditors. *Ibid.*
9. The several laws examined. *Ibid.*
10. The Supreme Court of the State held these laws to be valid, and consequently, the jurisdiction of this court attaches under the 25th section of the judiciary act. *Ibid.*
11. The soil under the public navigable waters of East New Jersey belongs to the State and not to the proprietors. This court so decided in the case of Martin *v.* Waddell, 16 Peters, 367; and the principle covers a case where land has been reclaimed from the water under an act of the legislature. *Den* v. *Jersey Company*, 426.

CONTRACT.
1. Black, as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee, until it came, through mesne assignments, into the hands of Miller and others. *Garrow* v. *Davis*, 272.
2. Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract, and by virtue of a clause contained in it, the contract became void. *Ibid.*
3. In this state of things, Miller employed one Paulk to ascertain from Black the lowest price that he would take for the land, and then to sell to others for the highest price that he could get. *Ibid.*
4. Paulk sold and assigned the contract to Davis for $1,050. *Ibid.*
5. Upon the theory that Paulk and Davis entered into a fraudulent combination, still, Miller and others are not entitled to demand that a court of equity should consider Davis as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor any thing but a good will, which alone was the subject-matter of the fraud, if there was any. *Ibid.*
6. But the evidence shows that this good will did not exist; for Black was not

CONTRACT (*Continued.*)
willing to sell to Miller and others for a less price than to any other person. *Ibid.*

7. Although Paulk represented himself to be acting for Miller and others, when in reality he was representing Davis, yet he did not obtain the land at a reduced price thereby; but, on the contrary, at its fair market value. *Ibid.*
8. The charges of fraud in the bill are denied in the answers, and the evidence is not sufficient to sustain the allegations. *Ibid.*
9. The city of New Orleans sold a lot in the city for a certain sum of money, the payment of which was not exacted, but the interest of it, payable quarterly, remained as a ground rent upon the lot. It was further stipulated, that if two of these payments should be in arrear, the city could proceed judicially for the recovery of possession, with damages, and the vendees were to forfeit their title. *Anderson* v. *Bock*, 323.
10. Six years afterwards, the city conveyed the same lot to another person, who transferred it to an assignee. *Ibid.*
11. The title of the first vendee could not be divested without some judicial proceeding, and the dissolution of the contract could not be inferred merely from the fact that the city had made a second conveyance. *Ibid.*
12. Therefore, the deed to the second vendee, and from him to his assignee, were not, of themselves, evidence to support the plea of prescription. The city, not having resumed its title in the regular mode, could not transfer either a lawful title or possession to its second vendee. *Ibid.*

CUSTOMS, COLLECTORS OF THE.

1. The act of Congress, passed on 2d March, 1799, (1 Stat. at Large, 705,) requires the bond given by a collector of the customs to be approved by the Comptroller of the Treasury. *Broome* v. *United States*, 143.
2. But the date of such approval is not conclusive evidence of the commencement of the period when the bond began to run. On the contrary, it begins to be effective from the moment when the collector and his sureties part with it in the course of transmission. *Ibid.*
3. Hence, where the surety upon the bond of a collector in Florida, died upon the 24th of July, and the approval of the comptroller was not written upon the bond until the 31st of July, it was properly left to the jury to ascertain the time when the collector and his sureties parted with the bond to be sent to Washington; and they were instructed that, before they could find a verdict for the surety, they must be satisfied from the evidence that the bond remained in the hands of the collector, or the sureties, until after the 24th of July. *Ibid.*
4. Collectors are often disbursing officers; and they and their sureties are responsible for the money which a collector receives from his predecessor in office; and also for money transmitted to him by another contractor upon his representation and requisition that it was necessary to defray the current expenses of his office, and advanced for that purpose. *Ibid.*

CUSTOM.
See Usage.

DEED.

1. The city of New Orleans sold a lot in the city for a certain sum of money, the payment of which was not exacted, but the interest of it, payable quarterly, remained as a ground rent upon the lot. It was further stipulated, that if two of these payments should be in arrear, the city could proceed judicially for the recovery of possession, with damages, and the vendees were to forfeit their title. *Anderson* v. *Bock*, 323.
2. Six years afterwards, the city conveyed the same lot to another person, who transferred it to an assignee. *Ibid.*
3. The title of the first vendee could not be divested without some judicial proceeding, and the dissolution of the contract could not be inferred merely from the fact that the city had made a second conveyance. *Ibid.*
4. Therefore, the deed to the second vendee, and from him to his assignee, were not, of themselves, evidence to support the plea of prescription. The city, not having resumed its title in the regular mode, could not transfer either a lawful title or possession to its second vendee. *Ibid.*

EVIDENCE.

1. In a suit brought for an infringement of a patent-right, the defendant ought to be allowed to give in evidence the patent under which he claims, although junior to the plaintiff's patent. *Corning* v. *Burden*, 252.
2. Burden's patent, for "a new and useful machine for rolling puddler's balls and other masses of iron in the manufacture of iron," was a patent for a machine, and not a process, although the language of the claim was equivocal. *Ibid.*
3. The difference explained between a process and a machine. *Ibid.*
4. Hence, it was erroneous for the Circuit Court to exclude evidence offered to show that the practical manner of giving effect to the principle embodied in the machine of the defendants was different from that of Burden, the plaintiff; that the machine of the defendants produced a different mechanical result from the other; and that the mechanical structure and mechanical action of the two machines were different. *Ibid.*
5. Evidence offered as to the opinion of the witness upon the construction of the patent, whether it was for a process or a machine, was properly rejected. *Ibid.*
6. A statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State. *Murray* v. *Gibson*, 421.
7. This statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defence in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained. *Ibid.*

EXECUTION.

1. Three judgments were entered up against a debtor on the same day. *Rockhill* v. *Hanna*, 189.
2. One of the creditors issued a *capias ad satisfaciendum* in February, and the other two issued writs of *fieri facias* upon the same day, in the ensuing month of March. *Ibid.*
3. Under the *ca. sa.* the defendant was taken and imprisoned, until discharged by due process of law. The plaintiff then obtained leave to issue a *fi. fa.*, which was levied upon the same land previously levied upon. The marshal sold the property under all the writs. *Ibid.*
4. The executions of the first *fi. fa.* creditors are entitled to be first satisfied out of the proceeds of sale. *Ibid.*
5. Each creditor having elected a different remedy, is entitled to a precedence in that which he has elected. *Ibid.*
6. Besides, the *ca. sa.* creditor, by imprisoning the debtor, postponed his lien, because it may happen, under certain circumstances, that the judgment is forever extinguished. If these do not happen, his lien is not restored as against creditors who have obtained a precedence during such suspension. *Ibid.*
7. A plaintiff in a judgment, having the defendant in execution under a *ca. sa.*, entered into an agreement with him that the plaintiff should, without prejudice to his rights and remedies against the defendant, permit him to be forthwith discharged from custody under the process, and that the defendant should go to the next session of the Circuit Court of the United States, and on the law side of that court make up an issue with the plaintiff, to try the question whether the defendant was possessed of the means, in or out of a certain marriage settlement, of satisfying the judgment against him. *Magniac* v. *Thompson*, 281.
8. The debtor was released; the issue made up; the cause tried in the Circuit Court; brought to this court, and reported in 7 Peters, 348. *Ibid.*
9. By suing out the *ca. sa.*, taking the defendant into custody, entering into the arrangement above mentioned, and discharging the defendant from custody, the plaintiff, in all legal intendment, admitted satisfaction of his demand, released the defendant from all liability therefor, and destroyed every effect of his judgment as the foundation of legal rights. *Ibid.*
10. In such a state of things, a court of equity will not interfere at the instance of the plaintiff. *Ibid.*
11. The allegation of fraud in the marriage contract is not sustained by the evidence; nor was the refusal of the defendant to apply the property which ac-

EVIDENCE (*Continued.*)
crued to him upon the death of his wife, to the discharge of the debt, a violation of the agreement under which he was released. *Ibid.*
12. The averment in the bill, that the rights of the plaintiff under the judgment remained unimpaired, is incompatible with a right to resort to a court of equity. *Ibid.*

FRAUD.
See CHANCERY.

INTERVENTION.
A person cannot intervene here who was no party to the suit in the court below. *United States* v. *Patterson*, 10.

JUDGMENT.
1. A plaintiff in a judgment, having the defendant in execution under a *ca. sa.*, entered into an agreement with him that the plaintiff should, without prejudice to his rights and remedies against the defendant, permit him to be forthwith discharged from custody under the process, and that the defendant should go to the next session of the Circuit Court of the United States, and on the law side of that court make up an issue with the plaintiff, to try the question whether the defendant was possessed of the means, in or out of a certain marriage settlement, of satisfying the judgment against him. *Magniac* v. *Thompson*, 281.
2. The debtor was released; the issue made up; the cause tried in the Circuit Court; brought to this court, and reported in 7 Peters, 348. *Ibid.*
3. By suing out the *ca. sa.*, taking the defendant into custody, entering into the arrangement above mentioned, and discharging the defendant from custody, the plaintiff, in all legal intendment, admitted satisfaction of his demand, released the defendant from all liability therefor, and destroyed every effect of his judgment as the foundation of legal rights. *Ibid.*
4. In such a state of things, a court of equity will not interfere at the instance of the plaintiff. *Ibid.*
5. The allegation of fraud in the marriage contract is not sustained by the evidence; nor was the refusal of the defendant to apply the property which accrued to him upon the death of his wife, to the discharge of the debt, a violation of the agreement under which he was released. *Ibid.*
6. The averment in the bill, that the rights of the plaintiff under the judgment remained unimpaired, is incompatible with a right to resort to a court of equity. *Ibid.*

JURISDICTION.
1. Where a citizen of New Jersey was sued in a State court in New York, and filed his petition to remove the case into the Circuit Court of the United States, offering a bond with surety, the amount claimed in the declaration being one thousand dollars, it became the duty of the State court to accept the surety, and proceed no further in the cause. *Kanouse* v. *Martin*, 198.
2. Consequently, it was erroneous to allow the plaintiff to amend the record, and reduce his claim to four hundred and ninety-nine dollars. *Ibid.*
3. The case having gone on to judgment, and been carried by writ of error to the Superior Court, without the petition for removal into the Circuit Court of the United States, it was the duty of the Superior Court to go behind the technical record, and inquire whether or not the judgment of the court below was erroneous. *Ibid.*
4. The defendant was not bound to plead to the jurisdiction of the court below; such a step would have been inconsistent with his right, that all proceedings should cease when his petition for removal was filed. *Ibid.*
5. The Superior Court being the highest court to which the case could be carried, a writ of error lies to examine its judgment, under the 25th section of the judiciary act. *Ibid.*
6. The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter. *Northern Indiana Railroad Company* v. *Michigan Central Railroad Company*, 233.
7. Another company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill

JURISDICTION (*Continued.*)
in the Circuit Court of the United States for the District of Michigan, against the Michigan Company, praying an injunction to prevent the construction of the road under the above agreement. *Ibid.*

8. The Circuit Court had no jurisdiction over such a case. *Ibid.*
9. The subject-matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo.* *Ibid.*
10. Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present. *Ibid.*
11. In 1836, the Legislature of Arkansas incorporated a bank, with the usual banking powers of discount, deposit, and circulation, the State being the sole stockholder. *Curran* v. *State of Arkansas*, 304.
12. The bank went into operation, and issued bills in the usual form, but in November, 1839, suspended specie payments. *Ibid.*
13. Afterwards, the legislature passed several acts of the following description:
    1843, January, continuing the corporate existence of the bank, and subjecting its affairs to the management of a financial receiver and an attorney, who were directed to cancel certain bonds of the State, held by the bank, for money borrowed by the State, and reduce the State's capital in the bank by an equal amount. *Ibid.*
    1843, February, directing the officers to transfer to the State a certain amount of specie, for the purpose of paying the members of the legislature. *Ibid.*
    1845, January, requiring the officers to receive the bonds of the State, which had been issued as part of the capital of the bank, in payment for debts due to the bank. *Ibid.*
    1845, January, another act, taking away certain specie and par funds for the purpose of paying members of the legislature, and placing other funds to the credit of the State, subject to be drawn out by appropriation. *Ibid.*
    1846, vesting in the State all titles to real estate or other property taken by the bank in payment for debts due to it. *Ibid.*
    1849, requiring the officers to receive, in payment of debts due to the bank, not only the bonds of the State, which had been issued to constitute the capital of the bank, but those, also, which had been issued to constitute the capital of other banking corporations, which were then insolvent. *Ibid.*
14. Upon general principles of law, a creditor of an insolvent corporation can pursue its assets into the hands of all other persons, except *bonâ fide* creditors or purchasers, and there is nothing in the character of the parties in the present case, or in the laws transferring the property, to make it an exception to the general rule. For the Supreme Court of Arkansas has decided that the State can be sued in this case. *Ibid.*
15. The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, impaired the obligation of this contract. *Ibid.*
16. Nor does the repeal or modification of the charter of the bank by the legislature prevent this conclusion from being drawn. But in this case the charter of the bank has never been repealed. *Ibid.*
17. Besides the contract between the bill-holder and the bank, there was a contract between the bill-holder and the State, which had placed funds in the bank for the purpose of paying its debts, and which had no right to withdraw those funds after the right of a creditor to them had accrued. *Ibid.*
18. The State had no right to pass these laws, under the circumstances, either as a creditor of the bank, or as a trustee taking possession of the real estate for the benefit of all the creditors. *Ibid.*
19. The several laws examined. *Ibid.*
20. The Supreme Court of the State held these laws to be valid, and consequently, the jurisdiction of this court attaches under the 25th section of the judiciary act. *Ibid.*
21. Where a case was decided in a State court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the 25th section of the judiciary act. *Walworth* v. *Kneeland*, 348.
22. The State court decided against him upon the ground that the opposite party

JURISDICTION (*Continued.*)
was innocent of all design to contravene the laws of the United States. *Ibid.*

23. But even if the State court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case. *Ibid.*
24. Where a contract was made with an attorney for the prosecution of a claim against Mexico for a stipulated proportion of the amount recovered, and services were rendered, the death of the owner of the claim did not dissolve the contract, but the compensation remained a lien upon the money when recovered. *Wylie* v. *Coxe*, 416.
25. A court of equity can exercise jurisdiction over the case if a more adequate remedy can be thus obtained than in a court of law. *Ibid.*
26. The want of jurisdiction should have been alleged in the court below, either by plea or answer, if the defendant intended to avail himself of it. It is too late to urge it in an appellate court, unless it appears on the face of the proceedings. *Ibid.*
27. A person was sued in the territorial court of Florida. *Carter* v. *Bennett*, 354.
28. After the admission of Florida as a State, the case was transferred to a State court. *Ibid.*
29. The defendant appeared, and pleaded the general issue. *Ibid.*
30. The verdict was given against him. *Ibid.*
31. He then moved in arrest of judgment, upon the ground that the case ought to have been transferred to the District Court of the United States, instead of a State court. *Ibid.*
32. The motion was overruled, and judgment entered up against him. *Ibid.*
33. Upon an appeal to the Supreme Court of Florida, this judgment was affirmed. *Ibid.*
34. This court has no jurisdiction under the 25th section of the judiciary act, to review that decision. *Ibid.*
35. What the State court decided was the motion in arrest of judgment, where the record only is examined, and no new evidence admitted. There was nothing in the pleadings to show that the defendant was a citizen of Georgia, and no defect of jurisdiction was apparent. *Ibid.*
36. The defendant might have pleaded in abatement, that he was a citizen of Georgia, but not having done so, it was too late to introduce the matter upon a motion in arrest of judgment. *Ibid.*
37. As it does not appear, therefore, that the Supreme Court of the State must have decided adversely to the party now claiming the interposition of this court, and decided so upon the construction of an act of Congress, the writ of error must be dismissed for want of jurisdiction. *Ibid.*
38. In June, 1844, Congress passed an act, by virtue of which the Circuit Court of the United States for the District of Arkansas, was vested with power to try offences committed within the Indian country. *United States* v. *Dawson*, 467.
39. In July, 1844, it was alleged that a murder was committed in that country. *Ibid.*
40. In April, 1845, an indictment was found by a grand jury, in the Circuit Court of the United States for the District of Arkansas, against a person charged with committing the murder. *Ibid.*
41. In March, 1851, Congress passed an act erecting nine of the Western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a Circuit Court of the United States. *Ibid.*
42. The residue of the State remained a judicial district to be styled the Eastern District of Arkansas. *Ibid.*
43. This act of Congress did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending. *Ibid.*

LANDS — PUBLIC.

1. Two grants of land in the country known as the neutral territory, lying between the Sabine River and the Arroyo Hondo, confirmed, namely, one for La Nana, granted in 1798, and the other for Los Ormegas granted in 1795. *United States* v. *Davenport's Heirs*, 1.

LANDS—PUBLIC (*Continued.*)

2. These grants were made by the commandant of the Spanish post of Nacogdoches, who at that time had power to make inchoate grants. *Ibid.*
3. In both cases, the grants had defined metes and bounds, and the grantees were placed in possession by a public officer, and exercised many acts of ownership. *Ibid.*
4. The evidence of the grants was copies made by the commandant of the post, and also copies made by the land-office in Texas. These copies, under the circumstances, are sufficient. *Ibid.*
5. At the date of these grants, it was necessary to obtain the ratification of the civil and military governor before the title became perfected. This not having been done in the present case, the title was imperfect, although the petition alleges that it was perfect, and the District Court had jurisdiction under the acts of 1824 and 1844. *Ibid.*
6. But the District Court ought not to have decreed that floats should issue where the United States had sold portions of the land, because these vendees were not made parties to the proceedings. *Ibid.*
7. A claimant of a share of the grants spoken of in the preceding case, having failed to produce evidence of the right of his grantor to convey to him, cannot have a decree in his favor. *United States* v. *Patterson*, 10.
8. A person cannot intervene here who was no party to the suit in the District Court. And even if the practice of this court sanctioned such intervention, there is nothing to show his right to do so in this case. *Ibid.*
9. The heirs of D'Auterieve claimed a tract of land near the river Mississippi, upon two grounds, viz. 1st, Under a grant to Duvernay, by the Western or Mississippi Company, in 1717, and a purchase from him by D'Auterieve, the ancestor, accompanied by the possession and occupation of the tract from 1717 to 1780: and 2d, Under an order of survey of Unzaga, Governor of the province of Louisiana, in 1772, an actual survey made, and a confirmation thereof by the governor. *United States* v. *D'Auterieve*, 14.
10. With respect to the first ground of title, there is no record of the grant to Duvernay, nor any evidence of its extent. It is therefore without boundaries or location; and, if free from these objections, it would be a perfect title, and therefore not within the jurisdiction of the District Court, under the acts of 1824 and 1844. *Ibid.*
11. With respect to the second ground of title, if the proceedings of Unzaga be regarded as a confirmation of the old French grant, then the title would become a complete one, and beyond the jurisdiction of the District Court. *Ibid.*
12. If they are regarded as an incipient step in the derivation of a title under the Spanish government, then the survey did not extend to the back lands, which are the property in question, but only included the front upon the river, which was surrendered to the governor in 1780. *Ibid.*
13. Neither the upper or lower side line, nor the field notes, justify the opinion that the survey included the back lands. A letter addressed to Unzaga by the surveyor is so ambiguous, that it must be controlled by the field notes and map. *Ibid.*
14. The neglect of the parties to set up a claim, from 1780 to 1821, and the acts of the Spanish government, in granting concessions within the limits now claimed, furnish a presumption of the belief of the parties, that the whole property was surrendered in 1780. *Ibid.*
15. Under the laws of 1824 and 1844, relating to the confirmation of land titles, where a claimant filed his petition, alleging a patent under the French government of Louisiana, confirmed by Congress, and claiming floats for land which had been sold, within his grant, by the United States to other persons, the mere circumstance, that the court had jurisdiction to decree floats in cases of incomplete titles, did not give it jurisdiction to decree floats in cases of complete titles. *United States* v. *Roselius et al.* 31.
16. This title having been confirmed by Congress, without any allowance for the sales of lands included within it, the confirmation must be considered as a compromise accepted by the other party who thereby relinquished his claim to floats. *Ibid.*
17. If the title be considered as a perfect title, this court has already adjudged (9 Howard, 143) that the District Court had no jurisdiction over such titles. *Ibid.*
18. The claimant in this case prayed that the side lines of his tract might be widened

LANDS—PUBLIC (*Continued.*)
by diverging instead of parallel lines; but this court, in this same case, formerly (3 Howard, 693) recognized the validity of a decree of the Supreme Court of Louisiana, which decided that the lines should be parallel, and not divergent. The District Court of the United States ought to have conformed its judgment to this opinion. *Ibid.*

19. Moreover, the claimant in this case did not state in his petition what lands had been granted by the United States, nor to whom, nor did he make the grantees parties; all of which ought to have been done before he could have been entitled to floats. *Ibid.*

20. Where a party claimed title to a tract of land in Louisiana, under a judicial sale in 1760, and alleged that he and those under whom he claimed, had been in peaceable possession ever since the sale, a case of perfect title is presented which is not within the jurisdiction of the District Court, under the acts of 1824 and 1844. *Ibid.*

21. Upon the sufficiency of the evidence to sustain the title, no opinion is expressed. *Ibid.*

22. A grant of land in Louisiana, by the French authorities, in 1764, is void. The province was ceded to Spain in 1762. (See 10 Howard, 610.) *United States* v. *Ducros*, 38.

23. In 1793, certain legal proceedings were had before Baron de Carondelet, in his judicial capacity, wherein the property now claimed is described as part of the estate of the grantor of the present claimant. But this did not amount to a confirmation of the title in his political character; and if it did, the title would be a perfect one, and beyond the jurisdiction of the District Court, under the acts of 1824 and 1844. *Ibid.*

24. By two acts, passed in 1820 and 1823, Congress granted a lot in the village of Peoria, in the State of Illinois, to each settler who "had not heretofore received a confirmation of claim or donation of any tract of land or village lot from the United States. *Forsyth* v. *Reynolds*, 358.

25. Lands granted to settlers in Michigan, prior to the surrender of the western posts by the British government, and which grants were made out to carry out Jay's treaty in 1794, were not donations so as to exclude a settler in Peoria from the benefit of the two acts of Congress above mentioned. *Ibid.*

26. In 1841, Congress passed an act (5 Stat. at Large, 455) declaring that there shall be granted to each State, &c., (Louisiana being one,) five hundred thousand acres of land. *Foley* v. *Harrison*, 433.

27. This act did not convey the fee to any lands whatever; but left the land system of the United States in full operation as to regulation of titles, so as to prevent conflicting entries. *Ibid.*

28. Hence, where a plaintiff claimed under a patent from the State of Louisiana, and entries only in the United States office; and the defendant claimed under patents from the United States, the title of the latter is the better in a petitory action. *Ibid.*

29. The defendant has also the superior equity; because his entries were prior in time to those of the plaintiff, and the decision of a board, consisting of the Secretary of the Treasury, the Attorney-General, and the Commissioner of the Land Office, to whom the matter had been referred by an act of Congress, was in favor of the defendant. *Ibid.*

30. The several acts of Congress, passed in relation to claims to land in Missouri, under Spanish concessions, reserved such lands from sale from time to time. But there was an intermission of such legislation from the 29th of May, 1829, to the 9th of July, 1832; and, during this interval, lands so claimed were upon the footing of other public lands, as to sale, entry, and so forth. *Delauriere* v. *Emison*, 525.

31. By an act of the 6th of March, 1820, (3 Stat. at Large, 545,) Congress gave a certain amount of land to the State of Missouri, to be selected by the legislature thereof, on or before the 1st of January, 1825; and by another act, passed on the 3d of March, 1831, (4 Stat. at Large, 492,) the legislature were authorized to sell this land. *Ibid.*

32. Before the 1st of January, 1825, the legislature selected certain lands, which were then claimed under Spanish concessions, and reserved from sale under the acts of Congress first mentioned. *Ibid.*

33. In November, 1831, the land so selected was sold by the legislature, in conformity with the act of Congress of the preceding March. *Ibid.*

LANDS — PUBLIC (*Continued.*)

24. This sale having been made in the interval between May, 1829, and July, 1832, conveyed a valid title, although the claimant to the same land was subsequently confirmed in his title by Congress, in 1836. *Ibid.*

LEASE.

When broken, the lessor must recover possession and regain title by a judicial proceeding. *Anderson* v. *Bock*, 323.

LOUISIANA.

1. McDonogh, a citizen of Louisiana, made a will, in which, after bequeathing certain legacies not involved in the present controversy, he gave, willed, and bequeathed all the rest, residue, and remainder of his property to the corporations of the cities of New Orleans and Baltimore forever, one half to each, for the education of the poor in those cities. *McDonogh's Executors* v. *Murdock*, 367.
2. The estate was to be converted into real property, and managed by six agents, three to be appointed by each city. *Ibid.*
3. No alienation of this general estate was ever to take place, under penalty of forfeiture, when the States of Maryland and Louisiana were to become his residuary devisees for the purpose of educating the poor of those States. *Ibid.*
4. Although there is a complexity in the plan by which the testator proposed to effect his purpose, yet his intention is clear to make the cities his legatees; and his directions about the agency are merely subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity. *Ibid.*
5. The city of New Orleans, being a corporation established by law, has a right to receive a legacy for the purpose of exercising the powers which have been granted to it, and amongst these powers and duties is that of establishing public schools for gratuitous education. *Ibid.*
6. The civil and English law upon this point compared:
The dispositions of the property in this will are not "substitutions, or *fidei commissa*," which are forbidden by the Louisiana code. *Ibid.*
7. The meaning of those terms explained and defined:
The testator was authorized to define the use and destination of his legacy. *Ibid.*
8. The conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, do not invalidate the bequest, because the Louisiana Code provides that "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals, are reputed not written." *Ibid.*
9. The difference between the civil and common law, upon this point, examined:
The city of Baltimore is entitled and empowered to receive this legacy under the laws of Maryland; and the laws of Louisiana do not forbid it. The article in the code of the latter State, which says that "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State," does not most probably apply to the citizens or corporations of the States of the Union. Moreover, the laws of Maryland do not prohibit similar dispositions in favor of a citizen of Louisiana. *Ibid.*
10. The destination of the legacy to public uses in the city of Baltimore, does not affect the valid operation of the bequest in Louisiana. *Ibid.*
11. The cities of New Orleans and Baltimore, having the annuities charged upon their legacies, would be benefited by the invalidity of these legacies. Upon the question of their validity, this court expresses no opinion. But the parties to this suit, viz. the heirs at law, could not claim them. *Ibid.*
12. In case of the failure of the devise to the cities, the limitation over to the States of Maryland and Louisiana would have been operative. *Ibid.*

MISSISSIPPI.

See Statutes, Construction of.

NEW JERSEY.

The soil under the public navigable waters of East New Jersey belongs to the State and not to the proprietors. This court so decided in the case of Martin

NEW JERSEY (*Continued.*)
v. Waddell, 16 Peters, 367; and the principle covers a case where land has been reclaimed from the water under an act of the legislature. *Den* v. *Jersey Company*, 426.

NEW ORLEANS.
For McDonogh's Will see "Wills."

PATENTS FOR LAND.
1. In 1841, Congress passed an act (5 Stat. at Large, 455) declaring that there shall be granted to each State, &c., (Louisiana being one,) five hundred thousand acres of land. *Foley* v. *Harrison*, 433.
2. This act did not convey the fee to any lands whatever; but left the land system of the United States in full operation as to regulation of titles, so as to prevent conflicting entries. *Ibid.*
3. Hence, where a plaintiff claimed under a patent from the State of Louisiana, and entries only in the United States office; and the defendant claimed under patents from the United States, the title of the latter is the better in a petitory action. *Ibid.*
4. The defendant has also the superior equity; because his entries were prior in time to those of the plaintiff, and the decision of a board, consisting of the Secretary of the Treasury, the Attorney-General, and the Commissioner of the Land Office, to whom the matter had been referred by an act of Congress, was in favor of the defendant. *Ibid.*

PATENT-RIGHTS.
1. Morse was the first and original inventor of the electro-magnetic telegraph, for which a patent was issued to him in 1840, and reissued in 1848. His invention was prior to that of Steinheil of Munich, or Wheatstone or Davy of England. *O'Reilly et al.* v. *Morse et al.* 63.
2. Their respective dates compared. *Ibid.*
3. But even if one of these European inventors had preceded him for a short time, this circumstance would not have invalidated his patent. A previous discovery in a foreign country does not render a patent void, unless such discovery, or some substantial part of it, had been before patented or described in a printed publication. And these inventions are not shown to have been so. *Ibid.*
4. Besides, there is a substantial and essential difference between Morse's and theirs, that of Morse being decidedly superior. *Ibid.*
5. An inventor does not lose his right to a patent because he has made inquiries or sought information from other persons. If a combination of different elements be used, the inventors may confer with men, as well as consult books, to obtain this various knowledge. *Ibid.*
6. There is nothing in the additional specifications in the reissued patent of 1848, inconsistent with those of the patent of 1840. *Ibid.*
7. The first seven inventions, set forth in the specifications of his claims, are not subject to exception. The eighth is too broad, and covers too much ground. It is this: "I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specifications and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for making or printing intelligible characters, signs, or letters, at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer." *Ibid.*
8. The case of Neilson et al. *v.* Harford et al., in the English Exchequer Reports, examined; and also the American decisions. The acts of Congress do not justify a claim so extensive. *Ibid.*
9. But, although the patent is illegal and void, so far as respects the eighth claim, yet the patentee is within the act of Congress, which gives him a right to disclaim, and thus save the portion to which he is entitled. No disclaimer having been entered before the institution of this suit, the patentee is not entitled to costs. *Ibid.*
10. In 1846, Morse obtained a second patent for the local circuits, which was reissued in 1848. It is no objection to this patent, that it was embraced in the eighth claim of the former one, because that eighth claim was void. Nor is it

PATENT-RIGHTS (*Continued.*)

an objection to it, that it was an improvement upon the former patent, because a patentee has a right to improve his own invention. *Ibid.*

11. This new patent and its reissue were properly issued. The improvement was new, and not embraced in the former specification. *Ibid.*
12. These two patents of 1848, being good, with the exception of the eighth claim, are substantially infringed upon by O'Reilly's telegraph, which uses the same means, both upon the main line and upon the local circuits. *Ibid.*
13. The preceding case of O'Reilly and Morse having settled the principles involved in the controversy between them, this court declines to hear an argument upon technical points of pleading in a branch of the case coming from another State. *Smith* v. *Ely*, 137.
14. The case is remanded to the Circuit Court. *Ibid.*
15. A machine for planing boards, and reducing them to an equal thickness throughout, which was patented by Norcross, decided not to be an infringement of Woodworth's planing machine, for which a patent was obtained in 1828, reissued in 1845. *Brookes et al.* v. *Fiske*, 212.
16. The operation of both machines explained. *Ibid.*
17. In a suit brought for an infringement of a patent-right, the defendant ought to be allowed to give in evidence the patent under which he claims, although junior to the plaintiff's patent. *Corning* v. *Burden*, 252.
18. Burden's patent, for "a new and useful machine for rolling puddler's balls and other masses of iron in the manufacture of iron," was a patent for a machine, and not a process, although the language of the claim was equivocal. *Ibid.*
19. The difference explained between a process and a machine. *Ibid.*
20. Hence, it was erroneous for the Circuit Court to exclude evidence offered to show that the practical manner of giving effect to the principle embodied in the machine of the defendants was different from that of Burden, the plaintiff; that the machine of the defendants produced a different mechanical result from the other; and that the mechanical structure and mechanical action of the two machines were different. *Ibid.*
21. Evidence offered as to the opinion of the witness upon the construction of the patent, whether it was for a process or a machine, was properly rejected. *Ibid.*
22. A patent was taken out for making the body of a burden railroad car of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached. *Winans* v. *Denmead*, 330.
23. The claim was this: "What I claim as my invention, and desire to secure by letters-patent, is, making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the centre of gravity of the load, without diminishing the capacity of the car, as described. I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame and the draught bar, through the body of the car substantially described." *Ibid.*
24. This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result. *Ibid.*
25. Hence, where, in a suit brought by the patentee against persons who had constructed octagonal and pyramidal cars, the District Judge ruled that the patent was good for conical bodies, but not for rectilinear bodies; this ruling was erroneous. *Ibid.*
26. The structure, the mode of operation, and the result attained, were the same in both, and the specification claimed in the patent covered the rectilinear cars. With this explanation of the patent, it should have been left to the jury to decide the question of infringement as a question of fact. *Ibid.*
27. Where the assignors of a patent-right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in this court, and after a

PATENT-RIGHTS (*Continued.*)
final decree, an objection arising from a misjoinder of parties, the objection comes too late. *Livingston* v. *Woodworth*, 546.
28. Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted. *Ibid.*
29. That consent having been given, however, to a decree by which an account should be taken of gains and profits, according to the prayer of the bill, the defendant was not precluded from objecting to the account upon the ground that it went beyond the order. *Ibid.*
30. The report having been recommitted to the master, with instructions to ascertain the amount of profits which might have been realized with due diligence, and the master having framed his report upon the theory of awarding damages, this report, and the order of the court confirming it, were both erroneous. *Ibid.*
31. Under the circumstances of this case, the decree should have been for only the actual gains and profits during the time when the machine was in operation, and during no other period. *Ibid.*

PLANING-MACHINE.
1. A machine for planing boards, and reducing them to an equal thickness throughout, which was patented by Norcross, decided not to be an infringement of Woodworth's planing machine, for which a patent was obtained in 1828, reissued in 1845. *Brooks* v. *Fiske*, 212.
2. The operation of both machines explained. *Ibid.*

PLEAS AND PLEADINGS.
1. Where a clerk of a court was sued upon his official bond, and the breach alleged was, that he had surrendered certain goods without taking a bond with good and sufficient securities, and the plea was, that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond,—this plea was sufficient, and a demurrer to it was properly overruled. *Bevins* v. *Ramsey*, 179.
2. Where a citizen of New Jersey was sued in a State court in New York, and filed his petition to remove the case into the Circuit Court of the United States, offering a bond with surety, the amount claimed in the declaration being one thousand dollars, it became the duty of the State court to accept the surety, and proceed no further in the cause. *Kanouse* v. *Martin*, 198.
3. Consequently, it was erroneous to allow the plaintiff to amend the record, and reduce his claim to four hundred and ninety-nine dollars. *Ibid.*
4. The case having gone on to judgment, and been carried by writ of error to the Superior Court, without the petition for removal into the Circuit Court of the United States, it was the duty of the Superior Court to go behind the technical record, and inquire whether or not the judgment of the court below was erroneous. *Ibid.*
5. The defendant was not bound to plead to the jurisdiction of the court below; such a step would have been inconsistent with his right, that all proceedings should cease when his petition for removal was filed. *Ibid.*
6. The Superior Court being the highest court to which the case could be carried, a writ of error lies to examine its judgment, under the 25th section of the judiciary act. *Ibid.*
7. Prescription cannot be pleaded, where the assignor of the party who offers to plead it was a lessor, and had not regained possession, by a judicial proceeding, of the property which had been previously leased. *Anderson* v. *Bock*, 323.
8. A statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State. *Murray* v. *Gibson*, 421.
9. This statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defence in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained. *Ibid.*

PRACTICE.
See APPEAL and CHANCERY.

PRACTICE (*Continued.*)

1. The preceding case of O'Reilly and Morse having settled the principles involved in the controversy between them, this court declines to hear an argument upon technical points of pleading in a branch of the case coming from another State. *Smith* v. *Ely*, 137.
2. The case is remanded to the Circuit Court. *Ibid.*
3. In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. *Phelps* v. *Moyer*, 160.
4. The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge who authenticates it, to have been so taken. *Ibid.*
5. Hence, when the verdict was rendered on the 13th December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs. *Ibid.*
6. Three judgments were entered up against a debtor on the same day. *Rockhill* v. *Hanna*, 189.
7. One of the creditors issued a *capias ad satisfaciendum* in February, and the other two issued writs of *fieri facias* upon the same day, in the ensuing month of March. *Ibid.*
8. Under the *ca. sa.* the defendant was taken and imprisoned, until discharged by due process of law. The plaintiff then obtained leave to issue a *fi. fa.*, which was levied upon the same land previously levied upon. The marshal sold the property under all the writs. *Ibid.*
9. The executions of the first *fi. fa.* creditors are entitled to be first satisfied out of the proceeds of sale. *Ibid.*
10. Each creditor having elected a different remedy, is entitled to a precedence in that which he has elected. *Ibid.*
11. Besides, the *ca. sa.* creditor, by imprisoning the debtor, postponed his lien, because it may happen, under certain circumstances, that the judgment is forever extinguished. If these do not happen, his lien is not restored as against creditors who have obtained a precedence during such suspension. *Ibid.*
12. The Circuit Court having instructed the jury that, in its opinion, and the written proofs and law of the case, the plea of prescription must prevail, and the written proofs not being in the record, this court cannot test the accuracy of its conclusion. *Anderson* v. *Bock*, 323.
13. Where the assignors of a patent-right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late. *Livingston* v. *Woodworth*, 546.

RAILROADS.

1. A patent was taken out for making the body of a burden railroad car of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached. *Winans* v. *Denmead*, 330.
2. The claim was this: "What I claim as my invention, and desire to secure by letters-patent, is, making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the centre of gravity of the load, without diminishing the capacity of the car, as described. I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame and the draught bar, through the body of the car substantially described." *Ibid.*
3. This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result. *Ibid.*

RAILROADS (*Continued.*)

4. Hence, where, in a suit brought by the patentee against persons who had constructed octagonal and pyramidal cars, the District Judge ruled that the patent was good for conical bodies, but not for rectilinear bodies; this ruling was erroneous. *Ibid.*
5. The structure, the mode of operation, and the result attained, were the same in both, and the specification claimed in the patent covered the rectilinear cars. With this explanation of the patent, it should have been left to the jury to decide the question of infringement as a question of fact. *Ibid.*

STATUTES, CONSTRUCTION OF.

1. A statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State. *Murray* v. *Gibson*, 421.
2. This statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defence, in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad, and a demurrer to it sustained. *Ibid.*

SURETIES.

1. The act of Congress, passed on 2d March, 1799, (1 Stat. at Large, 705,) requires the bond given by a collector of the customs to be approved by the Comptroller of the Treasury. *Broome* v. *United States*, 143.
2. But the date of such approval is not conclusive evidence of the commencement of the period when the bond began to run. On the contrary, it begins to be effective from the moment when the collector and his sureties part with it in the course of transmission. *Ibid.*
3. Hence, where the surety upon the bond of a collector in Florida, died upon the 24th of July, and the approval of the comptroller was not written upon the bond until the 31st of July, it was properly left to the jury to ascertain the time when the collector and his sureties parted with the bond to be sent to Washington; and they were instructed that, before they could find a verdict for the surety, they must be satisfied from the evidence that the bond remained in the hands of the collector, or the sureties, until after the 24th of July. *Ibid.*
4. Collectors are often disbursing officers; and they and their sureties are responsible for the money which a collector receives from his predecessor in office; and also for money transmitted to him by another colleector upon his representation and requisition that it was necessary to defray the current expenses of his office, and advanced for that purpose. *Ibid.*

TELEGRAPH.

See PATENT-RIGHTS.

TREATY.

1. By two acts, passed in 1820 and 1823, Congress granted a lot in the village of Peoria, in the State of Illinois, to each settler who "had not heretofore received a confirmation of claim or donation of any tract of land or village lot from the United States. *Forsyth* v. *Reynolds*, 358.
2. Lands granted to settlers in Michigan, prior to the surrender of the western posts by the British government, and which grants were made out to carry out Jay's treaty in 1794, were not donations so as to exclude a settler in Peoria from the benefit of the two acts of Congress above mentioned. *Ibid.*

USAGE.

1. Where a note was given in the District of Columbia on the 11th of March, payable sixty days after date, and notice of its non-payment was given to the indorser on the 15th of May, (being Monday,) the notice was not in time. *Adams* v. *Otterback*, 539.
2. Although evidence was given that since 1846, the bank which was the holder of the note, had changed the preëxisting custom, and had held the paper until the fourth day of grace, giving notice to the indorser on Monday, when the note fell due on Sunday. This was not sufficient to establish an usage. *Ibid.*
3. An usage, to be binding, must be general, as to place, and not confined to a particular bank, and, in order to be obligatory must have been acquiesced in, and become notorious. *Ibid.*

WILLS.

1. McDonogh, a citizen of Louisiana, made a will, in which, after bequeathing certain legacies not involved in the present controversy, he gave, willed, and bequeathed all the rest, residue, and remainder of his property to the corporations of the cities of New Orleans and Baltimore forever, one half to each, for the education of the poor in those cities. *McDonogh's Executors* v. *Murdoch*, 367.
2. The estate was to be converted into real property, and managed by six agents, three to be appointed by each city. *Ibid.*
3. No alienation of this general estate was ever to take place, under penalty of forfeiture, when the States of Maryland and Louisiana were to become his residuary devisees for the purpose of educating the poor of those States. *Ibid.*
4. Although there is a complexity in the plan by which the testator proposed to effect his purpose, yet his intention is clear to make the cities his legatees; and his directions about the agency are merely subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity. *Ibid.*
5. The city of New Orleans, being a corporation established by law, has a right to receive a legacy for the purpose of exercising the powers which have been granted to it, and amongst these powers and duties is that of establishing public schools for gratuitous education. *Ibid.*
6. The civil and English law upon this point compared:
   The dispositions of the property in this will are not "substitutions, or *fidei commissa*," which are forbidden by the Louisiana code. *Ibid.*
7. The meaning of those terms explained and defined:
   The testator was authorized to define the use and destination of his legacy. *Ibid.*
8. The conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, do not invalidate the bequest, because the Louisiana Code provides that "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals, are reputed not written." *Ibid.*
9. The difference between the civil and common law, upon this point, examined:
   The city of Baltimore is entitled and empowered to receive this legacy under the laws of Maryland; and the laws of Louisiana do not forbid it. The article in the code of the latter State, which says that "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State," does not most probably apply to the citizens or corporations of the States of the Union. Moreover, the laws of Maryland do not prohibit similar dispositions in favor of a citizen of Louisiana. *Ibid.*
10. The destination of the legacy to public uses in the city of Baltimore, does not affect the valid operation of the bequest in Louisiana. *Ibid.*
11. The cities of New Orleans and Baltimore, having the annuities charged upon their legacies, would be benefited by the invalidity of these legacies. Upon the question of their validity, this court expresses no opinion. But the parties to this suit, viz. the heirs at law, could not claim them. *Ibid.*
12. In case of the failure of the devise to the cities, the limitation over to the States of Maryland and Louisiana would have been operative. *Ibid.*

4215 .4

ACME
BOOKBINDING CO. INC.

MAY 21 1985

100 CAMBRIDGE STREET
CHARLESTOWN, MASS.