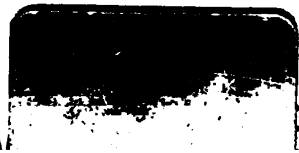
BRARY

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.

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SUPREME COURT OF THE UNITED STATES.

Hon. ROGER B. TANEY, Chief Justice.
Hon. JOHN McLEAN, Associate Justice.
Hon. JAMES M. WAYNE, Associate Justice.
Hon. JOHN CATRON, Associate Justice.
Hon. PETER V. DANIEL, Associate Justice.
Hon. SAMUEL NELSON, Associate Justice.
Hon. ROBERT C. GRIER, Associate Justice.
Hon. 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 AT ADJOURNED DECEMBER TERM, 1853.

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C. B. F. O'Neill,	*Pennsylvania.*
Charles Bayard Strode,	*California.*
Nathaniel Holmes,	*Missouri.*
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George W. Searle,	*Massachusetts.*
Roland Jones,	*Louisiana.*

LIST OF CASES REPORTED.

RULE No. 63.

1st. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court, within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule unless by order of the court or consent of the opposite party.

2d. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and if the case is docketed and a copy of the record filed with the clerk of this court, by either party, within the periods of time above limited and prescribed by this rule, the case shall stand for argument at the term.

3d. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah.

ERRATUM IN VOLUME XV.

At page 249, fourth line from the bottom, before the words "Could I consent," &c., insert "Mr. Justice Daniel," so as to make it read

"Mr. Justice Daniel."
"Could I consent," &c.

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1853.

JOHN H. LEWIS, APPELLANT, *v.* SARAH DARLING.

Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator, (there having been no administration in the United States upon the estate,) this daughter or her representatives if she were dead, ought to have been made a party defendant.

But if the complainant appears to be entitled to relief, the court will allow the bill to be amended, and even if it be an appeal, will remand the case for this purpose.

Where the will, by construction, shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.

The real estate will be charged with the payment of legacies where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund. This is an exception to the general rule that the personal estate is the first fund for the payment of debts and legacies.

Where it appears, by the admissions and proofs, that the defendant has substantially under his control a large property of the testator which he intended to charge with the payment of the legacy in question, the complainant is entitled to relief although the land lies beyond the limits of the State in which the suit is brought.

THIS was an appeal from the District Court of the United States for the Northern District of Alabama, exercising Circuit Court equity jurisdiction, under the act of Congress of February 19, 1831, ch. 28, (4 Stat. at Large, p. 444.)

The following is the statement contained in the brief of the counsel for the appellant, which is adopted by the court, in their opinion.

A bill was filed March 16, 1846, by the appellee against the appellant — alleging, that in the year 1822, one Samuel Betts, a citizen of the State of Connecticut, but transacting business at Havana, in the Island of Cuba, as a partner in the firm of F. M. Arredondo & Son, died at Havana, leaving a will in due form of law, proven and admitted to record in that city, by

which he bequeathed to the complainant, Darling, a legacy of $2,500. That Betts left but one child, his daughter Mary, who has since married the defendant Lewis — and that a tract of several hundred thousand acres of land, in the present State of Florida, was held and owned by the firm, of which Betts was a partner. That by a decree of the proper court of the State of Florida, Lewis, the defendant, has been declared entitled to 60,000 acres of this land, in right of his wife, the daughter of said Betts, which is worth more than $100,000; that Lewis had also received a deed of conveyance for 15,000 acres of land, valued at $50,000, which was the property of Betts, as a partner of the firm. And, in addition to this, also received large sums of money belonging to Betts's estate. The bill prays, that Exhibit A, (a copy of Betts's will,) and Exhibit B, (a copy of the answer of the defendant, Lewis, to a bill filed in the Superior Court of the District of East Florida, in the *now* State of Florida, by John Brush "*et al.*" *v.* Lewis "*et al.*") be considered parts of the bill. And propounds interrogatories to Lewis: 1st. As to whether Exhibit A is a correct copy of that which defendant, in the case against him in Florida, had set out in his answer there, as the will of Betts? 2d. Whether the original will was in defendant's possession; if not, why, and where it was, and was it admitted to probate in Havana? 3d. Whether defendant received any property, lands, or moneys, from the estate of Betts, and if so, whether it was the property of Betts, individually, or as a partner of the firm of Arredondo & Son, and what was its value? 4th. Whether Exhibit B was a true copy of the answer it purported to be? 5th. Whether Joseph Fenwick (who by the will of Betts was appointed executor in the United States) did ever, or did then, reside in Alabama, or where he then resided? 6th. What the value of the property was, received by defendant from Betts's estate; when was it received, and what was the rate of interest in Florida and in Cuba? And prays process to procure full answers to the interrogatories, and payment of the legacy, if it appear that the defendant has received from Betts's estate enough to satisfy the complainant.

On page 5 of Record, in complainant's Exhibit A, will be seen the appointment of Joseph Fenwick as the executor of Betts in the United States, and the legacy bequeathed, as stated in the bill. The residue of the testator's property, after a few minor dispositions, is devised to his only child, the wife of the defendant.

Exhibit B, which complainant makes a part of her bill, shows that the large tract of land mentioned in the bill did belong to the firm of Arredondo & Son, of which Betts was a member, and sets out how Lewis, by marriage with the daugh-

ter, the sole heir of Betts, became entitled to a portion of it. Lewis, in that answer, also states, with regard to the 15,000 acres mentioned in the bill in this case, that, being ignorant of the true rights of his wife, in the year 1831 he agreed with F. M. Arredondo upon the terms of a compromise as to his wife's interest in said lands; by which agreement he and his wife were to receive 15,000 acres, as an undivided portion of the balance of the tract, after certain sales which had been previously made by Arredondo & Son; and, in consideration of which, he and his wife were to relinquish forever, all rights to any further or other portion of said land, by virtue of the interest of Samuel Betts. That a deed was executed by said F. M. Arredondo, conveying to Lewis and wife, 15,000 acres of the land, and signed and delivered to Lewis, but that he and his wife had refused to execute any deed of release or relinquishment of their interest in said land — alleging as a reason for not doing so, that he ascertained Arredondo had not made full and fair representations of Betts's interest in the land, and had either by mistake, or with fraudulent purpose, made incorrect statements in the recitals of the deed of the sales previously made, and that he (the defendant) had therefore always regarded the said deed of Arredondo to himself and wife as void, and had claimed nothing under it since he ascertained the facts above referred to, and had always refused to carry out the verbal agreement of the compromise, and averring Betts's interest as partner to the extent of one third, in the large tract of land belonging to the firm of Arredondo & Son, he prays a decree for partition of said lands, and that the portion to which he is entitled in right of his wife, when established to the satisfaction of the court, be allotted to him by a decree to that effect.

On page 11 of Record, is defendant Lewis's first answer to the present bill, in which he totally denies having ever received one cent of value from Betts's estate, either in real, personal, or mixed property. But this answer being objected to as insufficient and evasive, the court below, May 21st, 1846, ruled that it was insufficient — but also ruled, that the bill did not allege sufficient matter for equitable relief, it not showing that the executor had not paid the legacy, and if it had not been paid, did not show any reason for proceeding against the residuary legatee instead of the executor.

Thereupon the complainant filed her amended bill, stating that "no one, to her knowledge or belief, had ever taken out letters testamentary or of administration upon the estate of Betts, either in the State of Alabama or elsewhere," and "that no person had ever paid the legacy, or any part thereof," and that no person but defendant had ever received any part of

Betts's estate, and called upon defendant to state, whether any one had taken out letters upon the estate.

Defendant then puts in his second answer, stating that he was a defendant in a suit in Chancery in Florida, brought against him and others by John H. Brush and others, and that before the termination of said suit, a copy of the will of Betts was filed by him as part of the evidence of his claim, in right of his wife. The original will was in Spanish, and he obtained a Spanish copy of it from the proper depository in the city of Havana. He believed that a Spanish copy and an English translation were filed among the papers in that suit. That the suit was not tried in the regular way — but the parties entered into a covenant or agreement, which was put upon the records of the Court of Florida, and was, by consent, made the decree of that court. That the will was not adjudicated upon; — cannot say on his oath that the Exhibit A is a correct translation of the original — but it does not differ from the English copy filed in the Florida case. To the third interrogatory, he states, that he has received no property, lands, or moneys from the estate of Betts. That a decree in the Florida case had been entered by consent of parties, and that the decree gave to his wife a large amount of land — but there was no decree in favor of him — and the decree in favor of his wife was not a final one — needing the report of commissioners appointed to make partition of the land before it became a final decree. Cannot say what is the value of the land decreed to his wife, because the decree is not final, and awaits the further action of the court. He admits the Exhibit B to the bill to be a true copy of the answer filed by him in the Florida case. States that Joseph Fenwick did reside in Alabama, and believes he is dead; and that he does not know or believe that any person has taken out letters of administration upon the estate of Betts in the United States. He does not know whether there was or was not administration in Cuba — and has no information on the subject; and suggesting the want of parties, prays to be dismissed.

No exception to this answer appears on record; but on the 23d November, 1847, the court decide the answer to be insufficient, and also that the bill was defective in not alleging sufficient matters for equitable relief, in not showing that the executors had not paid the legacy, and that not being shown in alleging no reasons for proceeding against the residuary legatee instead of the executor.

Leave to amend was granted; but instead of so doing the complainant filed her replication, averring the sufficiency of her bill, the insufficiency of the answer, and traversing the statements of the latter.

On November 23d, 1847, the court below decreed in favor of complainant, ordering that she recover against the defendant $7,645.45, the amount of the legacy with interest and costs, and ordered execution to issue accordingly.

On November 24th, 1847, defendant filed a petition for rehearing, alleging error in the decree; because the decree in the Florida case was not final, and he had not, as yet, received in right of his wife, or on his own account, the least benefit from that decree, nor was it certain that he ever would. For the report of the commissioners appointed to make partition in the suit in Florida had been objected to by some of the parties, and set aside by the court, and that another commission had been appointed which could not report before the next term of the court, in June, 1848; that he would, therefore, under the decree, have to pay a large sum of money to the complainant out of his own funds, when he had received nothing under the decree rendered in favor of his wife. He also states that in the case in Florida, a petition for leave to file a bill in the nature of a bill of review for the purpose of opening the decree in that court was then pending there, and submits a decision of the Supreme Court of the State of Florida, showing that by the decision of that court and the acts of assembly of Florida, the decree directing the partition of lands is not a final but an interlocutory decree.

He also urges that he should not be charged with the 15,000 acres mentioned in the deed from Arredondo, because the complainant makes his answer in the Florida case a part of her bill, and in that answer it is shown, that that deed is treated as void, and he has never claimed any thing under it, and that so far as it can be considered as a portion of his wife's interest in the estate, it is wholly merged in the decree for 60,000 acres in the suit in Florida.

On November 29th, 1848, defendant filed his affidavit, stating that since his petition for rehearing, the leave to file a bill in the nature of a bill of review in the court of Florida, referred to in said petition, had been granted in that court, that the bill had been accordingly filed, and that it had wholly suspended the execution of the decree there obtained — that he had answered that bill, and the same is at issue. That neither himself nor his wife had as yet received one dollar in real, personal, or mixed property from Betts's estate.

On December 2d, 1848, the court, upon argument of the petition for rehearing, dismissed it, and thereupon the defendant prayed an appeal. Nearly all the testimony embraced in the residue of the record appears to bear upon the partnership relations and the interest of Betts in the Florida lands, facts which are not disputed.

But on page 77 it will be seen that the proceedings in a case in the court below between this appellant and Burr Hubbell Betts, (who is one of the legatees in the will of Samuel Betts,) were produced in evidence in the trial, and that the bill in those proceedings, which in its general nature resembles the present bill, refers to a certain portion of the property of Betts (the deceased) which had come into the hands of the appellant by a conveyance there referred to as Exhibit C. That conveyance will be found on page 28 of record, and is a deed made by F. M. Arredondo to appellant and wife in 1831, stating that Samuel Betts had in his lifetime conveyed to the grantor certain property in trust for creditors, and the grantees having obtained from these creditors assignments of all their right and claim to the property, it was thereby conveyed to the grantees.

The first appeal was not taken within the time specified by law, and another appeal was granted 23d May, 1850.

This appeal, also, was not acted upon for the reason assigned on page 86, that a compromise was pending between the parties. In the mean time the case was docketed and dismissed under the rule of this court, and accordingly a third appeal was granted, and is now prosecuted.

The case was argued by Mr. Reverdy Johnson, and Mr. Reverdy Johnson, junior, for the appellant, and by Mr. Butler, for the appellee.

The points made by the counsel for the appellant were the following:

1st. The bill is materially defective for want of parties; the wife of defendant, through whom alone he claims, and whose right he represents, being an essential party to the proceedings. Story's Eq. Pl. § 75, 77, 137, 138; 22d and 52d Rules of Eq. Prac.

2d. Neither the original nor the amended bill allege that *all* the personal property (whatever it was) had come into the possession of the defendant, nor that the part that did come, was sufficient to pay the legacy. Story's Eq. Pl. § 241, 257.

3d. Nor do they aver that in fact there was not sufficient personal property to pay the legacy. 1 Story's Com. Eq. § 571; Hoye *v.* Bewer, 3 Gill & Johns. 153.

4th. The effect of the plaintiff's replication being to admit the sufficiency of defendant's second answer, there is no evidence to authorize the decree against the defendant. Story's Eq. Pl. § 877; 61st Rule Eq. Prac.

5th. If this be not the effect of the replication, yet the answer is distinct and full, and there is no evidence that any property belonging to the estate of Samuel Betts, ever came into the hands of the defendant, and he cannot be held liable "*de bonis propriis.*" 1st Florida Rep. 455, Putnam *v.* Lewis.

The points made by Mr. Butler, for the appellee, were the following:

First. The specific legacy is charged upon the residuary legacy of those who have a right to take it.

Second. It is certain that the residuary legacy, now capable of being reduced into possession by the residuary legatee, is more than sufficient to pay off the specific legacy.

Third. The replication of the complainant must be regarded as evidence in the case, as it has not been contradicted by any direct denial of the defendant, but must be regarded as a traverse of the assumptions of the answer. Story's Eq. Plead. p. 793, 794, 801, 802.

Fourth. Admitting the technical truth of the defendant in his evasive answer, that the defendant (Lewis) has not received any property of the testator, Samuel Betts, still it appears that he can receive, and is entitled by law to receive, property more than sufficient to pay all the debts of the testator and the specific legacies contained in his will.

Fifth. The defendant having intermeddled with, and appropriated to himself an interest in, the estate of Samuel Betts, he cannot exonerate himself from liability to creditors without making some such disclosure as would discharge him under a plea of *plene administravit.*

Sixth. The defendant ought not to be allowed to take any exception to the bill of the complainant at this stage of the proceedings; if any exception could have been taken originally, (which the complainant contends could not,) such exception may be regarded as having been waived by the defendant. Story's Plead. p. 74, 89, 301, 302.

Mr. Justice WAYNE delivered the opinion of the court.

We have verified the statement of the pleadings in this case attached to the brief of the counsel for the appellant, by a comparison of it with the record, and shall adopt it for the purpose of giving our judgment upon this appeal.

Upon this statement, the counsel for the appellant urges five grounds for the reversal of the judgment.

1. It is said that the bill is materially defective for want of parties, that the wife of the appellant, through whom alone he claims and whose rights he represents, ought to have been made a party.

2. That there is no allegation in the original or amended bill, that all the personal property of the testator had come into the hands of the appellant, or that so much of it as he may have received, was sufficient to pay the legacy claimed by the appellee, Sarah Darling.

3. That there is no averment in the bill that there was not sufficient personal property to pay the legacy.

4. That the effect of the plaintiff's replication being an admission of the sufficiency of the defendant's second answer, there is no evidence to authorize the decree against the defendant.

5. If this be not the effect of the replication, yet the answer is distinct and full, and there is no evidence that any property belonging to the estate of Samuel Betts ever came into the hands of the defendant, and that he cannot be liable *de bonis propriis.*

We have given these points because they raise every objection which can be made against the judgment of the court below, either upon the pleading or the merits of the case. We will discuss them successively

The record certainly discloses the fact, that the wife of the appellant has such an interest in the controversy, that no decree can be given which will not affect it. She is the residuary legatee of her father, and all the property given by that clause of his will became hers immediately upon his death. The interest which the appellant may have in it was acquired from his marriage with her, after her father's death. It is strictly marital, and the extent of it during the coverture, or afterwards if he lives longer than his wife, depends upon the law of the sovereignty where the real estate may be, and, so far as the personal property is concerned, upon the investiture of it in the legatee according to the law of her father's domicil at the time of his death. Or it may depend upon a marriage contract, if any was made. We have not undertaken to say what that interest is, or may become. We have only intimated upon what it may depend; and will further say, that the children, in the event of their mother's death, may acquire an interest in the property, independently of their father's control. If she be already dead, then such of the children as are *sui juris* should be made parties to the plaintiff's bill. And if there are other children still minors, the court should have them made parties by a guardian of its appointment, excluding their father from such an office. As the case stands, it is not too late to amend the bill by making the proper parties. The rule in equity, permitting it to be done, is this; that on the hearing of a cause, even upon an appeal, an order may be made for the cause to stand over, with liberty to the plaintiff to amend by adding proper parties, if it appears that the plaintiff is entitled to relief, but that it cannot be given for the want of proper parties. The equity of the plaintiff is sufficiently obvious in this case for the application of the rule. The proofs in the case show that she has a strong

claim upon the appellant for the payment of the legacy for which she sues him. It is manifest that the legacy has been made by the testator a charge upon both the real and personal estate which he means to give to his daughter. It will not do, then, to permit it to be defeated in this suit by any mistake or unskilfulness in pleading. We shall then reverse the judgment appealed from, in conformity with the first objection made against it. But we will remand the cause to the Circuit Court for further proceedings, and for the proper parties to be made.

The second and third objections are also exceptions to the sufficiency of the plaintiff's pleadings. It is said, that there are no averments in the bill, that all the personal property of the testator had come into the possession of the appellant. And if any part had come, that it was sufficient to pay the legacy. And further, that the bill contains no averment, that there was not sufficient personal property to pay the legacy. These objections are made upon the supposition that the legacy, in this instance, cannot be charged upon the real estate of the testator 57 il it has been shown that there is not personal property enough to pay the legacy. That depends upon the intention, as it is to be collected from the residuary clause of the testator's will.

It is, "And as to all the rest and remainder of my property, debts, rights, and actions, of what kind and nature soever, that may belong or appertain to me, I name and appoint as my sole and universal heiress, the above named Maria Margaret Betts, my lawful daughter, in order that whatever there may appear to appertain and belong unto me, she may have and inherit the same, with the blessing of God and my own." The testator's real and personal property are found blended by him in the clause together. He leaves to his daughter all of his property, of every kind, which may remain after the antecedent bequests and devises in his will have been paid and given to the objects of his bounty. His daughter is to have "the rest and remainder of his property, debts, rights, and actions, of what kind and nature soever." He had previously, in the will, declared that his property consisted of one third in the House established in this city under the firm of Fernando de la Maza Arredondo and Son, and that it would appear from the accounts, books, and other papers of the company. And he further declares that as both the debts due by him and to him will appear by the books of the company, that he confides it to his partners to collect and pay them. His executors were not to have any thing to do with the collection and payment of his debts.

Their office was to secure any surplus which there might be after his debts were paid, and to apply it according to his will,

in the manner required by the law of Cuba, where the testator was domiciled at the time of his death. The testator then appoints an executor to fulfil his will in the United States, where he had no personal property. Now it does not appear that either of his executors in Cuba or in the United States ever undertook to administer the testator's estate under his will. Indeed, the reverse is to be taken for the fact, from the statement of the appellant. There can be, then, no personal property of the testator *eo nomine* in the United States over which a court of equity in the United States could have any control for the payment of the legacy.

Nor is this a suit against a party, properly representing the testator, for the application of his personal property to the payment of the legacies. Between the appellant and the testator there is no official privity to give to him any of those rights or imposing upon him any of the obligations of an executorial trust. It is a suit against a defendant who is charged with having received large sums of money for which he is accountable, and which may be applied by a court of equity to the payment of the legacies bequeathed by the testator; and when that has been done, to the purposes of the residuary clause of his will. He is also charged with having under his control the real estate of the testator without the sanction or authority of the executor who was appointed to administer it in the United States. The proofs in the record show it to be so. In such a case such averments as are called for by the second and third objections are not necessary. If this were not so, the language of the residuary clause of the will would make such averments unnecessary. The testator has made bequests of money antecedently to that clause, without creating an express trust to pay them, and has blended the realty and personalty of his estate together in one fund in the residuary clause. That of itself makes his bequests of money a charge upon the real estate, excluding from it the previous devises of land to Fenwick, Wallace, and to John and Fernando Arredondo.

The rule in such a case is, that where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with legacies, for in such a case, the "residue" can only mean what remains after satisfying the previous gifts. Hill on Trustees, 508. Such is the settled law both in England and in the United States, though cases do not often occur for its application. Where one does occur, a legatee may sue to recover the legacy, without distinguishing in his bill the estate into the two kinds of realty and personalty, because it

is the manifest intention of the testator that both should be charged with the payment of the money legacies. Nor does this conflict at all with that principle of equity jurisprudence, declaring that generally, the personal estate of the testator is the first fund for the payment of debts and legacies. The rule has its exceptions, and this is one of them.

Ambrey *v.* Middleton, 2 Eq. C. Abr. 479; Hassel *v.* Hassel, 2 Dick. 526; Brudenell *v.* Boughton, 2 Atk. 268; Bench *v.* Biles, 4 Mad. 187; Cole *v.* Turner, 4 Russell, 376; Mirehouse *v.* Scaife, 2 M. & Cr. 695, 707–8; Edgell *v.* Haywood, 3 Atk. 358; Kidney *v.* Coussmaker, 1 Ves. Jr. 436; Nichols *v.* Postlethwaite, 2 Dall. 131; Hassanclever *v.* Tucker, 2 Binney, 525; Witman *v.* Norton, 6 Binn. 395; McLanahan *v.* Wyant, 1 Penn. 111; Adams *v.* Brackett, 5 Met. 280; Van Winkle *v.* Van Houten, 2 Green, Ch. 172; Downman *v.* Rust, 6 Rand. 587; Lupton *v.* Lupton, 2 Johns. Ch. Rep. 618, has been supposed to conflict with this rule, but it does not do so, for there it is said to be dependent upon the testator. The same is the case of Dudley *v.* Andrews, in 8 Taunt.; and Paxson *v.* Potts, in 2 Green, Ch. 313 is a case in point with this case.

We now proceed to the consideration of the fourth and fifth objections.

It is denied in these points that there is any evidence to authorize a decree in favor of the plaintiff, even if her bill had proper parties. We think differently. The appellant is charged in the bill with having obtained a decree in a court in Florida, in behalf of his wife, for sixty thousand acres of land, it being the real estate of her father, and that it was worth more than one hundred thousand dollars. He is also charged with having received large sums of money of the estate of the testator, and that he has refused to pay the plaintiff's legacy. He is not charged with having received the money *eo nomine* as the personal estate left by the testator, but as money received for which he is accountable to the estate. The difference between the two is obvious. He answers that he had not received as yet, of the estate of the testator, one cent of value. And when he answers concerning the real estate, he does not deny, but admits that he had obtained a decree in the State of Florida for the land of the testator. His answers are made with such reserve that they must be considered as having been meant to keep from the plaintiff the discovery of what her bill seeks to obtain. The natural and candid reply of the appellant, from his unofficial connection with the testator's estate, should have been a disclosure of the condition of the real estate of the testator — what had been done with it by himself; what contracts had been made by himself in respect to it; whether any arrangement

or bargain had been made for the sale of any part of it: whether any money had been received on account of it, or was to be paid to him. He should have made also a frank disclosure how the personal estate of the testator had been administered by the parties and executors of the testator, if they had administered it at all, and how and to what extent he had received or arranged to receive it as a part of his wife's interest in her father's estate.

This admission is found in his petition for a rehearing of this cause. In that he says that he has obtained a decree in the court of Florida, in behalf of his wife, for sixty-two thousand acres of the grant of land which had been made in 1817, to Arredondo & Son, containing two hundred and eighty-nine thousand six hundred and forty-five acres and five sevenths of an acre, of which the testator owned one third — that the grant had been confirmed and held to be valid by the Supreme Court of the United States; and that the grant had been located and surveyed under the authority of the government of the United States. Now it does not matter, for the purposes of this case, (the ownerships of the testator to one third of that grant having been admitted and proved,) that the writ of partition obtained for it by the appellant in Florida is only interlocutory, in the sense that it is not final until the partition shall be made and returned to the court. The ownership of the land is determined by the decree of the Supreme Court of the United States, and the testator's legacies have been made by him a charge upon it. The ownership of the testator of a part of that land cannot be affected by any proceedings, finished or unfinished, in the courts of Florida.

Further, there is proof in the record that the appellant has received for himself and his wife from Fernando M. Arredondo a conveyance for certain property which Betts, the testator, had conveyed to Arredondo and others in trust for the payment of sundry debts due at its date by the testator. Lewis, the appellant, obtains for his wife and for himself assignments from the creditors of the testator of their demands, and takes a reconveyance of the property. What that property is, does not appear, but whatever it may be it is liable, as well as the rest of the testator's property, for the payment of the legacy. Again, the appellant admits, and the proof is that he negotiated with the partners of the testator, for a conveyance of that portion of the Arredondo grant which was conveyed to the testator in behalf of his wife. It appears to have been made by Arredondo, but not to the extent of the testator's interest. On that account he rejected the deed tendered to him, and afterward obtained from proper court in Florida a decree for 62,000 acres in behalf s wife in that grant.

We shall not pursue this part of the case further. We are satisfied that the merits of the controversy were not misunderstood by the learned judge in the court below.

It appears then, from the admissions and proofs in this case, that the appellant has substantially under his control a large property of the testator, which we think from his will that he meant to charge with the payment of the plaintiff's legacy, excluding, as we have said, the devises of land to Fenwick, Wallace, and Fernando and Joseph Arredondo. We repeat that it is a charge upon the rest of the real as well as the personal property of the testator. But he states that the real estate is in another sovereignty than that in which the plaintiff has sued, and is therefore out of the jurisdiction of this court to make any decree concerning it. It is true that the court cannot, in such a case, order the land to be sold for the payment of any decree which it may make in favor of the plaintiff. But it is not without power to act efficiently to cause the defendants to pay any such decree.

The land may be declared to be charged with the payment of the legacy so as to compel the parties who claim the same as the property of the testator to set off or sell a part of it for such purpose. And we further say, if, in the proceedings of the court below hereafter, it shall appear that the appellant has received or made arrangements to receive any fund or money equitably belonging to the testator, sufficient to pay her the plaintiff's legacy, that a decree may be made against him for application of it to that purpose.

We do not consider it necessary to say more in the case.

We shall direct the judgment of the court below to be reversed, for the want of proper parties, and that the court shall allow them to be made parties, with such other amendments to be made by the plaintiff to her bill as the court may judge have not been put in issue by the bill with sufficient precision, and that a master shall be appointed to report upon the testator's estate, and to take an account thereof.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed with costs, for the want of proper parties, and that this cause be, and the same is hereby remanded to the District Court, in order that proper parties may be made, and for further proceedings to be had therein, in conformity to the opinion of this court.

HENRY F. TURNER, JAMES F. PURVIS, AND STERLING THOMAS, PLAINTIFFS IN ERROR, *v.* JOSEPH C. YATES.

A bond, with sureties, was executed for the purpose of securing the repayment of certain money advanced for putting up and shipping bacon. William Turner was to have the management of the affair, and Harvy Turner was to be his agent.

After the money was advanced, Harvy made a consignment of meat, and drew upon it. Whether or not this draft was drawn specially against this consignment was a point which was properly decided by the Court from an interpretation of the written papers in the case.

It was also correct to instruct the jury that if they believed, from the evidence, that Harvy was acting in this instance either upon his own account, or as the agent of William, then the special draft drawn upon the consignment was first to be met out of the proceeds of sale, and the sureties upon the bond to be credited only with their proportion of the residue.

The consignor had a right to draw upon the consignment with the consent of the consignee, unless restrained by some contract with the sureties, of which there was no evidence. On the contrary, there was evidence that Harvy was the agent of William, to draw upon this consignment as well as for other purposes.

It was not improper for the court to instruct the jury that they might find Harvy to have been either a principal or an agent of William.

An agreement by the respective counsel to produce upon notice at the trial table any papers which may be in his possession, did not include the invoice of the consignment, because the presumption was, that it had been sent to London, to those to whom the boxes had been sent by their agent in this country.

A correspondence between the plaintiff and Harvy, offered to show that Harvy was acting in this matter as principal, was properly allowed to go to the jury.

The testimony of an attorney was admissible, reciting conversations between himself and the attorney of the other parties in their presence, which declarations of the attorney were binding on the last mentioned parties.

Evidence was admissible to show that a charge of one per cent. upon the advance made upon the consignment, was a proper charge according to the usage and custom of the place.

It is not necessary that the bill of exceptions should be formally drawn and signed, before the trial is at an end. But the exception must be noted then, and must purport on its face so to have been, although signed afterwards *nunc pro tunc*.

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

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

It was argued by *Mr. Barroll* and *Mr. May*, for the plaintiffs in error, and by *Mr. Johnson*, for the defendant in error. There was also a brief filed upon that side by *Mr. S. T. Wallis*.

The points on behalf of the plaintiffs in error were the following:

First and fifth exceptions. That the court erred in ruling out the parol testimony offered, of the contents of the invoice sent to the defendant in error by William H. F. Turner from Chatanooga.

Second, third, and sixth exceptions. That the court erred in

admitting the testimony to prove the separate contract alleged to have been made by Mr. Yates with H. F. Turner, &c., as set forth in the statement upon page 34 of printed record. Cole *v.* Hebb, 7 G. & J. 20; Davis *v.* Calvert, 5 G. & J. 269; Clark *v.* State, 8 G. & J. 111; Magill *v.* Kauffman, 4 Serg. & Rawle, 317, 321; Franklin Bank *v.* Penn. Del. & Md. S. N. Co., 11 G. & J. 28; Gilpins *v.* Consequa, 1 Peters's C. C. Rep. 87.

Fourth exception. That the court erred in admitting the evidence of usage for commission to be charged on advances on shipments made to London, because the said evidence was irrelevant.

Sixth exception. That the court erred in admitting the evidence of Mr. Teackle, because it was incompetent testimony, and because it was irrelevant.

Seventh exception. That the court erred in rejecting the prayers of the defendants, and in its instructions to the jury, for the following reasons:

1. Because said instructions are vague and uncertain, and therefore calculated to mislead the jury. 2. Because the first instruction is not limited to the interview (or subsequent ones) in which the defendants requested plaintiff's counsel to see Mr. Ward. 3. Because said first instruction embraces the acts and declarations of Mr. Ward, in the interview with Mr. Teackle. 4. Because said first instruction directs the jury that the defendants are bound by the acts and declarations of Mr. Ward, although he was only retained by H. F. Turner as such, unless such limitation of retainer was stated to plaintiff or his counsel. 3 Ph. Ev. 359; 1 Greenl. Ev. § 197, 199. 5. Because the said Purvis and Thomas, two of the defendants, were not bound in law by the acts or declarations of said Ward, if the jury believed the testimony, that said Ward was not their agent or counsel, and did not claim or profess to act as such with their knowledge or consent. (Same authorities.) 6. Because, in order to make the defendants liable for the declarations of said Ward, it ought to have been put to the jury to find that defendants, although present, heard such declarations, or were in a position to be able to hear, if so disposed. Gale *v.* Spooner and others, 11 Vermont Rep. 152; Edwards *v.* Williams, 2 How. Miss. 846; Ward *v.* Hatch, Iredell, 282.

And so far as the second instruction is concerned, that the court erred in giving the same. Because, 1. The said instruction invades the province of the jury, by assuming as facts the making of the draft for $5,733, and also that said draft was drawn as an advance on said bacon. Lewis *v.* Kramer, et al. 3 Md. Rep. 294. 2. The said instruction calls upon the jury

to decide a question of law, in leaving them to find what are liens on said bacon. Plater *v.* Scott, 6 Gill & Johns. 116. 3. The said instruction requires the jury to deduct from the net proceeds of sales, the draft for $5,733, without requiring them to find the fact that said Harry drew said draft, as agent of William, and had authority so to do, or the facts from which such authority may be inferred. 4. Because there was no evidence from which the jurors had the right to infer that the draft for $5,733 was in fact drawn by Harry as the agent of William, or that said draft was accepted, or paid by the plaintiff to said Harry, as agent of William, the admission of the payment of said draft being that such payment was to Harry, in his individual capacity, and not as agent. 5. Because the principle announced in said instruction, that if the jury find Harry acted as agent of William in the transactions after occurring in relation to the bacon at Chatanooga, then Harry had authority to draw said draft, and William and his property are bound therefor, is in conflict with the principles of law, there being no evidence in the cause from which an authority to Harry, to draw and negotiate drafts as agent of William, can be sustained. The plaintiffs in error will contend, that the agency of Harry was not otherwise than as overseer and adviser for William, in slaughtering hogs and packing the meats, and did not authorize said agent to procure advances, by pledging the meat before or after its shipment, to Messrs. Gray & Son. And that the character of the agency was known to the defendant in error from the beginning. And in ascertaining whether Harry had authority to draw the draft in question, the court are bound to exclude from their consideration all the testimony limited to the proof, that Harry acted as principal, and not as agent, in drawing such draft. Sto. Ag. §§ 87, 251, 390. 6. Because the advance of $5,733, under the circumstances of the case, was a fraud upon the sureties in the bonds, if such advance was made upon William's meat. 7. Because the said instruction does not require the jury to find that the advance of $12,000 was made in pursuance of the bond. 8. Because the court erred in allowing the plaintiff below to contend before the jury, upon two distinct, inconsistent propositions. Winchell *v.* Latham, 6 Cowen, 689. Beake's Ex. *v.* Birdsall, 1 Coxe, 14.

Additional objections to the Court's second instruction.

1. Because the court erred in its instruction to the jury, that only half the net proceeds of the bacon was to be credited to the defendants. The plaintiffs in error will contend that the whole net proceeds of the bacon should have been credited to the

amount of the advance of $12,000, and the jury instructed to give a verdict for the amount found to be due by William H. F. Turner. They will contend that under the instruction, as given, the jury were bound to find a verdict against the defendants for a greater sum than was owing by William, the excess being to the extent of the other half of the net proceeds not credited.

2. They will also contend that, whether the meat belonged to William or Harry, the $5,733 draft, paid by Mr. Yates, was not a lien on the meat, because the bill of lading was not indorsed. That there can be no lien without an actual or constructive possession of the thing intended to be given in pledge, and that, in the case at bar, Mr. Yates had no such possession. 14 Peters, 445.

3. In the court's instruction the term liens was intended to embrace the item of $5,733, under the fourth exception. The plaintiffs in error will contend that such item was a personal charge against him, to whom the advance was made, and was not a lien on the meat; and the jury should not have been instructed to deduct the same as a lien.

The points on behalf of the defendant in error, were:

1. That the parol evidence referred to in the first exception was properly excluded.

Because notice, at the trial table, to produce the invoice, was insufficient except under the agreement, and the agreement referred only to papers in the actual possession of the parties. The agreement rested obviously on the good faith of the parties and their counsel; and the declaration of the plaintiff below, that the paper was not in his possession, was *primâ facie* sufficient to establish that fact, and exclude the paper from the effect of the agreement.

Because, even if the notice had been sufficient to justify parol proof of a paper constructively in the possession of the plaintiff below, the invoice in question was not so constructively in his possession, having been forwarded to accompany meat, destined for the Messrs. Gray, and received by them, and being therefore, by legal presumption, in their possession.

It will be further argued, that the plaintiffs in error were not prejudiced by the exclusion of the parol proof, even if it was admissible under the other proof in that stage of the cause, because it afterwards appeared that the invoice had been actually transmitted to the Messrs. Gray, and was still in their possession, which would have made the parol proof incompetent, even if it had been admitted, under the notice to Yates.

It will further be contended that no prejudice resulted to the plaintiffs in error, in any event, from the rejection of the proof,

because its whole purpose was to show notice to Yates, that the meat on which he advanced $5,733 was William Turner's, not Harry's, and the court rightly instructed the jury, afterwards, that it made no difference, for the purposes of the case, to which of the Turners the meat in fact belonged.

2. That the plaintiffs in error could under no circumstances be entitled to a credit, on the bond in suit, of the proceeds or any part of the proceeds of the shipments to the Messrs. Gray, unless the meat so shipped belonged to William H. F. Turner; that the proof offered by the defendants in error, and the admission of which forms the matter of the second exception, was offered in connection with other direct proof stated in advance, and afterwards adduced, showing that there was a separate contract with Harry F. Turner for the shipment of meats and receiving advances thereon, which separate contract was known to the plaintiffs in error (Henry F. Turner himself being one of them,) when they signed the bond in suit; that the defendants in error, with this knowledge, and forewarned of the difficulties which might result from the two coëxisting contracts, insisted nevertheless on becoming sureties in the mode proven; that by the very terms of the bond they constituted Harry F. Turner (one of themselves) their agent, as to William H. F. Turner's business, and placed him in the position of deceiving or misleading Yates in regard thereto, and of managing and shipping the meat as his own or his son's — which they were forewarned might happen; that they were thus bound by Harry F. Turner's action in the premises; that the correspondence between Harry F. Turner and Yates furnished the only positive evidence of the capacity in which Turner shipped the meat and asked and received Yates's advance thereupon, and such correspondence was therefore clearly admissible, for that purpose, which was the only purpose for which it was offered, and went directly to the question of the right of the plaintiffs in error to be credited on the bond with any part of the shipments to the Messrs. Gray.

That the letters of Turner, and the Messrs. Gladsden, who shipped for him at Charleston, inclosing the bills of lading, and relating to the shipment of the meat, were part of the *res gestæ*, and bore directly on the points for which the proof was offered.

That the accounts of sales of the bacon, rendered by the Messrs. Gray, had been previously spoken of by Robert Turner, the witness of the plaintiffs in error, and were admissible on that ground, as well as part of the *res gestæ*.

That the letters of Harry F. Turner to Yates, about the meat, and in regard to drawing thereupon, had been spoken of

by the same witness, and were admissible, on that score, if on none other.

That the capacity in which Harry F. Turner acted at Chatanooga, had been proven by Wilkins and James S. Turner from said Harry F. Turner's acts, and his letters, accompanying his acts and transactions there, were competent to go to the jury for the same purpose.

3. That the evidence of Mr. Thomas was clearly admissible for the purpose for which it was offered.

4. That the proof in the fourth exception of the custom in Baltimore to charge one per cent. on advances upon shipments to London, and that the plaintiff (below) claimed it, on his advance of $5,733, was admissible, because the advance of $5,733 was properly made, and the plaintiff being entitled to charge for it in account was entitled to the usual commission upon it. The plaintiffs in error themselves, had proven, by the production of Mr. Yates's letter, that such a per centage was chargeable.

5. That the evidence, as to the invoice claimed to be admissible by the fifth exception, was properly rejected, for the reasons previously stated, (No. 1.) and because it was not rebutting evidence, and was inadmissible at that stage of the cause.

6. That the evidence of Mr. Teackle, sought to be excluded by the sixth exception, was not only competent in itself, but was rendered proper by the proof previously introduced by the plaintiffs in error themselves, and embodied in the same exception.

That the letters between the Messrs. Gray and Harry F. Turner, were competent proof, because it had been shown that the plaintiffs in error, when they signed the bond, were notified of the existence of the agreement which these letters constituted, and of which they were the best proof.

That they were likewise admissible, because the plaintiffs themselves had previously produced Mr. Yates's letters, referring to the understanding between Harry F. Turner and the Messrs. Gray, of which the letters here referred to were the only proof.

7. That under the circumstances of this case, and in view of the relation of the plaintiffs in error, Purvis and Thomas, to Harry F. Turner, as their joint obligor and co-defendant, with whom they had taken joint defence, they were bound by his acts and declarations in the premises. Van Reimsdyk *v.* Kane, 1 Gallison, 635; Simonton *v.* Boucher, 2 Wash. C. C. Rep. 473; Martin *v.* Root, 17 Mass. 227; Montgomery *v.* Dillingham, 3 Smedes & Marshall, 647; Armstrong *v.* Farrar, 8 Missouri, 627; 1 Greenleaf's Evidence, § 174; 2 Starkie's Evid. 25; 1 Phillips's Evid. 92.

8. That even if the proof offered and objected to in the second, third, and sixth exceptions was inadmissible, as against Purvis and Thomas, it was clearly competent as against Harry F. Turner, and as the objections were taken, generally, to the admissibility of the proof against all the defendants, they were properly overruled.

9. That the objection to testimony in the third, fourth, and sixth exceptions, was too indefinite to be allowed. Camden *v.* Doremus, 3 Howard, 530.

10. That if the court erred in reference to the instructions prayed or given, it was in favor of the plaintiffs in error, by rejecting the prayer of the plaintiff below, which was based upon evidence properly before the jury, and tending to the conclusion which the prayer adopted.

That the first prayer of the plaintiffs in error was properly rejected, because it excluded from the jury all consideration of the contract between Yates and Harry F. Turner individually, as well as of the question whether the meat in controversy was or was not his individual property; and because, further, it made the right of the defendants to a credit from the said meat dependent exclusively on the fact of its belonging to William H. F. Turner, without reference to Yates's knowledge or ignorance of that fact, or to the responsibility of William H. F. Turner and his sureties, under the circumstances, for the acts and declarations of Harry F. Turner, whom they had constituted their agent in the transaction.

Said first prayer is further defective, obviously, in that it claims credit to the extent of the whole sale, and receipt of proceeds of the meat, whereas, in no case could the plaintiffs in error have been entitled to a credit of more than one half the said proceeds; the sureties on the other bond being in equal right and entitled to divide whatever credits might appear.

The prayer is likewise improper, because the cause of action being joint, and the defence and issues joint, it nevertheless asks an instruction that the jury may sever in their finding, and give to the defendants, Thomas and Purvis, a credit to which their co-defendant, Turner, is not entitled.

The second prayer of the plaintiffs in error was properly rejected, upon the grounds expressed in the court's first instruction, it being immaterial whose attorney Mr. Ward in fact was, or whether he represented himself to be the attorney of Purvis and Thomas, provided the jury believed, that in their presence and with their knowledge, he acted for them, and that the attorney of Yates was referred by them to him, to settle the differences then pending in regard to the bond.

11. That the rule of court was lawful and governed the case,

and the court properly refused to postpone the swearing of the bailiff and the discharge of the jury until the signing and sealing of the exceptions. Walton *v.* United States, 9 Wheaton, 651; Ex parte Bradstreet, 4 Peters, 106–7; Brown *v.* Clarke, 4 Howard, 15.

12. The defendant in error will argue, upon the whole case, that the agreement of William H. F. Turner to send his shipments to Gray & Son, to pay off the advance of $12,000, and whatever else he might be allowed to draw for, was no part of the bond or of the consideration upon which the plaintiffs in error joined in it; but a stipulation made afterwards to Yates, not by him, for his benefit, nor that of Turner and his sureties; that it in no way precluded Yates from making subsequent advances, or pledged him to appropriate the proceeds of the meat first to the $12,000 loan; but, on the contrary, expressly provided for further advances and their payment; that whether Harry F. Turner signed himself "agent" or not to the $5,733 draft, made no difference whatever, provided Yates accepted and paid the same in good faith, on a pledge of the meat; that whatever be the shape of the transactions, it is manifest that the original loan was to have been made to Harry F. Turner, on the terms of his letters to Messrs. Gray; that bonds to that effect were drawn with the knowledge of Purvis and Thomas; that the substitution of William H. F. Turner was only as to the loan of $12,000, and was made for the benefit of Harry F. Turner, without the participation of William, who was in Chatanooga, and at the request of the sureties, against the remonstrance of Yates's attorney, that Harry F. Turner was agent of William and manager of the whole business, its property and correspondence, with the privity and at the desire of the sureties; if he committed a fraud on Yates, or on them, they must bear the burden, as he was of their selection; and that they are under no circumstances entitled to have carried to the credit of the bond more than the amount given by the jury; that is to say, the margin left of the proceeds of the shipments, after allowing for the usual stipulated advances.

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 action was debt on the bond of the plaintiffs in error, the condition of which was as follows:

Whereas the said Joseph C. Yates is about to lend and advance to William H. F. Turner the sum of twelve thousand dollars, in such sums and at such times as the said William may designate and appoint; which designation, and appoint-

ment, and advances it is hereby agreed shall be evidenced by notes drawn by the said William in favor of the said Harry F. Turner, agent, and by the latter indorsed, or by drafts drawn by the said William H. F. Turner in favor of the said Harry F. Turner, agent, on, and accepted or paid by the said Yates, indorsed by said Harry F.

And whereas the said Harry F. Turner, Sterling Thomas, and James F. Purvis, have agreed, as the consideration for the said loan, to secure the said Yates the payment of the sum of six thousand dollars, and interest thereon, part of the said loan; and the said Harry F. Turner, with Robert Turner and Absalom Hancock, have entered into a bond similar to this, for the payment of the other six thousand dollars and interest.

Now the condition of the above obligation is such, that if the said William H. F. Turner, at the expiration of twelve months from the date hereof, shall well and truly pay to the said Joseph G. Yates, his executors, administrators, or assigns, all such sum or sums of money as may be owing to the said Yates, by the said William H. F. Turner, evidenced as aforesaid, at the said expiration of the said twelve months, or in case the said William H. F. Turner should fail or omit to pay said sum or sums of money, at said time, if the said Sterling Thomas and James F. Purvis, or either of them, shall well and truly pay to the said Yates, his executors, administrators or assigns, so much of said sum or sums of money as may then be owing, as shall amount to six thousand dollars and interest, in case so much be owing, with full legal interest thereon, or such sum or sums of money as may be owing with interest thereon, in case the same should amount to less than six thousand dollars, then this obligation to be null and void, otherwise to remain in full force and virtue in law.

HARRY F. TURNER, [SEAL.]
STERLING THOMAS, [SEAL.]
JAMES F. PURVIS. [SEAL]

The defence was that, seven hundred boxes of bacon had been consigned by William Turner to Gray & Co., in London for sale, and having been sold, the whole of its proceeds ought to be credited against the advance of twelve thousand dollars mentioned in the condition of the bond. The plaintiff did not deny that the merchandise was received by Gray & Co. for sale, and sold by them, but insisted that the property belonged to Harry, and not to William Turner, and so no part of its proceeds were thus to be credited; and that, if bound to credit any part of these proceeds, there was first to be deducted the amount of a draft for $5,733, drawn by Harry Turner on the plaintiff specifically against this property, which draft the plaintiff was admitted to have accepted and paid.

Upon this part of the case, the district judge who presided at the trial ruled:

"If the jury believe that defendants executed and delivered the bond now sued upon, and that Harry F. Turner, in the transactions, after occurring, in relation to the bacon at Chattanooga, was either the principal in such transactions, or acted as agent of William H. F. Turner, then defendants are entitled only to be credited for one half the net amount of the shipments of bacon made by them, after deducting from the proceeds of sales of such bacon all liens thereon, including in such liens the draft of $5,733 drawn as an advance on such bacon."

This ruling having been excepted to, several objections to its correctness have been urged at the bar by the counsel of the plaintiffs in error.

The first is, that the bond does not show the advances were actually made, and, therefore, the judge ought to have directed the jury to inquire concerning that fact. It is a sufficient answer to this objection to state what the record shows, that, in the course of the trial, the plaintiff, having put in evidence drafts corresponding with those mentioned in the bond, amounting to $12,000, the defendants admitted their genuineness, and that they were all paid at the times noted thereon. The fact that the $12,000 was advanced was not therefore in issue between the parties, and there was no error in not directing the jury to inquire concerning it.

It is further objected that in his instruction to the jury the judge assumed that the draft of $5,733 was drawn against this consignment, instead of leaving the jury to find whether it was so drawn. The draft itself and the letter of advice were in the case. The draft requested the drawee to "charge the same to account as advised." The letter of advice states: "I have this day drawn on you at ninety days for $5,733, being ten dollars and fifty cents per box on 544 boxes singed bacon, &c." This was a part of the merchandise in controversy. It was clearly within the province of the court to interpret these written papers, and inform the jury whether they showed a drawing against this property. When a contract is to be gathered from a commercial correspondence which refers to material extraneous facts, or only shows part of a course of dealing between the parties, it is sometimes necessary to leave the meaning and effect of the letters, in connection with the other evidence, to the jury. Brown v. McGran, 14 Pet. R. 493.

But this was not such a case; and we think the judges rightly informed the jury that this draft was drawn against this property. Whether, being so drawn, it bound the property and its proceeds, so that in this action its amount was to be deducted

therefrom, depended upon other considerations, which are exhibited in the other part of the instruction. Assuming, what we shall presently consider, that there was evidence from which the jury might find that Harry, who drew the draft, was either himself the owner of the property, and so the principal, or if not, that he was the agent of William, there can be no doubt of the correctness of this instruction, unless there was something in the case to show that the owner of the consignment could not bind its subject by a draft made and accepted on the faith of it. This is not to be presumed; and if the two defendants, who were sureties on this bond, assert that they had a right to have the whole of the proceeds of this property appropriated to the repayment of the advance of $12,000, for which they were in part liable, it was incumbent on them to prove that the ordinary power of a consignor, by himself or his agent, to draw against his property, with the consignee's consent, was effectually restrained by some contract with the sureties, or of which they could avail themselves. We have carefully examined the evidence on the record, and are unable to discover any which would have warranted the jury in finding such a contract.

The bond itself contains no intimation of it. And although the evidence tends to prove that the sureties had reason to expect that bacon would be packed and sent to Gray & Co., and that, through such consignments, the advance of $12,000 might be partly or wholly repaid, they do not appear to have stipulated or understood that William was to have no advance on such property. Indeed, the real nature of the transaction seems to have been that the bond was taken to cover an ultimate possible deficit, after the property should have been sold and all liens satisfied; leaving William. their principal, free to create such liens as he might find expedient in the course of the business.

We are also of opinion that there was evidence in the case, from which the jury might find that Harry was held out to the plaintiff, by William, as his agent, as well for the purpose of drawing against this property as for other purposes. The letter from William Turner to the plaintiff of the 14th November, 1849, and the agreement of Harry appended to it, tend strongly to prove this. They are as follows:

"CHATTANOOGA, Tenn., *Nov.* 14, 1849.

"MR. JOS. C. YATES:

"DEAR SIR: In consideration of the advance of twelve thousand dollars made me by you for the purpose of packing meats for the English market, I hereby bind myself to make my whole shipments, of whatever kind they may be, to your friends in

London or Liverpool, Messrs. B. Charles T. Gray & Son, for the entire season, or longer, till such advance shall have been paid off, together with any other that I may be permitted to draw for.

"I am, dear sir, your most obedient servant,

"W. H. F. TURNER.

"I agree to see the above carried out in good faith, and bind myself for the due fulfilment of it.

"HARRY F. TURNER, *Agent of*
"W. H. F. TURNER."

It thus appears that further advances to William were contemplated as a part of the arrangement with him, and Harry, as agent of William, was to see the whole arrangement carried out upon his personal responsibility. If, as these witnesses show, Harry was agent for William for carrying out the whole arrangement, and further drawing was contemplated as a part of it, it necessarily follows he was his agent thus to draw. It is shown by the correspondence that Harry had the sole charge of getting the property down to the sea-board from the interior, and of shipping it; and that he had incurred large debts on account of it; and, finally, William Turner has not, so far as appears, repudiated his act in drawing, and the defendants now claim the benefit of a consignment, on the faith of which the draft in question was accepted.

Under these circumstances our opinion is that it was not improper for the judge to leave it to the jury to find whether Harry was the agent of William, if he were not himself the owner of the property. Nor do we think these two states of fact present such inconsistent grounds as ought not to have been submitted to the jury. It is true Harry could not be at the same time principal and agent; but it often happens in courts of justice that a right may be presented in an alternate form or upon different grounds.

If one party has dealt with another as an agent, it would be strange if the transaction should be held invalid because it is proved on the trial he was principal — and *è converso*. The substantial question, in such a case, is a question of power to do an act; and this power may be shown, either by proving he had it in his own right or derived it from another. Of course there may be cases where the allegations of the parties on the record restrict them to one line of proof; and there may be others in which the court, to guard against surprise, should not allow a party to open one line of proof, and in the course of the trial abandon it and take an inconsistent one. But this last is a matter of practice, subject to the sound discretion of the court, and not capable of revision here upon a writ of error.

We hold the second instruction, which involved the merits of the case, to be correct.

The other bills of exception relate chiefly to questions of evidence.

In the course of the trial the defendants introduced a witness, who testified that he made out an invoice of the 700 boxes of bacon, and sent it by mail to the plaintiff, who was the agent of Gray & Co., to whom the property was consigned in London.

The defendants then called on the plaintiff to produce this invoice under the following agreement:

"It is agreed between the plaintiff and defendant in this cause, that either party shall produce, upon notice at the trial table, any papers which may be in his possession, subject to all proper legal exceptions as to their admissibility or effect as evidence; and that handwriting, where genuine, shall be admitted without proof. "S. T. WALLIS, *for plaintiff*,

"BENJ. C. BARROLL, *for defendants*."

The plaintiff said the invoice was not in his possession. The defendants then offered to prove its contents. But the court was of opinion it was to be presumed the invoice had gone to the consignees in London, who were competent witnesses to produce the original; and therefore parol evidence of the contents of the paper was excluded.

This ruling was correct. So far as appears, this was the only invoice made. Every consignment of merchandise, regularly made, requires an invoice. It is the universal usage of the commercial world to send one to the consignee. The revenue laws of our own country, and we believe of all countries, assume the existence of such a document in the hands of the consignee on the arrival of the merchandise. It was the clear duty of the plaintiff, when he received the invoice, to send it to the consignees in London. The presumption was that he had done what is usually done in such cases, and what his duty required. If the paper was in the hands of the consignees in London, secondary evidence was not admissible. For it was not within the written agreement to produce papers, which applied only to those in the possession of the plaintiff; and though the plaintiff was an agent of those consignees, and seems to have been suing for their benefit, yet aside from the written agreement they must be treated either as parties or third persons. If as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it. This also disposes of the fifth exception; because, if the evidence in the cause had some tendency to prove the document had been retained, the offer of the plaintiff to prove the contraly, and the election by

the defendants to rest their motion for the admission of the parol evidence upon a concession that the fact was as the plaintiff offered to prove it, instead of first calling for that proof, must preclude them now from objecting that the proof was not given.

The second exception relates to the admission of certain correspondence respecting this property between the plaintiff and Harry Turner and Messrs. Gadsden & Co., of Charleston, S. C., before the property was shipped to London, and also the accounts of sales of the property, which were introduced by the plaintiffs for the purpose of showing that they were dealing with Harry Turner as principal, and under a separate contract with him. We have no doubt of the admissibility of this evidence for the purpose for which it was offered. Whether Harry was principal or agent, it was competent and important for the plaintiff to prove that he was dealt with and treated as a principal; and there could be no better evidence of it than the correspondence concerning the transaction. On the trial of a commercial cause such a correspondence is not only generally admissible, but it is often the highest evidence of the nature of the acts of the parties and the capacities in which they acted and the relations they sustained to each other. It must be observed that the plaintiff, in one aspect of his case, had three things to prove. First, that there was a distinct arrangement with Harry to ship property to Gray & Son and receive advances on it. Second, that the plaintiff and Gray & Son acted on the belief that this consignment was made under that arrangement. Third, that in point of fact this consignment was made by Harry on his own account, and not on account of William. And evidence showing that Harry, being in possession of the property, consigned it to them, accompanying or preceded by such letters as showed the consignment to be for his own account, was clearly admissible upon each of these points. It is true it might, nevertheless, be the property of William, and really sent for his account, but that was a question for the jury upon the whole evidence.

The third exception relates to the admission of the testimony of Mr. Thomas respecting certain declarations made to him by Mr. Ward. We do not deem it necessary to detail the evidence, it being sufficient to say, that so far as these declarations were made in the presence of all the defendants, they were of such a character, and made under such circumstances, as imperatively to have required them to deny their correctness if they were untrue; and therefore they were clearly admissible. So far as Mr. Ward's declarations were made to Mr. Teackle, when the defendants were not present, they are stated to have been merely a repetition of his former statements.

The judge left them to the jury, with the following instruction:

"If the jury find that W. J. Ward, Esq., was, in his communication with the plaintiff's counsel, accompanied by the defendants, and that defendants referred plaintiff's counsel to said Ward to adjust and settle the differences between them, that said defendants are bound by the acts and declarations of said Ward, although he was only retained by H. F. Turner as such, unless such limitations of retainer were stated to plaintiff or his counsel."

This was sufficiently favorable to the defendants. It was really of no importance whether Mr. Ward was counsel for one or all the defendants, if they united in referring Mr. Thomas to him to adjust the mode of preparing the papers; and, in our opinion, there was evidence from which the jury might find such an authority to have been given by the defendants jointly.

We consider the fourth exception untenable. If it was usual to pay a commission for such services, it was properly charged in this case there being no evidence, to show that there was a special agreement to render the services without pay, or for less than the customary commission.

The sixth exception was taken on account of the admission of the testimony of Mr. Teackle, and certain letters of Gray & Co. and Harry Turner. The former has already been disposed of in considering the third exception, and the latter in considering the second exception respecting the correspondence of Harry Turner, most of the observations upon which are applicable to these letters.

The remaining bill of exceptions is in the following words:

"Upon the further trial of this case, after the instructions prayed for had been argued, and the court had decided to refuse the same, and had granted the two instructions set out on the defendants' seventh exception, the defendants' counsel having prepared out of court their exceptions thereto, and to the other points of law ruled by the court and excepted to during this trial immediately after the court had so decided, and before the bailiff to the jury was sworn, or the jury had withdrawn from the bar of the court, presented their said exceptions, and moved the court to sign and seal the same before the verdict should be rendered; but the court refused so to do, and refused to consider the said exceptions, or either of them, under the rule of that court, November 25th, 1846, at the November term thereof.

"Ordered, that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing, and presented to the court during the term at which it is reserved, otherwise it will not be sealed by the court."

In Walton *v.* The United States, 9 Wheat. 657, this court said, "we do not mean to say, (and in point of practice we know it to be otherwise,) that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, according to the rules of the court, be reduced to form and signed by the judge; and so in fact is the general practice. But in all such cases the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if it had been reduced to form and signed during the trial; and it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exception are allowed has always been considered as restricted to matters of exception taken pending the trial and ascertained before the verdict."

To what was there said this court has steadily adhered. 4 Pet. 106; 11 Pet. 185; 4 How. 15. The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. The convenient despatch of business, in most cases, does not allow the preparation and signature of bills of exceptions during the progress of a trial. Their requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends; and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication. The rule of the Circuit Court for the District of Maryland is unobjectionable, and this exception is overruled.

The judgment 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 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 affirmed, with costs and interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Maryland.

JOHN C. YERGER, APPELLANT, *v.* WILLIAM H. JONES, AND ROBERT S. BRANDON, EXECUTORS OF WILLIAM BRANDON, DECEASED.

Where a person who was acting as guardian to a minor, but without any legal authority, being indebted to the minor, contracted to purchase real estate for the benefit of his ward, and transferred his own property in part payment therefor, the ward cannot claim to receive from the vendor the amount of property so transferred.

He can either complete the purchase by paying the balance of the purchase-money, or set aside the contract and look to his guardian for reimbursement; but in the absence of fraud, he cannot compel the vendor to return such part of the purchase-money as had been paid by the guardian.

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

It was a bill filed by John C. Yerger, a minor, suing by his next friend, against William Brandon in his lifetime, and after his death revived against his executors.

The material facts in the case were not disputed; but the controversy depended upon the construction put upon those facts.

In 1835, Albert Yerger, the father of the appellant, and a citizen of Tennessee, made a nuncupative will and died. In this will he expressed his desire that, with certain exceptions, all his property should be equally divided between his wife and son. There was also this clause in it; and he also stated he wished Col. James W. Camp to manage his plantation, and to have discretionary power as to its management, and to sell it if he thought it most beneficial to do so; and he desired, and declared his will to be, that his son should have his plantation.

Camp removed into Madison county, Alabama, at some period which is not exactly stated in the record, but probably about 1837. He carried with him some eight or ten negroes, which belonged to the boy.

In August, 1842, and May, 1843, Camp executed two deeds of trust to James W. McClung, for the benefit of certain creditors.

On the 14th of August, 1843, McClung had a sale of the property, when William Brandon purchased the tract of land upon which Camp lived, containing nine hundred and sixty acres.

On the 23d of August, 1843, Camp made an arrangement with Brandon to this effect, viz. that Camp should repurchase the land from Brandon for eight thousand dollars, give his note for that sum payable in two years with interest, and convey cer-

tain property to him as security. Brandon, on his part, gave to Camp a bond of conveyance.

The language made use of in these instruments was as follows:

In the first it is said "Whereas the said James W. Camp, as guardian of said John C. Yerger, and for the benefit of said John C. Yerger, hath this day purchased, &c., &c., &c."

The note was as follows:

HUNTSVILLE, August 23, 1843.

Within two years from the date above, I, James W. Camp, as guardian of John C. Yerger, promise to pay William Brandon eight thousand dollars with interest from date, being the amount which I, as guardian, have agreed to give the said William Brandon for the tract of land whereon I now live, for the benefit of said John C. Yerger.

In testimony whereof I hereunto set my hand and seal.

JAMES W. CAMP. [SEAL.]

The conveyance to Brandon to secure the above note included a considerable amount of personal property, and ran as follows:

To have and to hold all the above described property to said William Brandon, his executors, administrators, or assigns forever. Upon trust, nevertheless, that said Brandon shall take immediate possession of all the above described property; that he shall gather said crops and sell them, and all the other property above described, either at public or private sale, as may appear best, for ready money; that said Brandon may retain out of the proceeds of sales reasonable compensation for his trouble and expense in executing the trust hereby created; and the said Brandon shall apply the residue of said proceeds to the payment, as far as they will extend, of the debts first above mentioned, all to be done as early as practicable; and the said William Brandon hereby covenants, to and with the said James W. Camp, that he, the said William Brandon, will faithfully execute the trusts above reposed in him, but without being responsible for losses beyond his control.

From August, 1843, to January, 1845, Brandon continued to make sales of the property, sometimes at public auction and sometimes at private sale.

On the first of January, 1844, Camp made out an account between himself and Yerger, by which it appeared that he owed Yerger on that day, (chiefly for the hire of negroes,) $8,017.29.

In 1845, Camp died insolvent.

On the 4th of October, 1847, Yerger filed his bill, reciting most of the above facts, and charging

That Camp, as guardian of complainant, contracted on 23d of August, 1843, with the defendant, to purchase of defendant for the use of complainant, certain real estate mentioned in the bond of conveyance, executed by defendant to Camp, as guardian. The complainant charges that Camp had no authority by the laws of Alabama to convert his ward's personal into real estate, at least without the direction of a court of equity, which was not obtained; and that said contract was prejudicial to the complainant, as the property was not worth more than half of what Camp, as guardian, agreed to give for it; that to secure the payment, Camp, on 23d August, 1843, executed a deed of trust, filed with the bill. By sales of property under this deed of trust, and otherwise, Camp paid the defendant 5 or $6,000 on account of the purchase, and the present bill alleges, that these payments are to be regarded in equity as payments made on account of the complainant, and out of funds in the hands of Camp as his guardian; that he is entitled to have the contract rescinded and the money previously paid to defendant paid to complainant with interest; that Camp died in Alabama on 9th October, 1845, wholly insolvent, and there was no administration upon his estate. The bill further states, that the defendant claims a large balance on account of the contract, for which complainant would be responsible in case the contract is binding.

The defendant, William Brandon, put in his answer, admitting the Exhibit C to bill, and the sale of the land, and the contract thereby shown; and also Exhibit D to bill, the deed of trust from Camp to him, stating that he sold all the property embraced in that deed (except a few articles referred to) for $5,234.23, and retained out of said proceeds, agreeably to the provisions of the deed, $1,868.47, as a reasonable compensation for gathering the crops and selling the property, and refers to his Exhibit H, as his account of sales, with his charges for expenses and trouble. He then states, that a short time after the execution of the deed of trust, two parties having executions against Camp, levied upon certain articles contained in the deed of trust; for which they and the sheriff levying, were sued by the defendant, and judgment for $1,607.38 obtained against them, which sum the defendant collected; but he claims that counsel-fees for prosecuting that matter, the amount of which is not yet ascertained, should be deducted from the amount of the judgment; states that, with these exceptions, nothing else had been received by him on account of the land, and there still remained a balance due; admits that Camp died insolvent; that at the time of his death, and for many years previous, he resided in Alabama; he died intestate, and no administration had ever

been taken out upon his estate; that complainant's father lived in Tennessee and there died, while the complainant was quite a small boy, and that he is a minor; that, some years ago, Camp brought complainant to Alabama, "where he kept and treated him as a member of his family, and seemed to control him and his property." But he denies that Camp was ever appointed guardian of the complainant, either by any court, or the will of the father; or that he ever was his guardian. The contract for the land and the deed of trust securing the purchase-money, were both made in Alabama, and all the property embraced in the latter, and sold under said deed, belonged to Camp individually, and not in the capacity of guardian.

He states: The purchase was made by Camp, to be paid for out of his own individual property, and not out of that of complainant. The land was worth what Camp agreed to pay, and there was no fraud contemplated by the purchase or the sale, either on the part of Camp or the defendant. He insists that his lien for the balance of the purchase-money is binding, and avers his readiness, upon the payment of the balance, to convey the land according to the contract; suggesting the necessity of making Camp's personal representative a party to the bill, and denying all fraud and combination, prays to be dismissed.

On the 17th November, 1852, the court dismissed the bill with costs, and the complainant appealed to this court.

The cause was argued by *Mr. Reverdy Johnson* and *Mr. Reverdy Johnson, Jr.*, for the appellant, and *Mr. Badger*, for the appellees.

The counsel for the appellant made the following points:

1st. The bill and answer showing that Camp, the guardian, died insolvent, and that there was no administration upon his estate, the bill is not defective for want of his personal representative as a party. 1 Story's Eq. Pl. § 91.

2d. The relation of guardian and ward subsisting in fact between Camp and the complainant, (though Camp may never have been legally appointed guardian,) Brandon dealing with the guardian, as such, and having, therefore, full notice of the fiduciary capacity in which he acted, cannot in equity, while seeking to maintain the contract, deny the existence of the guardianship. 1 Story's Eq. Jur. § 511; 2 Ib. § 1356; Field *v.* Schieffelin, 7 Johns. Ch. R. 150; Lloyd *v.* Ex'r. of Cannon, 2 Desaus. 232; Drury *v.* Connor, 1 Har. & Gill, 220; Bibb *v.* McKinley, 9 Porter's (Alab.) R. 636.

3d. By the contract itself, (Exhibit C,) and the deed of trust of 23d August, 1843, (Exhibit D,) apart from the declarations of Brandon, in evidence, he and his representatives are estopped

denying that Camp was the guardian of complainant. 1 Phillips's Evid. 367; Cowen & Hill's Notes to same, 1st Part, 372.

4th. The contract for the purchase is not binding upon the complainant, and Camp being insolvent at the time, and largely indebted to the complainant, equity will regard the payments on the purchase made under the trust deed (Exhibit D) as so much money paid out of the ward's funds on account of the land, and will decree them to be reimbursed. 2 Story's Eq. Jurisp. §§ 1257 and 1357; 2 Kent's Com. 229; Cawthorn *v.* McCraw, 9 Alabama R. 519.

5th. The contract should be set aside, because the evidence shows that the investment was injurious to the infant — the land not being worth $8,000.

6th. The amount, claimed by Brandon as a reasonable compensation under the deed of trust, is exorbitant, being more than twenty per cent. on the amount of sales — and is unsustained by the evidence.

The counsel for the appellees made the following points:

First. That Camp was not the guardian of appellant, the will of his father not appointing him guardian. Peyton *v.* Smith, 2 Dev. & Bat. Eq. 325.

Secondly. That there is no proof admissible against the appellees, that at the time of the contract for the land in August, 1843, Camp was indebted to appellant at all; and if there were such proof, it cannot be heard by the court for want of an allegation in the bill of the existence of such indebtedness at that time, the only averment in the bill being that at the time of his death, which the bill avers took place in October, 1845, more than two years thereafter, he was so indebted.

Thirdly. That it is proved the land was fully worth the price agreed to be given for it.

Fourthly. That it is fully proved that all the property conveyed by the deed of trust to secure payment of the purchase-money of the land, belonged to Camp in his own right, and none of it ever belonged to appellant. As, therefore, Camp might have applied these funds of his own to purchase the land for himself, it is absurd to suppose it an injury to the appellant to apply them in making the purchase for the benefit of appellant.

Fifthly. That there is no evidence, at all events none admissible against the appellees, that any thing whatever was paid to William Brandon, on account of the purchase, from any other source than the sale of the property conveyed by the deed of trust; and, therefore, that no money, funds, or effects of the appellant, in the hands of Camp, or elsewhere, were paid to or received by Brandon.

And, therefore, it will be insisted that the appellant's bill is without support in any point material to the relief asked by him, supposing such relief could be rightfully claimed upon his bill, if proved to be altogether true.

But it will be further insisted, that if the case made by the bill and the proofs were that Camp, being the guardian of appellant, and having funds of his ward in his hands, had purchased the land for his ward, and paid for it with those funds, with an intent to convert the funds into real estate, the appellant would not be entitled, upon these facts merely, to call for an account of the money from Brandon; for such purchase might be a wise and judicious investment: as if the ward had slaves without lands on which to employ them, and money with which lands could be purchased; and Brandon could only be liable for partaking in an apparently injurious application of the ward's funds, in itself implying a breach of trust. However, it might be a question whether the ward might not, on his arrival at age, repudiate the purchase as between the guardian and himself, and call upon the guardian to keep the land and account for the money; because, further, the right to elect either to take the purchased land or repudiate the contract, is one to be exercised by the ward on arriving at full age, and ought not to be trusted to a next friend: because, to hold the contrary would be to embarrass without necessity, and with great injury to the public, all the transactions of guardians in investing the funds of their wards; and because, finally, this purchase would have been, upon the supposition made, an advantageous one to the ward, and its character is not to be affected by events of subsequent occurrence.

It will be also insisted that the ground taken in Brandon's answer, that a personal representative of Camp is a necessary party to this suit, is a sound one. To determine the right of the appellant, upon the very frame of his bill, requires the accounts between himself and his guardian to be taken; but this can only be done when his personal representative is before the court.

Finally, it will be insisted that, upon any view of this case, the bill was properly dismissed, and the decree below must therefore be affirmed.

Mr. Justice GRIER delivered the opinion of the court.

The appellant, John C. Yerger, a minor, suing by his next friend, filed his bill against William Brandon, setting forth that the father of complainant died in the State of Tennessee, leaving him his only child and heir at law; that his father made a nuncupative will, by which James W. Camp was appointed

guardian of complainant; that Camp, acting as such, took possession of his property, and removed to the State of Alabama, where he died in 1845, insolvent. That at the time of his death Camp was largely indebted to his ward for the use and hire of his slaves, and stated an account admitting the sum of about six thousand dollars to be due. That Camp contracted with Brandon to purchase a tract of land, for the use of his ward, for the price or sum of $8,000. That Camp paid to Brandon about five or six thousand dollars, on account of such purchase, by a sale of certain property under a deed of trust. That Camp had no right, as guardian, to convert the personal property of his ward into real estate; that the price agreed to be paid for the land was exorbitant, and a large balance is still due on said contract, which the complainant is unwilling to pay in order to obtain the title. He therefore prays the court to rescind and annul the contract, to take an account of the payment made by Camp and Brandon, and decree that the amount be restored to the complainant.

The answer denies that Camp was the legal guardian of complainant — but admits that he lived in the family of Camp after he came to Alabama, and apparently under his control. That the purchase made by Camp was for a fair price, and the property transferred by him, in part payment, was the property of Camp and not of complainant; and that the contract was made without any view to injure or defraud the complainant, and did not have that effect; and that respondent is ready and willing to convey the tract of land to complainant, on receipt of the balance of the purchase-money.

The evidence in the case does not show that Camp was appointed guardian of the complainant by his father's will or by any competent legal authority, either in Tennessee or Alabama. But it appears that when Camp came to Alabama, that the complainant lived in his family, and that Camp acted as his guardian, having control of his person and of his property, which consisted of negroes. Camp had a farm of 960 acres in Alabama, and employed the negroes of complainant to work for him, and was largely indebted to him on account thereof. He was indebted also to Brandon, and his farm was subject to a deed of trust or mortgage. To satisfy this mortgage the land was sold and bid in by Brandon for the sum of $4,500. Some negroes belonging to Camp were also included in the mortgage, and were bid in for the sum of over $2,000, for the use of Yerger, (the complainant,) and paid for by Camp. An agreement was also made between Camp and Brandon, that Brandon should convey the farm purchased by him to the complainant, on receiving the sum of eight thousand dollars, being the amount of the pur-

chase-money advanced by Brandon and of the debt due by Camp to him. To secure the payment of this sum Camp gave Brandon a bill of sale, or trust deed, for a large amount of personal property, consisting of 350 acres of cotton, 450 acres of corn, 300 hogs, besides horses, mules, farming utensils, &c. Brandon was to sell this property, and apply it in payment of this contract for the land, after deducting reasonable compensation for his trouble and expenses. The defendant, in his answer, admits the amount of sales under this trust to be $5,235.24; deducting charges and expenses, $1,868.48, leaves a balance applicable to the purchase-money of the farm, of $3,365.75.

The bill does not allege that there was any fraud or collusion between the parties to this transaction, or any intention to injure the complainant. Nor would the evidence in the case support any such allegation. Brandon was endeavoring to secure his own debt in a manner least oppressive to Camp, by an arrangement which would leave him in possession of the farm on which he resided. Camp was endeavoring to save something for his ward, to whom he was indebted, out of the wreck of his estate. By this transaction the remains of his personal estate was vested in a valuable property, for the use of his ward, and put out of the reach of other creditors, with the incidental advantage to himself of retaining a home to himself and family. He was not converting the property of his ward to his own use, or to pay his own debts by collusion with Brandon, but was applying his own personal property in the best manner he could, to secure his ward from loss. His death has prevented his good intentions from being fulfilled to the extent contemplated. It is not easy to perceive on what principle of equity or justice the complainant can invoke the aid of a court of chancery to rescind and annul this contract, and compel the defendant to refund the amount paid by Camp on it. It is true a guardian has no power to convert the personal property of his ward into realty. Nor is the ward bound to fulfil or perform the contract made with Brandon. He has a right to hold his guardian accountable for the balance due him, and repudiate the contract made for his use. Or he may elect to take the land bargained for, but cannot demand a title from Brandon without payment of the balance due on the contract.

In Alabama, and some others of the States, a guardian cannot sell even the personal property of his ward without the leave of the court. By the common law, and in those States where is has not been modified by statute, he is considered as having the legal power to sell or dispose of the personal property of his ward, and a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to in-

quire into the state of the trust, nor is he responsible for the faithful application of the money unless he knew, or had sufficient information at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was in fact, by the transaction, applying it to his own private purpose. The cases on this subject are reviewed by Cancellor Kent in Field *v.* Schieffelin, 7 Johns. Chan. 150. In order to follow trust funds which have been transferred to third persons, there must be a breach of trust in their transfer, and a collusion by the purchaser or assignee with the guardian, executor, or trustee.

If Brandon had taken the negroes belonging to plaintiff from his guardian, in payment of his debt, knowing the guardian was insolvent, and abusing his trust, a court of equity would compel him to return them to the ward, or pay their full value. But, in the case before us, Camp was dealing with his own property, and there is no pretence of any collusion with him by Brandon in the abuse of his trust. He has received nothing which belonged to the ward, or which he is under any obligation to restore to him.

So far as the interest of the complainant were affected by this transaction, the object of it was to benefit, not to injure him. He may therefore assume the contract, and demand a specific execution of it from the defendant, but has shown no right to rescind it and recover the money advanced in execution of it.

The decree of the court below 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 Northern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed, by this court, that the decree of the said District Court, in this cause, be, and the same is hereby affirmed, with costs.

FREDERIC D. CONRAD, PLAINTIFF IN ERROR *v.* DAVID GRIFFEY.

In 11 Howard, 480, it is said, "Where a witness was examined for the plaintiff, and the defendant offered in evidence declarations which he had made of a contradictory character, and then the plaintiff offered to give in evidence others, affirmatory of the first, these last affirmatory declarations were not admissible, being made at a time posterior to that at which he made the contradictory declarations given in evidence by the defendant."

The case having been remanded to the Circuit Court under a *venire facias de novo*, the plaintiff gave in evidence, upon the new trial, the deposition taken under a recent commission of the same witness whose deposition was the subject of the former

examination, when the defendant offered to give in evidence the same affirmatory declarations which upon the former trial were offered as rebutting evidence by the plaintiff.

The object of the defendant being to discredit and contradict the deposition of the witness taken under the recent commission, the evidence was not admissible. He should have been interrogated respecting the statements, when he was examined under the commission.

If his declarations had been made subsequent to the commission, a new commission should have been sued out, whether his declarations had been written or verbal.

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

It was before this court at December term, 1850, and is reported in 11 Howard, 480.

In order to give a clear idea of the point now brought up for decision, it may be necessary to remind the reader of some of the circumstances of that case.

Griffey was a builder of steam-engines, in Cincinnati, and made a contract with Conrad, a sugar planter, in Louisiana, to put up an engine upon his plantation for a certain sum. Disputes having arisen upon the subject, Griffey brought his action against Conrad to recover the amount claimed to be due.

Upon the trial, in 1849, the testimony of Leonard N. Nutz, taken under a commission, was given in evidence. He was the engineer who was sent by Griffey to erect and work the machine. The deposition was taken on the 1st April, 1847. This evidence being in favor of Griffey, the counsel for Conrad offered the depositions of three persons to contradict the evidence of Nutz. Griffey then produced, as rebutting evidence, a letter written by Nutz to him, under date of April 3, 1846, which was admitted by the court below, and the propriety of which admission was the point brought before this court in 11 Howard. This court having decided that the letter ought not to have been received in evidence, the cause was remanded under an order to award a *venire facias de novo*.

Before the cause came on again for trial, Griffey took the testimony of Nutz again under a commission, on the 28th of June, 1852, when the following proceedings were had, and bill of exceptions taken.

Be it known, that on the trial of this cause, the plaintiff having read in evidence the deposition of Leonard N. Nutz, taken under commission on the 28th June, 1852, and filed on the 9th July, 1852, the defendant then offered in evidence a letter of Leonard N. Nutz, dated at New Albany, on the 3d April, 1846, with an affidavit annexed by said Nutz of the same date, all addressed to the plaintiff in this cause; and as preliminary proof to the introduction of said letter, the defendant adduced the bill of exceptions

signed upon a former trial of this cause, and filed on the 23d February, 1849, and the indorsement of the clerk upon said letter of its being filed, showing that said letter had been produced by the plaintiff in said former trial, and read by his counsel in evidence as the letter of said Nutz in support of a former deposition of the same witness. And the said letter and affidavit were offered by said defendant to contradict and discredit the deposition of said witness taken on the said 28th of June, 1852; but upon objection of counsel for the plaintiff that the said witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same, and that upon the former trial the counsel for defendant had objected to the same document as evidence, (and the objection had been sustained by the Supreme Court of the United States,) the court sustained the said objections, and refused to allow the said letter and affidavit annexed to be read in evidence; to which ruling the defendant takes this bill of exceptions, and prays that the interrogatories and answers of said Nutz, taken on said 28th June, 1852, the said letter and affidavit annexed, of date the 3d April, 1846, with the indorsement of the clerk of filing the same, and the bill of exceptions filed on the 23d February, 1849, be all taken and deemed as a part of this bill of exceptions, and copied therewith accordingly.

THEO. H. McCALEB, *U. S. Judge.* [SEAL.]

Upon this exception, the case came up again to this court.

It was argued by *Mr. Benjamin*, for the plaintiff in error, and by *Mr. Gilbert*, for the defendant in error.

Mr. Benjamin, for plaintiff in error.

From this bill of exceptions, it appears that the defendant in error, who was plaintiff in the cause below, offered in support of his case the testimony of Leonard N. Nutz, taken in St. Louis, on the 18th June, 1852, under a commission issued by the Circuit Court on the 5th of the same month. This testimony is found at p. 14 of the record.

After the testimony of Nutz had been read, the defendant offered in evidence a letter of Nutz, dated 3d April, 1846, with his affidavit of the truth of the statements contained in the letter, in order, as stated in the bill of exceptions, "to contradict and discredit his deposition taken on the 28th June, 1852."

The evidence thus offered by defendant, was rejected on two grounds: 1st. That "the witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same;" and 2d. That "upon the former trial, the counsel for defendant had objected to the same

document as evidence, and that the objection had been sustained by the Supreme Court of the United States."

On the first ground, the objection to the evidence proceeds on a misapprehension of a rule of practice in relation to the cross-examination of a witness. The rule and its reason are so clearly set forth in 1 Greenleaf on Evidence, § 462, (6th ed.) and the authorities there cited, that comment on it is unnecessary. The witness was not under cross-examination; his testimony was not taken in court in the presence of the parties where it was possible to give him an opportunity of explanation. It was impossible for the defendant, in New Orleans, to know in advance what answers the witness would make in St. Louis to the questions propounded to him; and when those answers were read on the trial, it was perfectly legitimate to offer the former written and sworn statements of the witness on the subject-matter, to contradict and discredit his later statements.

On the second ground, it is sufficient to say that evidence is frequently admissible against a party that he is not allowed to offer in his own favor, that it is frequently admissible at one period of the trial, when not admissible at another; that it is frequently admissible for one purpose, when not admissible for another; and that the decision of the Supreme Court, in 11 Howard, did not determine that the evidence in question was totally inadmissible for any purpose by either party, at any time, but only that it was not admissible for the plaintiff in the cause for the purpose for which he offered it. An array of authorities in support of these elementary principles of the law of evidence, would be deemed disrepectful to the court.

Mr. Gilbert, for defendant in error, made the following points:

First. To authorize proof of previous acts or declarations of a witness, for the purpose of invalidating his testimony, the witness must, previous to the introduction of such evidence, be examined as to the matter. The attention of the witness, Nutz, not having been called to the letter offered in evidence, and no opportunity allowed to explain what he intended by it, such letter was inadmissible in evidence to discredit him.

A witness should always be allowed to explain what he has said or done concerning the matter under investigation, otherwise his reputation might suffer wrongfully. If his attention is not called, by cross-examination, to the supposed contradiction, he will have no opportunity to explain seeming contradictions, or errors, by making more full statements, or showing the connection of things, or defining his meaning of expressions and the terms he may have used. No man always conveys his ideas in the same language. Many, even of the most learned, fail to

express themselves clearly and properly. In such case, a few explanatory words may reconcile seeming contradictions. It would be unjust that the party should suffer where he has no means of giving an explanation, which may be most ample; and cruel to a witness to discredit him, thereby injuring his character, without allowing him an opportunity to show that he has committed no fault. Hence the rule that contradictory statements and acts of an inconsistent character cannot be given in evidence, without preparing the way for its admission by cross-examining the witness as to the supposed contradictory statements.

Phillips on Evidence, p. 294, says: "Thus it appears that a witness ought to be regularly cross-examined as to the contradictory statements supposed to have been made by him on a former occasion, before such contradictory statements can be admitted in evidence to impeach the credit of his testimony. And this rule has been extended not only to such contradictory statements, but also to other declarations of the witness, and acts done by him through the medium of declarations or words."

Roscoe, Criminal Evidence, p. 182, says: "But in order to let in this evidence, in contradiction, a ground must be laid for it in the cross-examination of the witness who is to be contradicted. When a witness has been examined as to particular transactions, if the other side were permitted to give in evidence declarations made by him respecting those transactions at variance with his testimony, without first calling the attention of the witness to those declarations, and refreshing his memory with regard to them, it would, as has been observed, have an unfair effect upon his credit."

In the Queen's case, 2 Brod. & Bing. 312, (6 Com. Law Rep. 130, 131,) Abbott, C. J., said: "If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular transaction may happen to furnish."

In Angus *v.* Smith, 1 Moody & Malkin, 473, (22 Com. Law Rep. 360,) Tindal, C. J., said: "I understood the rule to be, that before you can contradict a witness by showing that he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction." Cowen & Hill's Notes, 774, 775; Williams *v.* Turner, 7 Geo. 348; Doe *v.* Reagan, 5 Blackf. 217; Johnson *v.* Kinsey, 7 Geo. 428; Franklin Bank *v.* Steam Nav. Co. 11 Gill & J. 28; Palmer *v.* Haight, 2 Barbour, Sup. C. Rep. 210, 213; McKinney *v.* Neil, 1 McLean,

R. 540; Moore *v.* Battis, 11 Humph. 67; The United States *v.* Dickinson, 2 McLean, R. 325; Chapin *v.* Siger, 4 McLean, R. 378, 381; Wienzorpflin *v.* The State, 7 Blackf. 186; Check *v.* Wheatley, 11 Humph. 556; Beebe *v.* DeBaun, 3 Eng. R. 510; McAteer *v.* McMulen, 2 Barb. 32; Clementine *v.* The State, 14 Mo. 112; Regnier *v.* Cabot, 2 Gilman's R. 34; King *v.* Wicks, 20 Ohio, 87.

The rule is the same whether the evidence offered by way of contradiction rests in parol, or is in writing. In Roscoe's Criminal Evidence, p. 182, he says: "So, what has been said or written by a witness at a previous time may be given in evidence to contradict what he has said on the trial, if it relate to the matter in issue." . . . "But in order to let in this evidence in contradiction, a ground must be laid for it in the cross-examination of the witness who is to be contradicted."

3 Starkie's Evidence, 1740, 1741. "Where the question is so connected with the point in issue that the witness may be contradicted by other evidence, if he deny the fact, the law itself requires that the question should be put to the witness, in order to afford him an opportunity for explanation, although the answer may involve him in consequences highly penal." Same, p. 1753, 1754. The Queen's case, 2 Brod. & Bing. 284, (6 Com. Law Rep. 112,) proceeds throughout upon this principle.

Greenleaf, vol. 1, p. 579, in relation to laying a foundation by cross-examination, before offering contradictory evidence, says: "This course of proceeding is considered indispensable, from a sense of justice to the witness; for as the direct tendency of the evidence is to impeach his veracity, common justice requires that by first calling his attention to the subject he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a reëxamination to explain the nature, circumstances, meaning, and design of what he has proved elsewhere to have said. And this rule is extended, not only to contradictory statements by the witness, but to other declarations, and to acts done by him through the medium of verbal communications, or correspondence, which are offered with a view either to contradict his testimony in chief, or to prove him a corrupt witness himself, or to have been guilty of attempting to corrupt others."

In Carpenter *v.* Wall, 11 Adol. & El. 803, (39 Com. Law Rep. 234,) Denman, C. J., the other judges concurring, said: "When words are to be proved as having been uttered by a witness, it is always expected that he shall have an opportunity to explain." Regina *v.* St. George, 9 Car. & Pa. 483, (38 Com. Law Rep. 198); Johnson *v.* Todd, 5 Beavan, 600, 602, cited 1 Greenleaf on Ev. p. 581; Conrad *v.* Griffey, 11 Howard, 480.

1 Greenleaf on Ev. p. 579, in note beginning at the bottom of the page, where it is said the rule in the Queen's case is adopted in the United States, except in Maine and Massachusetts, and cites 2 Cowen & Hill's Notes on Phil. Ev. p. 774.

Jenkins *v.* Eldridge, 2 Story's Rep. 181, 284, Story, J. says: "If one party should keep back evidence which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it. This course may be a fit one in cases where otherwise gross injustice may be done."

Crowley *v.* Page, 7 Carrington & Payne, 789, (32 Com. Law Rep. 737.) "If the witness made a previous contradictory statement, in writing, on a matter relevant to the issue, he may be asked, on cross-examination, whether the paper containing it is in his handwriting; and if he admit it, that will entitle the other side to read it; and if he contradicts the evidence of the witness, he may be called back to explain it." 4 Harrison's Dig. 2948, No. 11.

Yeos *v.* The State, 4 Eng. R. 42. "Where a witness has made a different statement from the one made by him on the trial, he is not thereby discredited, unless the discrepancy is wilful."

Story *v.* Saunders, 8 Humph. R. 663. "When the deposition of a witness is taken, evidence of his having made contradictory statements are not admissible to impeach his testimony, unless an opportunity to explain had been first offered him."

The contradictory statement offered in this case was the witness's testimony on a previous trial.

In Everson *v.* Carpenter, 17 Wend. 419, referring to the requisites for admitting a written instrument by way of contradiction, Cowen, J., said: "It was introduced, with the proper preliminary question to the witness, whether he had made the indenture and the representation about to be imputed to him. He answered with such explanations as occurred to him. Here was all the precaution required by this kind of examination by the Queen's case and others."

In Kimball *v.* Davis, 19 Wend. 437, Nelson C. J. considered this question at length, in a case where the defendant offered to prove that witnesses who had been examined undera commission, had subsequently made statements contradicting their written testimony. The marginal note of this decision is in these words:

"The declarations of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as

contained in the depositions, is inadmissible in evidence, if objected to; the only way for the party to avail himself of such declarations, is to sue out a second commission; such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This case went to the Court of Errors, and is reported in the 25th of Wend., 259, where it was affirmed. Walworth, Chancellor, there said: "I concur with the Supreme Court in the opinion that it was improper to give the declarations of the witnesses in evidence without giving them, in the first place, an opportunity to explain; and the fact that the witnesses had been examined under a commission did not prevent the operation of the principle upon which the rule is founded."

Edwards, Senator, said he was satisfied with Chief Justice Nelson's reasoning on this question.

Howell *v.* Reynolds, 12 Alabama R. 128. "The rule that a witness cannot be contradicted by proof of previous counter declarations, either written or verbal, applies to testimony taken by deposition, and if such supposed contradictory declarations exist at the time the deposition is taken, the witness must have an opportunity afforded him of explaining it, if in his power. "The reason of the rule is, that he may have it in his power to explain the apparent contradiction, and the rule is the same, whether the declaration of the witness supposed to contradict his testimony be written or verbal." 3 Stark. Ev. 1741. "The question is usually made when the witnesses are examined orally in open court, and in our opinion it must also apply to testimony taken by deposition, as the deposition is a mere substitute for the witness; and we can perceive no reason why a witness testifying in this should not be entitled to the same protection as if he had testified orally, in the presence of the court and jury. If this paper existed when the plaintiff was notified that the deposition of the witness was to be taken, and was informed by the interrogatories of the testimony the witness was expected to give, it was his duty to give him an opportunity of explaining it, if he could, and reconciling it with the evidence he then gave, if there was any real or apparent contradiction between them."

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States, for the Eastern District of Louisiana.

This action was brought to recover the balance of three thou-

sand seven hundred and eighty-one dollars and fifty-eight cents, claimed to be due under a contract to furnish, deliver, and set up, on the plantation of the defendant, in the parish of Baton Rouge, a steam-engine and sugar-mill boilers, wheels, cane carriers, and all other things necessary for a sugar-mill; all which articles were duly delivered.

The defendant in his answer set up several matters in defence.

The error alleged arises on the rejection of evidence offered by the defendant on the trial before the jury, and which appears in the bill of exceptions. The plaintiff read in evidence the deposition of Leonard N. Nutz, taken under a commission on the 28th of June, 1852, and filed the 9th of July succeeding. The defendant then offered in evidence a letter of the witness dated at New Albany, on the 3d April, 1846, with an affidavit annexed by him of the same date, addressed to the plaintiff Griffey. As preliminary proof to the introduction of said letter, the defendant adduced the bill of exceptions signed upon a former trial of this cause, and filed on the 23d February, 1849, showing that the letter had been produced by the plaintiff in the former trial, and read by his counsel in evidence as the letter of Nutz, in support of a former deposition made by him. And the said letter and affidavit were offered by the defendant to contradict and discredit the deposition of the witness taken the 28th June, 1852; but upon objection of counsel for the plaintiff that the witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same, it was rejected.

On the former trial the letter was offered in evidence by the plaintiff in the Circuit Court, to corroborate what Nutz, the witness, at that time had sworn to; and the letter was admitted to be read for that purpose by the court. On a writ of error, this court held that the Circuit Court erred in admitting the letter as evidence, and on that ground reversed the judgment. Conrad *v.* Griffey, 11 How. 492.

The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. In the Queen's case, 2 Brod. & Bing. 312; Angus *v.* Smith, 1 Moody & Malkin, 473; 3 Starkie's Ev. 1740, 1753, 1754; Carpenter *v.* Wall, 11 Adol. & Ellis, 803.

This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the state-

ments referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

This rule is generally established in this country as in England. Doe *v.* Reagan, 5 Blackford, 217; Franklin Bank *v.* Steam Nav. Co. 11 Gill & Johns. 28; Palmer *v.* Haight, 2 Barbour's Sup. Ct. R. 210, 213; 1 McLean's R. 540; 2 Ib. 325; 4 Ib. 378, 381; Jenkins *v.* Eldridge, 2 Story's Rep. 181, 284; Kimball *v.* Davis, 19 Wend. 437; 25 Wend. 259. "The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible, if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission." "Such evidence is always inadmissible until the witness, whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. 3 Starkie's Ev. 1741.

A written statement or deposition is as susceptible of explanation, as verbal statements. A different rule prevails in Massachusetts and the State of Maine.

The letter appears to have been written six years before the deposition was taken which the letter was offered to discredit. This shows the necessity and propriety of the rule. It is not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to. But, independently of the lapse of time, the rule of evidence is a salutary one, and cannot be dispensed with in the courts of the United States. There was no error in the rejection of the letter, under the circumstances, by the Circuit Court; its judgment is therefore affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged, by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and interest, until paid, at the same rate per annum that similar judgments bear in the courts of the State of Louisiana.

SAUNDERS BURGESS, PLAINTIFF IN ERROR, *v.* JOHN M. GRAY, THOMAS BURGESS, JR., AARON BURGESS, SIMEON BURGESS, JAMES BURGESS, JR., SAMUEL T. NORTHCUT, *alias* NORTHCRAFT, SILAS HUSKY, AARON A. SMIRL, GEORGE ARNOLD, AUSTIN M. JOHNSTON, GEORGE W. OGDEN, JOHN C. HARRINGTON, JOHN WATSON, LEWIS BUSH, AND JAMES G. CROMME.

No equitable and inchoate title to land in Missouri, arising under the treaty with France, can be tried in the State Court.

The Act of Congress, passed on the 2d of March, 1807, (2 St. at Large, 440,) did not *proprio vigore* vest the legal title in any claimants; for it required the favorable decision of the Commissioner, and then a patent before the title was complete.

The Act of 12th April, 1814, (3 St. at Large, 121,) confirmed those claims only which had been rejected by the Recorder upon the ground that the land was not inhabited by the claimant on the 20th of December, 1803.

Where it did not appear by the report of the Recorder that a claim was rejected upon this specific ground, this act did not confirm it.

The question whether or not the Recorder committed an error in point of fact, was not open in the State Court of Missouri upon a trial of the legal title.

The mere possession of the public land, without title, for any time, however long, will not enable a party to maintain a suit against any one who enters upon it; and more especially against a person who derives his title from the United States.

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.

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

It was argued by *Mr. Garland*, for the plaintiff in error, and by *Mr. Darby*, for the defendants in error. *Mr. Garland* laid down the three following propositions: —

First Proposition. This claim was confirmed by the 2d sect. of the act 3d of March, 1807, which is in these words:

"That any person, or persons, and the legal representative of any person or persons, who, on the twentieth day of December, one thousand eight hundred and three, had, for ten consecutive years, prior to that day, been in possession of a tract of land not claimed by any other person, and not exceeding two thousand acres, and who were on that day residing in the territory of Orleans, or Louisiana, and had still possession of such tract of land, shall be confirmed in their titles to such tract of land: Provided, that no claim to a lead mine or salt spring shall be confirmed merely by virtue of this section: And provided also, that no more land shall be granted by virtue of this section than is actually claimed by the party, nor more than is contained within the acknowledged and ascertained boundaries of the tract claimed."

The Supreme Court of Missouri, commenting on this section

say: "The words which declare that a certain class of claims 'shall be confirmed,' are only a direction to the board of commissioners to confirm the claims which may be brought within the class of evidence produced before them, and by no means import a present confirmation, by direct action of Congress upon the claims."

Whether the words in this section are merely directory I will hereafter examine, but that this may import a present confirmation has been decided by this court. In Rutherford *v.* Greene's Heirs, 2 Wheat. 196, it is so decided. The Legislature of North Carolina had made a donation of land to General Nathaniel Greene, in these words: "Be it enacted that 25,000 acres of land shall be allotted for, and given to, Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners."

On the part of the appellant it is contended, say the court, that these words give nothing; they are in the future, not in the present tense, and indicate an intention to give in future, but create no present obligation on the State, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed, of any special land, but of 25,000 acres in the territory set apart for the officers and soldiers. . . . . As the act was to be performed in future, the words directing it are necessarily in the future tense. — "Twenty-five thousand acres of land shall be allotted for, and given to, Major-General Nathaniel Greene." Given when? The answer is unavoidable — when they shall be allotted. Given how? Not by any further act, for it is not the practice of legislation to enact, that a law shall be passed by some future legislature, but given by force of this act. It has been said, that to make this an operative gift, the words "are hereby" should have been inserted before the word "given," so as to read, "shall be allotted for, and are hereby given to, &c." Were it even true that these words would make the gift more explicit, which it is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends, in no degree, on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment and to give the land, when allotted, to General Greene. . . . . The allotment and survey marked out the land given by the act, and separated it from the general map liable to appropriation by others. The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North

Carolina, had now become a particular gift of 25,000 acres contained in this survey."

In the treaty with Spain ceding the Floridas, the 8th article says: "All the grants of land made before the 25th January, 1818, &c., shall be ratified and confirmed." The counterpart, in the Spanish language, rightly translated, reads thus: "Shall remain ratified and confirmed." This court, commenting on these words, in the United States *v.* Perchman, 7 Pet. 89, say: "Although the words, 'shall be ratified and confirmed,' are properly the words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, we think the construction proper, if not unavoidable."

Here are two important cases decided by this court, in which the words, "shall be given," and the words, "shall be confirmed," are construed into a present grant and confirmation, by force of the instrument itself.

Let us now see whether such is not the true construction of the statute before us. The Supreme Court of Missouri say that the words, "shall be confirmed," are only a direction to the board of commissioners. The act of 2d March, 1805, created a board of commissioners to decide on claims to land in Louisiana. The 1st and 2d sections prescribed the character of claims to be acted on, and the kind of evidence to be given in their support. The supplemental act of April 21st. 1806, modified the evidence to be given. The decision of the board amounted only to a recommendation to Congress. These statutes, and the restrictions in them, giving much dissatisfaction, Congress passed the 4th section of the act of March 3d, 1807, in which they conferred on the board of commissioners full powers to decide, according to the laws and established usages and customs of the French and Spanish governments, upon all claims to lands, where the claim is made by any persons who were, on the 20th of December, 1803, inhabitants of Louisiana, and for a tract not exceeding the quantity of acres contained in a league square, and which does not include either a lead mine, or salt springs; which decision, when in favor of the claimant, shall be final against the United States.

Here we see power conferred on the board to decide, according to the laws and established usages and customs of the French and Spanish governments. They were restricted to claims coming under those laws and usages, and what might be those laws and usages they had full power to determine.

Now the claims embraced in the second section of the same act, do not necessarily fall under this head; if they do, then the second section was superfluous; the board having full power, under the fourth section, to decide such claims as are described in the second. But that the subject-matter of the second section was not intended to be referred to the board, is made plain by the eighth section, which says that the commissioners shall report to the Secretary of the Treasury, their opinion on all the claims to land, which they shall not have finally confirmed by the fourth section of this act.

If the law had intended that they should act on claims in the second section, that section would have been included in the above clause, and it would read, "shall not have finally confirmed by the second and fourth section of this act." The report would be in these words: The commissioners would have confirmed such and such a claim, by virtue of the second section of the act of March, 1807, but for such and such defects. This was generally the style of their negative reports. But we see that the claims under the second section, were not subjects on which they were authorized to report adversely upon; of course they were not subjects on which they would act at all.

Again, the second section makes no allusion to the claims therein described, being recognized and valid by the laws and usages of the country; on the contrary, we are bound to infer that Congress did not consider them as so recognized, and therefore singled them out as the special objects of their bounty. There were but two classes of claims recognized by the Spanish; both were described by the first and second sections of the act of 2d of March, 1805. The first was some written evidence of title, a concession or warrant, or order of survey; the second was a mere verbal permission to occupy and cultivate, hence it was called a "Settlement Right."

Now, the claims in the second section cannot come under the head of "Settlement Rights." A settlement right could not exceed eight hundred arpens, and required inhabitation and cultivation to give it validity. The claims under the second section largely exceed the quantity in a settlement right, and only required proof of possession, which does not necessarily involve inhabitation or cultivation. Hence, I conclude that the subject-matter of the second section, was not intended to be referred to the Board of Commissioners for their action.

Let us now examine the second section in its own terms. If the claimant was an inhabitant of the territory at the change of government, and was still in possession at that time, if the tract claimed had acknowledged and ascertained boundaries, not exceeding two thousand acres and not adversely claimed,

his title shall be confirmed. If the second section stood by itself, no one would fail to construe these words into a present grant, being in all respects similar to the two cases above cited. If then, the words of the section are sufficient to create a present grant, it is a forced construction to prevent them from having that effect, and to throw the confirmation on the future decision of a Board of Commissioners for the reasons already given. *First*, if the board had power to act on the subject, the second section was superfluous. *Second*, the eighth section implies an exclusion of the second from the jurisdiction of the board. *Third*, the language of the second section, leads us to presume that the Legislature did not think that the claims therein embraced, were recognized by the Spanish laws and usages, or they would have left them to be decided by the commissioners under their general powers.

The proviso of the second section puts it beyond doubt, that the claims were intended to be confirmed by force of the act itself. The proviso says, that no claim to a lead mine or salt spring shall be confirmed merely by virtue of this section. The necessary inference is, that a tract of land, not containing a lead mine or salt spring, but in other respects complying with its terms, shall be confirmed merely by virtue of this section. It may be said, that this proviso was intended as an instruction to the Board of Commissioners; but the fourth section, which confers the powers on the board, and imposes limitations on them, has this very same prohibition. This affords us good evidence of the meaning of the Legislature. They did not intend under any circumstances to confirm a lead mine or a salt spring; therefore, in the second section, where they intended to confirm certain claims, merely by force of the section, they introduced a proviso exempting lead mines and salt springs from its operation; and in the fourth section, where full powers are given to the board to decide all French and Spanish claims, they introduced a claim imposing the same restriction on them, in regard to lead mines and salt springs. This is the only way, in which we can give an independent existence to the second section and preserve it from being a mere superfluity.

There is nothing in the words of the section, that necessarily requires further action on the part of the Legislature or its ministerial agents. All that the claimant would have to do, when his right is brought in question, is to show that he comes within the provisions of the statutes, just as the claimants of village lots under the act of the 13th June, 1812. He will have to establish his title by showing a tract, not exceeding two thousand acres, with defined and ascertained limits; proving uninterrupted possession for ten consecutive years; residence in the

province and possession at the time of the change of government. These facts would work a title in him, having relation back to the time of the passage of the act.

Second Proposition. The next statute on which we rely for a confirmation, is the second section of the act passed April 12, 1814, entitled "An act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri."

(The argument of *Mr. Garland*, upon this proposition, is too long to be inserted.)

Third Proposition. If the court are not satisfied, that the claim of John Jarrott was confirmed by the acts we have been commenting on, there is another view of the case, to which I would now ask their attention.

By the facts set forth in the petition, and admitted to be true by the demurrer, it seems that Jarrott had been in possession of the land more than ten consecutive years prior to the 20th December, 1803; that it did not exceed in quantity two thousand acres, and that he was an inhabitant of the territory, and still in possession on that day. By the second section of the act 3d March, 1807, he was entitled to a confirmation from any tribunal authorized to act on the subject. The claim was presented to the Recorder of Land Titles, and by him rejected, it was reserved from sale by the act of 17th February, 1818, third section. It was afterwards surveyed and marked on the books of the Surveyor General and on the books of the Register, as reserved to fill the claim of John Jarrott. In 1824 an act was passed authorizing the representatives of certain French and Spanish claims to prosecute them before the District Court. Various other acts were subsequently passed on these claims which it is not necessary to mention. On the 17th June, 1844, an act was passed reviving for five years the act of 1824.

The claim of John Jarrott did not come within the purview of these statutes. The act of 26th May, 1824, gave jurisdiction to the District Court over claims to lands, "by virtue of any French or Spanish grant, concession, warrant or order of survey legally made, granted, or issued before the 10th day of March, 1804," by the proper authorities. Jarrott's claim was neither a grant, a concession, a warrant, or order of survey; it was founded on verbal permission only, and was called a settlement right; as such it was filed, and as such it was acted on by the Recorder. That it did not come under the jurisdiction of the court, is put beyond question by a comparison of other statutes on the same subject. On the 9th of July, 1832, an act was passed creating a Board of Commissioners "to examine all the unconfirmed claims to land in that State, (Missouri,) heretofore filed in the office of the Recorder according to law, founded upon any incomplete

grant, concession, warrant, or order of survey, issued by the authority of France or Spain, prior to the 10th day of March, 1804." It will be perceived that the class of claims embraced in this statute is precisely the same as that in the act of 1824, over which the District Court took cognizance. They were claims originating in a grant, concession, warrant, or order of survey. Donation or settlement claims were not embraced; accordingly Congress passed a supplemental act embracing those claims.

On the 2d of March, 1833, it was enacted that the provisions of the act of the 9th of July, 1832, shall be extended to, and embrace in its operations every claim to a donation of land in the State of Missouri, held in virtue of settlement and cultivation. This supplement shows the understanding of the Legislature, and proves that Jarrott's claim, which was a "donation-right," was not embraced by the act of 9th of July, 1832, and consequently not by the act of 26th May, 1824, giving jurisdiction to the court, to precisely the same class of claims.

Since writing the above, I have seen the opinion of this court in the case of the United States *v.* Rillieux, 14 Howard, 189, which fully sustains the conclusion that the District Court had no jurisdiction in this case.

After the act of 1818, reserving this tract from sale, there was no other statute operating on it till the supplemental act of March, 1833, extending the provisions of the act of 1832, to donation and settlement rights. It was made the duty of the Commissioners to examine all the unconfirmed claims heretofore filed in the office of the Recorder, to take additional testimony, if they thought proper, in regard to those claims, and then to class them so as to show, first, what claims, in their opinion, would in fact have been confirmed under former authorities, and, secondly, what claims, in their opinion, are destitute of merit. They were required to proceed, with or without any new application of the claimants, and to lay before the Commissioners of the General Land Office a report of the claims so classed, to be laid before Congress for their final decision upon the claims contained in the first class.

The third section then enacts, "that from and after the final report of the Recorder and Commissioners, the lands contained in the second class shall be subject to sale as other public lands, and the lands contained in the first class shall continue to be reserved from sale as heretofore, until the decision of Congress shall be made thereon." Jarrott's claim was not embraced in either class, it was not acted on at all. The law made it the duty of the Board to proceed without further application. The claim was regularly filed in the office of the Recorder; the Commissioners might take additional testimony if the case required it. The

representatives of Jarrott had nothing to do; they could only wait in silence the action of the board. Their claim was overlooked or not reached; the board made their final report, and dissolved. Now, it is a well settled principle of law that no person shall suffer in his rights in consequence of the delay or neglect of government officers. This tract of land stands reserved from sale, as heretofore, to fill the claim of John Jarrott's representatives.

In Menard *v.* Massey, 8 Howard, 309, this court have said: "That this provision (section 6th of act 3d March, 1811,) is an exception to the general powers conferred on the officers to sell, is not an open question; having been so adjudged by this court in the case of Stoddard's Heirs *v.* Chambers, reported in 2 Howard; and again, at the present term, in the case of Bissell *v.* Penrose. Nor is it an open question, that the act of February 17, 1818, folio 3, reënacts and continues in force the exception as respects such lands. This was also decided by the above cases; and that such was the opinion of Congress, is manifest from the third section of the act of 9th July, 1832, under which the last Board acted; for it declares that lands of the first class shall be reserved from sale as heretofore." Now it is manifest that lands not classed at all, not acted on by the Board, must continue reserved from sale as heretofore. We can come to no other conclusion without admitting that the neglect or delay of public officers can deprive a person of his rights, which is not consistent with law or justice.

The Supreme Court of Missouri, in a similar case, have held that the lands continue to be reserved as heretofore. In Perry *v.* O'Hanlon, 11 Mo. 596, they say: "What then was the condition of the land, the title to which is now in controversy, in 1847, when the patent issued? The act of July 9th, 1832, directed the Commissioners to divide the claims submitted to them into two classes. The first class was to embrace such claims as, in their opinion, were meritorious and ought to be confirmed; and the second class, to include such as were destitute of merit. The act declared that, after the final report of the Board, the lands embraced in the second class should be subject to sale as other public lands; that the lands contained in the first class should be reserved from sale until the final action of Congress thereon. Congress finally acted on this report in 1836; and the act, July 4, 1836, confirmed the claims recommended by the Commissioners, with certain exceptions specified in the act. Perry's claim was not in the second class, for it was never rejected by the Board; it was not in the first class, for it was not reported for confirmation. How then has the reservation been removed? By the act of 1832, this land was expressly

reserved from sale. No proceeding under that act has had the effect of taking off this reservation, nor has any subsequent law been enacted having such purpose or tendency. If Perry, then, by virtue of the proceedings under the proviso to the third section, failed to acquire a complete title to the land by purchase, it still continues under the general reservation. Whether Perry's title be good or otherwise, until Congress shall direct the land to be brought into market, no other individual can acquire a title. It was expressly reserved on account of Perry's claim under Valle. That reservation still remains."

This tract of land, therefore, stands reserved from sale "as heretofore," and all the entries made upon it are consequently void. But the Supreme Court of Missouri tell us there is no remedy. "Suppose it be true," say they, "that the reservation did exist, and that its effect would be to render the purchases void, still his position (plaintiff's) in court is not changed thereby. The reservation confers no title on him; and the nullity of purchases made by the defendants does not enhance the merits of his title. He is still without any title that we can enforce."

They came to this conclusion on the authority of cases decided by this court. "The Supreme Court of the United States," say they, in Les Bois *v.* Bramell, 4 Howard, 462, and in Menard *v.* Massey, 8 Howard, 307, "distinctly declare that until an inchoate title originating under the Spanish government has been 'confirmed,' it has no standing in a court of law or equity."

In the view I am now about to press upon the consideration of the court, I do not rest the case on the "unconfirmed title" filed in the Recorder's office. The above authorities, therefore, and the principle deduced from them, are inapplicable.

I maintain that we have a right to the aid of the court on the ground of possession; legal possession of a tract of land with acknowledged and ascertained boundaries, by permission and authority of the Congress of the United States. We are tenants of the government, and have a right to be protected in our possession.

The statute of Missouri says: "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises."

In this case, Burgess, as representative of Jarrott, is legally entitled to the possession of the premises.

Kendall, who purchased of Jarrott's heirs, filed his claim with the Recorder under the seventh section of the act 13th June, 1812, which required him to be an actual settler on the land. As the claim was not confirmed on other grounds we are to presume

that he complied with the law in this respect, and was an actual settler. We know, from the record, he was. The land thus actually settled was reserved from sale by a subsequent act of Congress. It was surveyed and marked on the book of surveys, in the Register's office, as reserved from sale, to fill the claim of John Jarrott's representative. This representative was in the actual occupation and use of the land. Here, then, is a specific tract of land in the actual occupation of Kendall, who has authority by law to hold the same until Congress shall determine whether or not he has a right to demand a legal title for it. Until that event he has possession, and a legal right to the possession.

Burgess, in his petition, sets out his possession and the ouster of possession by the defendants. After describing the chain of events, and proving himself the legal representative of John Jarrott, the petition then proceeds: "And your petitioner has been in possession of six hundred and forty acres of said land ever since he purchased it as aforesaid."

The petition goes on to show that the land was marked on the books as reserved from sale, and was reserved from sale to fill the claim of Jarrott's representatives, "until the 30th day of December, 1847, a period of twenty-nine or thirty years, when, in violation of law, the several acts of the Congress of the United States, and the rights of the legal representatives of the said Jarrott," the Register suffered prëemptions to be taken on it; "and the persons who took said prëemptions had full knowledge at the time of the claim of John Jarrott's legal representatives to said land, and now having possession of said land, and claiming the same as their property, (although attempted to be unlawfully obtained,) and are keeping the legal representatives of the said Jarrott out of their possession of the same, notwithstanding it is their property, and belongs to no other person whatever." And, in conclusion, the petition prays "that said defendants be, by verdict and judgment in your petitioner's behalf, compelled to abandon their illegal claim to said land or any part of it: to wit, your petitioner's six hundred and forty acres of it."

This petition is awkwardly worded, but the statute of Missouri requires no particular form, only that the petitioner shall set out his case in full, and in language so that a man of common understanding shall know what is meant. There can be no mistake as to the meaning of this petition. Burgess had bought six hundred and forty acres of this land by deed, and was in the actual possession of the same, according to the metes and bounds of his deed, when the defendants intruded and unlawfully obtained possession, and are holding the same against the lawful possession of him, the legal representative of John

Jarrott, and he prays that they may be adjudged to surrender up this unlawful claim to his land.

It is on this right of possession we now ask the judgment of the court.

That the entries are void, cannot be questioned. See Stoddard's Heirs *v.* Chambers, 2 Howard 284; Menard *v.* Massey, and Bissell *v.* Penrose, 8 Howard; and Perry *v.* O'Hanlon, 11 Missouri, 585. The entries being void, our right of possession will be recognized and enforced.

The political power has acted on this claim, and it is now cognizable by the courts of law. The claim was required by statute to be filed with the Recorder of Land Titles; to be investigated and reported to Congress. Another statute declares that until the final action of Congress thereon it shall be reserved from sale. The executive officers are instructed to carry these laws into effect. The Surveyor-General marks it out on the maps in his office; draws lines around the claim, and writes on the face of it, "Reserved from sale, to fill the claim of John Jarrott's representatives." Will not the courts recognize a claim in this condition, and enforce the law in regard to it? They do not look upon it as an unconfirmed Spanish grant, having no standing in a court, but as a claim filed and reserved from sale by the laws of Congress: it has a legal existence. They enforce the laws of Congress and say: The possession of Jarrott's representatives is recognized by statute, and is valid until the final action of Congress: in the mean time all entries on this land are without authority and void. The Supreme Court of Missouri admit that they have power to pronounce the entry of the defendants void, because the land is reserved from sale by a law of Congress; but deny that they can go further, and protect the right of possession in the plaintiff, because he sets up nothing more than an unconfirmed Spanish grant which is not recognized by law. But he does more, he sets up a right of possession in this land under the law of Congress. It is admitted that the plaintiff is in possession, and has been from the beginning. It must also be conceded that the reservation was made in respect of this possession, because every law on the subject of incomplete Spanish grants is based on the idea of actual possession or inhabitation and cultivation. This reasoning is specially applicable to the present case, because it has no written evidence of title, and rests entirely on actual settlement or possession. Here then is a claim founded in possession, only, recognized by law. If, therefore, the courts can protect the reservation by declaring all entries on it, subsequent to the reservation, void, they can likewise protect and enforce the right of possession on which the reservation was founded. The same

law that gives them power to protect the reservation, gives them power to protect the possession under it. If this be not so, then a *bonâ fide* holder of land under the authority of Congress can be ousted of his possession, and the courts have no power to protect him. But this is not law. An ejectment can be maintained on a bare possession against a trespasser. In the case of Crockett *v.* Morrison, 11 Mo. page 6, the court say: "As the action of ejectment is a possessory action, where no title appears on either side, a prior possession, though short of twenty years, will prevail over a subsequent possession which has not ripened into a title, provided the prior possession be under a claim of right and not voluntarily abandoned. . . . . This doctrine is recognized by the New York courts in a variety of cases. . . . . In all these cases it will be found that the defendants, against whom a recovery was permitted, were mere trespassers, and that they, or those under whom they claimed, or from whom they obtained possession, entered upon the actual or constructive possession of the plaintiff."

In the present case there is no question of title: that remains in the United States. The Supreme Court of Missouri admit that Burgess is in possession, and that the entry of the defendants is void. Then the defendants are mere trespassers on the actual and constructive possession of the plaintiff, and ought to be ejected by the present action.

Mr. Darby, for defendants in error.

The petition of the plaintiff shows that he has no title. His claim is not based upon a concession, and was never confirmed. The only action ever taken with the claim by the parties purporting to represent it, was when it was presented to the Recorder of Land Titles, by Kendall, after his purchase in 1812. The Recorder refused to recommend it for confirmation, and rejected it; and from that time to the commencement of this suit, a period of nearly forty years, the claim appears to have been abandoned. At least, no steps appear to have been taken to bring it before the Recorder, or any of the several boards of commissioners, for confirmation. It does not appear to have been presented to Congress, or any department of the government or other tribunal, for their sanction, approval, or confirmation.

The opinion of the Supreme Court of Missouri has shown, most conclusively, that it was not confirmed by the second section of the act of the 3d of March, 1807, (2 U. S. Stat. at Large, 440,) as was contended by the counsel in that court, in the argument of this cause.

The plaintiff, then, has nothing more than an unconfirmed,

unprosecuted claim to land, which has been rejected by the Recorder of Land Titles, and that rejection acquiesced in for nearly forty years; and which the defendants, as shown by the plaintiff's petition, have purchased, at different times, of the United States, and to which they have severally a title from the government. It is manifest the plaintiff has no such title as will authorize a court of justice to give him the relief prayed for in his petition.

The claim was not filed under the provisions of the act of Congress of May 26, 1824, giving jurisdiction to the District Court of the United States for the Missouri District, to adjudicate and pass on these unconfirmed claims. The claim was consequently barred. The fifth section of that act provides, "That any claim not brought before the District Court within two years from the passing thereof, shall be forever barred, both in law and equity; and that no other action at common law, or proceeding in equity, shall ever thereafter be sustained in relation to said claim."

In further support of this position, the defendants refer to the case of Barry *v.* Gamble, 3 How. 55, and also to the case of Chouteau *v.* Eckhart, 2 How. 352.

To show, moreover, that the plaintiff's claim has "no standing in a court of law or equity," the defendants rely with much confidence on the case of Les Bois *v.* Bramell, decided in this court at the January term, 1846, 4 How. 462. And in the case of Menard *v.* Massy, 8 How. 307, the same principle is still more strongly asserted and adhered to.

The decision of the Supreme Court of Missouri is made in accordance with the decisions referred to, and is governed by them. The demurrers were rightfully sustained on both points.

The defendants were improperly joined in the action. They held separately, each in his own right, under entries made at the Land office at different times, and under preemptions allowed in favor of each of the defendants. The petition shows that they did not hold or claim title in common, but that they held separately.

In conclusion, the defendants adopt, as a part of their argument, a portion of the able opinion of Chief Justice Gamble, in delivering the opinion in this cause:

"The plaintiff, then, has no title which authorizes him to ask the relief prayed for in this petition. But he alleges that the land was, by different acts of Congress, reserved from sale in order to satisfy his claim, and therefore the purchases made by the defendants were void. Suppose it to be true that the reservation did exist, and that its effect would be to render the purchases void, still his position in court is not changed there-

by. The reservation confers no title on him, and the nullity of purchases made by the defendants does not enhance the merits of his title. He is still without any title that he can enforce."

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

This was a suit brought by petition in the Circuit Court of Jefferson county, in the State of Missouri, by the plaintiff in error, against the defendants.

"The petition sets forth, in substance, that John Jarrott, *alias* Gerrard, in 1780, with the consent and permission of the officers of the Spanish government, settled upon a tract of land in what is now Jefferson county, in the State of Missouri, and that he continued to inhabit and cultivate it until about 1796, when he was driven off by the Indians. His son Joseph succeeded him in the possession of the land, and continued to reside upon and cultivate it until he sold it to Kendall, in the year 1812. Kendall filed a notice of the claim with the United States Recorder of Land Titles, who rejected it. The right of Kendall passed by descent to his heirs at law, who sold to the plaintiff, as appears by conveyances filed with the petition. It appears, moreover, that the plaintiff has always been in possession since the purchase of Kendall's heirs. A plat of the claim was laid down on the maps of the public lands, in the Registrar's office, representing it as being reserved to satisfy the claim of John Jarrott's legal representatives. After the claim had been examined and rejected by the Recorder of Land Titles, no farther action appears to have been taken on the claim.

"In the years 1847 – 8, and 9, different portions of the same tract of land were entered at the Registrar's office, by different individuals, under preëmptions allowed to them; the entries being made at different times, each person purchasing in his own right and in his own individual name, separate and distinct from the others. The several persons making these separate and different entries are made the defendants to this suit.

"The defendants demurred to the petition, and assigned as causes of demurrer: first, that the plaintiff showed no right, in his petition, to maintain the action; second, that separate and distinct causes of action against different persons were joined in the petition.

"The Circuit Court of Jefferson County, sustained the demurrers, and the plaintiff appealed to the Supreme Court of of Missouri. The Supreme Court affirmed the decision of the Circuit Court, and the plaintiff has brought his case before this court, by writ of error, to reverse the decision of the Supreme Court of Missouri."

In proceeding to deliver the opinion of the court, it is proper to observe, that by the laws of Missouri the distinction between suits at law and in equity has been abolished. The party proceeds by petition, stating fully the facts on which he relies, if he seeks to recover possession of land to which he claims a perfect legal title; and he proceeds in the same manner if he desires to obtain an injunction to quiet him in his possession, or to compel the adverse party to deliver up to be cancelled evidences of title, improperly and illegally obtained, and he may, it seems, assert both legal and equitable rights in the same proceeding, and obtain the appropriate judgment.

This has been done by the plaintiff in error in the present case. His suit is brought according to the prayer of his petition to recover possession of land to which he claims title, and upon which, as he alleges, the defendants have unlawfully entered; and also to compel them to abandon (as he terms it) their illegal claim.

The demurrer admits the truth of the facts stated in the petition. And, consequently, if these facts show that he had any legal or equitable right to the land in question under the treaty with France, or an act of Congress, which the State court was authorized and bound to protect and enforce, he is entitled to maintain this writ of error, and the judgment of the State court must be reversed.

Now as regards any equitable and inchoate title which the petitioner may possess under the treaty with France, it is quite clear that the State court had no jurisdiction over it. For it has been repeatedly held by this court that, under that treaty, no inchoate and imperfect title derived from the French or Spanish authorities can be maintained in a court of justice, unless jurisdiction to try and decide it has first been conferred by act of Congress. Certainly no such jurisdiction has been given to any State court. And the Supreme Court of Missouri were right in sustaining the demurrer, as to this part of the petition, even if it had been of opinion, that the permit to settle on the land, and the long possession of it under the Spanish government, gave him an equitable right, by the laws of Spain, to demand a perfect and legal title. The court had no jurisdiction upon the question. And the judgment of the State court cannot be reversed unless the plaintiff can show that he had a complete and perfect title derived from the Spanish or French authorities: or a legal or equitable title under the laws of the United States.

The petitioner does not claim a perfect grant from the French or Spanish government; nor a patent from the proper officers of the United States. But he insists that the act of Congress of March 3, 1807, 2d Stat. 440, vested in him a complete legal title, and needed no patent to confirm it.

Undoubtedly Congress may, if it thinks proper, grant a title in that form, and it has repeatedly done so. And we proceed to examine whether the title, claimed by the plaintiff, was confirmed to him by the act referred to.

The plaintiff relies on the second section as a confirmation of his claim. But it evidently will not bear that construction when taken in connection with the whole act. For the fourth section directed commissioners to be appointed, who were authorized to decide upon all claims to land under French or Spanish titles in the territories of Louisiana or Orleans; and by the sixth section, whenever the final decision of the Commissioner was in favor of the claimant, he was entitled to a patent for the land, to be issued in the manner provided for in that section. The eighth section required the Commissioners to report to the Secretary of the Treasury their opinion upon all claims not finally confirmed by them — the claims to be classified in the manner therein prescribed. And it was made the duty of the Secretary to lay this report before Congress for their final determination.

This act of Congress did not, *proprio vigore* vest the legal title in any of the claimants. For even when the decision of the Commissioners was final in their favor, yet a patent was still necessary to convey the title. The report was made conclusive evidence of the equitable right, and nothing more. And when the final decision was against the validity of the claim, he was directed to report his opinion upon its merits; and Congress reserved to itself the ultimate determination.

The powers and duties of the Commissioner were subsequently transferred to the Recorder of Land Titles. And this claim was presented to him in 1812, with the evidence upon which the claimant relied to support it. It is a claim under a settlement right derived from the Spanish authorities, and which the claimant insisted was within the provisions, and entitled to confirmation under the second section of the act of 1807.

The Recorder reported against it. His report states that there was "possession, inhabitation, and cultivation in 1781, and eight following years, and again two or three years." He assigns no particular reason for rejecting the claim, but simply enters in his report "not granted." And in this form it was laid before Congress, together with the other claims not finally decided by the Recorder in favor of the claimants. It does not therefore appear from the report whether it was rejected because, in the judgment of the Recorder, the possession of ten consecutive years was not sufficiently proved: or because no evidence was offered (and none appears to have been offered) to prove that the party under whose title the claim was made was a resident of the territory on the 20th of December, 1803.

On behalf of the petitioner it is contended, that the decision of the Recorder was erroneous, and founded upon a mistake as to a matter of fact; and that it appears by the evidence returned with the report to the Secretary of the Treasury, that the possession spoken of was proved to have been for more than ten consecutive years before the 20th of December, 1803 — and not broken, as stated in the report.

This may be true. The Recorder may have fallen into error. But it does not follow that plaintiff was entitled, on that account, to maintain his petition in the Missouri court. That court had no power to correct the errors of the Recorder if he made any; nor to revise his decision; nor to confirm a title which he had rejected. That power, by the act of 1807, was expressly reserved to Congress itself; and has not been committed even to the judicial tribunals of the general government. The decision of the Recorder against him is final, unless reversed by act of Congress; and the petitioner can make no title under the United States, by virtue of the provisions in that act.

It is however insisted that if it was not confirmed by the act of 1807, it was made valid by the act of 1814. And this confirmation is claimed under the first section, which confirms all claims where it appears by the report of the Recorder that it was rejected merely because the land was not inhabited by the claimant on the 20th of December, 1803.

But it is very clear that this act does not embrace it. The report of the Recorder does not place its rejection merely on that ground. On the contrary, it would seem to place it upon the want of proof of continued residence upon the land for ten consecutive years; and upon none other.

It may indeed have happened that the son of John Jarrett was in possession, and actually inhabited the land on the day mentioned in the law; and that from ignorance of its provisions, or from other cause, he omitted to produce proof of it to the Recorder, and that the claim was in fact rejected on that account. But that question was not open to inquiry in the Missouri court. The act of Congress does not confirm all claims where this fact existed and could be proved, but those only in which it appeared on the face of the report that the want of this proof was the sole cause of its rejection. This must appear on the written report of the Recorder to bring it within the provisions of this act, and cannot be supplied by other evidence. And as it does not so appear in the present case, the act of 1814 does not embrace it nor confirm it.

Neither can the petition be maintained upon the long and continued possession held by the petitioner and those under whom he claims.

The legal title to this land, under the treaty with France, was

in the United States. The defendants are in possession, claiming title from the United States, and with evidences of title derived from the proper officers of the government. It is not necessary to inquire whether the title claimed by them is valid or not. The petitioner, as appears by the case he presents in his petition, has no title of any description derived from the constituted authorities of the United States, of which any court of justice can take cognizance. And the mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it; and more especially he cannot maintain it against persons holding possession under title derived from the proper officers of the government. He must first show a right in himself, before he can call into question the validity of theirs.

Whatever equity, therefore, the plaintiff may be supposed to have, it is for the consideration and decision of Congress, and not for the courts. If he has suffered injury from the mistake or omission of the public officer, or from his own ignorance of the law, the power to repair it rests with the political department of the government, and not the judicial. It is expressly reserved to the former by the act of Congress.

We see no error in the judgment of the Supreme Court of Missouri, and it must be 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.

JOSIAS PENNINGTON, PLAINTIFF IN ERROR, *v.* LYMAN GIBSON.

Whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law.

Whenever, therefore, an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for a specific amount; and the records of the two courts are of equal dignity and binding obligation.

A declaration was sufficient which averred that "at a general term of the Supreme Court in Equity for the State of New York," &c. &c. Being thus averred to be a court of general jurisdiction, no averment was necessary that the subject-matter in question was within its jurisdiction. And the courts of the United States will take notice of the judicial decisions in the several States, in the same manner as the courts of those States.

Pennington v. Gibson.

THIS case was brought up by a writ of error from the Circuit Court of the United States for the District of Maryland.

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

It was argued by *Mr. Schley*, for the plaintiff in error, and by *Mr. Frick* and *Mr. Collier*, for the defendant in error.

Mr. Schley stated that there were three causes assigned for the demurrer to the declaration. They were—

1. For that it appears from the declaration, that the cause of action is an alleged decree of an alleged court of equity, as set forth in said declaration; whereas, an action at law cannot be maintained in this court, on such a decree; at least without averment in pleading, that said decree, within the limits of its territorial jurisdiction, is of equal efficacy with a judgment at law.

2. For, even if an action at law can be maintained for the recovery of the sums of money directed by such alleged decree to be paid, as stated in said declaration, yet the form of action adopted in this case is not the proper form of action for the enforcement of such recovery.

3. For that it does not appear in and by the said declaration, nor is it therein averred, in any manner, that the said alleged court of equity had any jurisdiction to pass a decree against this defendant for payment to the plaintiff of any of the sums of money in the said declaration mentioned.

After joinder in demurrer, the court gave judgment upon the demurrer in favor of the plaintiff below, for $6,134.86, and $3,000 damages; the damages to be released on payment of the debt, with interest from 25th November, 1848, and costs of suit.

The counsel for the plaintiff in error will insist that said several causes of demurrer were well assigned.

As to the first ground. There is no averment that said "Supreme Court in Equity of the State of New York," is a court of record. The decree is referred to "as remaining in the office of the County Clerk of Steuben county." No averment that such a decree in the State of New York is of equal efficacy with a judgment at law.

It is conceded that it has been held, in many cases, in this court, that a decree in Chancery is equally as conclusive as a judgment in a court of common law. In Hopkins *v.* Lee, 6 Wheat. 109, the decree was evidenced by the record of the proceedings in Chancery in the Circuit Court for the District of Columbia; and being offered in evidence in the same court, the only question was as to the effect of said decree as evidence.

But Hugh *v.* Higgs, 8 Wheat. 697, is an express decision on the very point, and sustains the demurrer. Smith *v.* Kernochen, 7 How. 217, merely decided the effect, in evidence, of a decree in Chancery, as between the parties. It was not the case of an action at law grounded on a decree. On this point, the following cases will also be relied on: Carpenter *v.* Thornton, 3 B. & Ald. 52; Houlditch *v.* Marquis of Donegal, 8 Bligh, N. S. 301; and 1 Stat. at Large, 122, and notes there, will be cited.

On the second point, the following cases will be cited: Walker *v.* Witter, 1 Doug. 1; Dupleix *v.* De Roven, 2 Vern. 540; Crawford *v.* Whittall, and Sinclair *v.* Fraser, Doug. 4.

As to the ground of demurrer thirdly assigned, it will be insisted that the courts of the United States cannot judicially know the extent or character of the jurisdiction of the said Court of Equity; and of course cannot know whether it had jurisdiction over the subject-matter, or over the plaintiff in error. There is no averment in the declaration as to the jurisdiction of said court; nor is it even averred that said court was holden at a place within its jurisdiction, or that said decree was pronounced within its jurisdiction. It is consistent with all that is averred in pleading that the decree may be merely void. The following cases will be cited: Boswell's Lessee *v.* Otis, 9 How. 349; Allen *v.* Blunt, 1 Blatch. Cir. Court, 480; D'Arcy *v.* Ketchum, 11 How. 165; Crawford *v.* Howard, 30 Maine, (17 Shep.) 422; Burckle *v.* Eckart, 3 Denio, 279; Cobb *v.* Haynes, 8 B. Mon. 137; Van Buskirk *v.* Mulock, 3 Harr. 184; Moravia *v.* Sloper, and Herbert *v.* Cook, Willes, 30, 37; Read *v.* Pope, 1 Cr. Mee. & R. 302; S. C. 4 Tyrw. 403. It is not to be intended that because a court is termed a superior court, that it is a court of general jurisdiction. It may be an inferior court, and of limited jurisdiction.

The counsel for the defendant in error thus stated and argued the points.

The questions for argument arise upon the demurrer, which raises substantially three points, namely:

1. That an action at law cannot be maintained in the courts of the United States, upon the decree of a State court of equity.

2. That if such action be maintainable, the declaration must set forth that the decree, within the limits of the State in which it is passed, is of equal efficacy with a judgment at law; and also that the court had jurisdiction to pass the decree in question.

3. That the action, if maintainable, must be assumpsit, not debt.

1st. Under the Constitution of the United States, and the laws of Congress, the judgments of the courts of each State are to be regarded in all other States, not as foreign, but domestic judgments; and as equally conclusive with domestic judgments. Mills v. Duryee, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 234.

And where the court has jurisdiction of the parties and the subject-matter, a decree in chancery is equally conclusive between the parties with a judgment at law. "In this there is, and ought to be no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise." Hopkins v. Lee, 6 Wheat. 113, 114.

In all the States where the question has arisen, (in Kentucky, Louisiana, Tennessee, South Carolina, Maine, and New York,) decrees in Chancery have been held to be within the Constitution and act of Congress; which make them equally with judgments at law, of the same dignity in all other States, as in the State in which they are pronounced. See Cowen and Hill's Notes to Phillips's Evidence, Part II. p. 900, and the cases there cited.

This being so, the money decree of a court of chancery of competent jurisdiction is in every other State, the final and conclusive ascertainment of a debt, upon which a legal obligation to pay arises. And there can be no sufficient reason, why an action of debt should not be maintained as well on such a decree, as upon a judgment at law. There may be decrees in Chancery, which cannot well form the basis of a suit at law. Such are decrees for specific performance, or such as contain multifarious matter, or require acts and conditions to be performed by each party. But this objection cannot be made to a final decree for the payment of a specific sum of money, free from conditions or qualifications of any kind. A legal obligation to pay is necessarily implied by such a decree.

"Every man is bound, and hath virtually agreed to pay such particular sums of money, as are charged on him by the sentence or assessed by the interpretation of the law. Whatever the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. This implied agreement gives the plaintiff a right to institute a second action, founded merely on the ground of contract, to recover such a sum. So, if he hath obtained judgment, he may bring an action of debt on this judgment, &c., &c.; and the law implies, that by the original contract of society, the defendant hath

contracted a debt, and is bound to pay it." 3 Blackstone, Comm. 160. It is on this ground alone, that "assumpsit" lies on foreign judgments; and why not on a decree in equity for the payment of money?

It has been said, that a legal obligation cannot be implied from a merely equitable obligation to pay; and that an action at law cannot be maintained upon a decree in equity for the payment of money founded on equitable considerations only. Carpenter *v.* Thornton, 3 Barn. & Ald. 52, (5 E. C. L. R. 225.) In that case, it appeared from the record, that the bill was filed for the specific performance of an agreement to purchase; and the decree was manifestly on the ground of that particular equity. The chief objection to the suit urged in argument, was, that it had been brought in England upon a decree of the High Court of Chancery of England, having, of course, the power to enforce its own decrees in the territory in which the suit was brought. It was determined, under the circumstances of that case, that the action would not lie.

But in a subsequent case, Henley *v.* Soper, 8 Barn. & Cress. 16, (15 E. C. L. R. 147,) it was admitted and held that debt would lie on the decree of a colonial court of equity (in Newfoundland) for the payment of a specific balance found to be due by one partner to another. Lord Tenterden, (by whom Carpenter *v.* Thornton was determined,) said, "There is a great difference between the decree of a colonial court, and a court of equity in this country. The colonial court cannot enforce its decrees here: a court of equity in this country, may. In the latter case, there is no occasion for the interference of a court of law; in the former, there is, to prevent a failure of justice. The case of Carpenter *v.* Thornton does not establish the broad principle for which it was cited," that is, that no action at law could be maintained on a decree in equity.

In Sadler *v.* Robins, 1 Campb. 253, it was also held, that an action at law was maintainable upon the decree of a colonial court of equity. The amount of the decree in that case was indefinite. But Lord Ellenborough said, "Had the decree been perfected, I would have given effect to it, as well as to a judgment at common law. One may be the consideration for an assumpsit equally with the other."

This question, in England, seems to have been settled by the two cases last referred to. In 7 Wentworth's Pleadings, 95, is a precedent for an action of debt for a sum of money decreed by the Lord Chancellor to be paid to the plaintiff; and the form is attributed to Mr. Tidd. The books of precedents all contain forms of actions upon foreign decrees in equity. The only exception would seem to be the case of an action at law, brought

in the same territorial jurisdiction, to enforce a decree in equity, appearing on its face to be grounded on equitable considerations only. See Carpenter *v.* Thornton.

It has been repeatedly ruled in this country, that the action would lie upon a chancery decree ordering the payment of money. Post *v.* Neafie, 3 Caines, 22; Dubois *v.* Dubois, 6 Cowen, 496; see also 19 Johnson's R. 166, 577; Evans *v.* Tatem, 9 Serg. & Rawle, 252; Howard *v.* Howard, 15 Mass. 196; McKim *v.* Odom, 3 Fairfield 94.

In the first case, (Post *v.* Neafie) Chief Justice Kent dissented from the opinion of the court; but chiefly on the ground, that as the Supreme Court of New York, in Hitchcock & Fitch *v.* Aicken, (1 Caines, 469,) had determined the judgments of sister States, to be only *primâ facie* evidence, and open to inquiry upon their merits, to sustain an action at law upon the decree in equity of another State, would involve the court in the discussion and determination of questions of exclusively equitable jurisdiction, which a court of law was not competent to pass upon. The overruling of the case of Hitchcock & Aicken, and the settlement of the question by this court, that a judgment is conclusive in every other State if a court of the State where it was rendered would hold it so, has removed, it may fairly be presumed, the reason of Chancellor Kent's objection to the ruling in Post *v.* Neafie. See 1 Kent's C. 5th ed. 260, 261. Note C.

In the case of McKim *v.* Odom, 3 Fairfield, 94, the whole subject is most fully and learnedly discussed; and the authority is worthy of special reference.

To refuse the jurisdiction contended for, it is obvious would, in this country, amount in many cases to an absolute denial of justice. In some of the States there is no court of equity, so called; and if a plaintiff in such States, to enforce a decree in equity obtained lawfully in another State, may not resort to a court of law, where the defendant has removed from and holds no property in the State in which the decree was passed, but has both residence and property in the State in which he must be sued at law, if at all — there is, to all practical intent, a right, for which there is no remedy. In the American cases cited, the distinction taken in Carpenter *v.* Thornton, between decrees passed upon legal and equitable considerations, does not seem to have been regarded; but the distinction, even if well founded, cannot apply to this case. For from any thing that appears to the contrary on the record, the obligation of the defendant in equity (plaintiff in error) upon which the decree was passed, might have been binding in law as well as in equity.

2d. If the action can be maintained, it is not necessary to set forth in the declaration, that the decree sued on is of equal efficacy in the State in which it was passed, with a judgment at law; or that the court had jurisdiction to pass the decree. By the act of May, 1790, it is provided, that the judicial proceedings of the State courts shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State, from which the records are or shall be taken. If they are conclusive in the State where pronounced, they are so everywhere. If open to examination there, they are so everywhere. A decree in chancery is, from its nature, equally conclusive with a judgment at law. 6 Wheat. 113, &c. It may not have equal efficacy in the State in which it is passed, with a judgment at law, in respect to the mode and means of its enforcement: but it is of like conclusiveness, as "*res adjudicata*," provided the court had jurisdiction of the parties and subject-matter. It is averred by the declaration in this case, that the decree in question was duly signed and enrolled, &c.; and as the record of the judicial proceedings of another State, (every presumption being in favor of the jurisdiction,) it is *primâ facie* evidence that the court had jurisdiction over the parties and subject-matter; (see 4 Cowen's R. 294, 296, and 8 Cowen, 311,) and it is conclusive upon them while not reversed, set aside, &c., unless that evidence be rebutted. But that issue is matter of defence, and must be so tendered. It is not necessary to aver in pleading, by the declaration, that there was jurisdiction to pass the decree, in a suit on such decree, any more than to aver the jurisdiction to render a judgment, in a suit on such judgment: nor to allege the conclusiveness of the one, any more than that of the other. As the plea to an action of debt upon the judgment of another State must be "*nul tiel record*," and not "*nil debet*," so the plea to an action on a decree of another State must be of like import. In either case, of course, a special plea to the jurisdiction would be good: and if the conclusiveness of either cause of action is to be called in question, it may, and must be done as matter of defence. No precedent can be found of debt on judgments or decrees, where the jurisdiction is averred in the declaration.

In England, there is a distinction between superior and inferior courts. In the former every thing is intended to be within the jurisdiction; in the latter, every material fact must be alleged to be within the jurisdiction. It is necessary, therefore, in a suit in a superior, upon the judgment of an inferior court, to allege not merely that the latter had jurisdiction, but that the "original cause of action arose within the jurisdiction, &c." Read *v.* Pope, 1 C. M. & R. 302. (Exchequer.)

So, in pleading the judgments of courts of limited and special jurisdiction, it may be necessary to state the facts upon which the jurisdiction is founded; but, with respect to courts of general jurisdiction, the rule is, that they are presumed to have jurisdiction until the contrary clearly appears. The want of jurisdiction must be averred, as matter of defence. "Every presumption is in favor of the jurisdiction of the court. The record is *primâ facie* evidence of it, and will be held conclusive, until clearly and explicitly disproved." 4 Cowen's Rep. 294. 296; Cowen & Hill's Notes, Part II. 905, 906.

We have considered this case on the assumption that the decree sued on was that of a chancery court, exercising general equity jurisdiction. But in fact, it was passed by a court exercising no separate equity jurisdiction, but having general jurisdiction over the whole cause of action, whether founded on legal or equitable considerations. Its decree, so called, was as much a judgment at law as it was a decree in chancery, to certain intents and purposes, in the State of New York, and was made so by the constitution and laws of that State.

The federal courts, supreme and inferior, considering their relations to the States, are supposed to have judicial knowledge of the constitutions, laws, and public usages of all the States. Whatever question may be as to the propriety of the State courts taking such judicial notice, there can be none in regard to this court. See Cowen & Hill's Notes, Part II. pp. 901, 902. The New Constitution, the Judiciary Act, and Code of Procedure of the State of New York, may therefore properly be examined, to ascertain the jurisdiction of the court which passed the decree on which this action was brought.

The New Constitution of New York, adopted November, 1846, Art. 6, § 3, provides: "There shall be a supreme court, having general jurisdiction in law and equity." Sect. 6. "The legislature shall have the same power to alter, and regulate the proceedings in law and equity, as they have heretofore possessed." Art. 14, § 8: "The offices of Chancellor, Vice-Chancellor, &c., are abolished, from and after the first Monday in July, 1847."

The Judiciary Act, passed after the adoption of the New Constitution, (Laws of 1847, c. 280, § 16,) provides. "The Supreme Court, organized by this act, shall possess the same powers and exercise the same jurisdiction, as is now possessed and exercised by the Supreme Court, and Court of Chancery, &c., and all laws relating to the present Supreme Court, and Court of Chancery, and the jurisdiction, powers and duties of said courts, &c., shall be applicable to the Supreme Court, organized by this act, &c., so far as the same can be so applied, and are consistent with the Constitution, and the provisions of this act.

The Code of Procedure, passed April 12, 1848, c. 379, § 62, provides: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, as heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action.

Sec. 62. "The party complaining shall be known as plaintiff, &c."

Sec. 119. "The first pleading on the part of the plaintiff is the complaint."

Sec. 120. "The complaint shall contain, 1. The title of the cause, &c. 2. A statement of the facts constituting the cause of action, &c. 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

This act (§ 391,) went into effect July 1, 1848. The decree of the Supreme Court, in this case, was signed and enrolled April 30, 1849. At the time of its rendition, the distinction, in New York, between actions at law and suits in equity was abolished, and there was but one form of action in all civil cases. The decree, therefore, so called, was of "equal efficacy" with a judgment at law. It was passed by a court of general jurisdiction, whose judgments were conclusive in New York; and moreover, by whatever technical title known, it was a final judgment for the payment of money, rendered by a court having no separate equity jurisdiction or powers, though properly exercising complete jurisdiction over the parties and subject-matter. In no other court in New York could it be a matter of inquiry, whether that judgment was founded upon legal or equitable considerations. How then, in any other State court, or court of the United States, could it be viewed as a decree in chancery, founded upon equitable considerations only? What other action could be maintained in another State for its enforcement, than an action at law, there being only one form of civil action, for that purpose, in the State of New York?

3d. Debt is the proper remedy; assumpsit would not lie. The latter is maintainable only upon the judgment of a foreign court, which is not regarded as a record, nor as a specialty, but only as *primâ facie* evidence of a simple contract debt; as in England, upon an Irish judgment, or Scotch decree; or in this country, before the Revolution, upon judgments of other States. Chitty's Pleading, vol. 1, p. 106.

But the judgments of other States are not now regarded as foreign judgments, but as of the same nature and effect as domestic judgments. The original debt is therefore thereby

merged, and the plaintiff must resort to his highest remedy. The decree is a record, (and there is here the proper averment, *prout patet per cecordum, &c.*,) and debt or *scire facias* is the only remedy on such records.

In the case of Hugh *v.* Higgs and Wife, 8 Wheat. 697, the action was "case," to recover money due under the decretal order of a court of equity. It was conceded by both the counsel, as stated by the court, that the action would not lie for the money ordered to be paid by the decree; but it was supposed and so argued, that the record showed that money had been received by the defendant upon transactions which took place after the decree, and the right to recover was put in argument on that ground.

It is quite clear, however, that if assumpsit would lie in this case, debt also could be maintained; for it lies concurrently with assumpsit, upon all foreign judgments, decrees of colonial courts, &c.; in fact, on all judgments or decrees, upon which assumpsit would lie. Chitty's Pleading, vol. 1, p. 111.

Mr. Justice DANIEL delivered the opinion of the court.

The defendant in error, a citizen of the State of New York, instituted in the Circuit Court an action of debt against the plaintiff in error, a citizen of the State of Maryland, to recover the amount of a decree, with the costs thereon, which had been rendered in favor of the defendant against the plaintiff in error by the Supreme Court in equity in the State of New York. The averments in the declaration are as follow: That at a general term of the Supreme Court in Equity of the State of New York, one of the United States of America, held at the court house in the village of Cooperstown, in the county of Otsego, in the State of New York, on the first Monday in November in the year 1848, present William H. Shankland (and others) Justices, it was ordered, adjudged and decreed, by the said court, in a certain suit therein pending, wherein the said Lyman Gibson was complainant, and the said Josias Pennington (and others) were defendants, that the said Lyman Gibson recover against the said Josias Pennington, and that the said Josias Pennington pay to the said Lyman Gibson, the amount of the consideration money paid by the said Lyman Gibson to a certain Samuel Boyer, as agent and attorney of the said Josias Pennington, as should appear by the several indorsements upon the contract mentioned and set forth in the bill of complaint, and produced and proved as an exhibit in said suit, with interest on the several payments and indorsements respectively, amounting in the aggregate on the 25th day of November, 1848, to the sum of $5,473.18, and also that the said Josias Pennington pay to

the said complainant his costs in said suit, which were taxed at the sum of $661.68, as by the said decree duly signed and enrolled at a special term of the Supreme Court in equity aforesaid, held on the 30th day of April in the year 1849, at the village of Bath, in the county of Steuben, in the State of New York, and now remaining in the office of the Clerk of Steuben county aforesaid, will on reference appear.

To the declaration as above stated, the defendant, the now plaintiff in error, demurred; and upon a joinder in demurrer, the court overruled the demurrer of the said defendant, and gave judgment for the plaintiff, the now defendant in error, for the debt and costs in the declaration set forth, together with costs of suit.

The defendant in the Circuit Court assigned for causes of demurrer the three following:

1. For that it appears from the said declaration that the cause of action in this case is an alleged decree of an alleged court of equity, as set forth in the said declaration, whereas an action at law cannot be maintained in this court on such a decree; at least without an averment in pleading that said decree within the limits of its territorial jurisdiction is of equal efficacy with a judgment at law.

2. For even if an action at law can be maintained for the recovery of the sums of money directed by such alleged decree to be paid, as stated in said declaration, yet the form of action adopted in this case is not the proper form of action for the enforcement of such a recovery.

3. For that it does not appear in and by the said declaration, nor is it averred in any manner, that the said alleged court of equity had any jurisdiction to pass a decree against this defendant for payment to the plaintiff of any of the sums of money in the said declaration mentioned.

In considering these causes of demurrer, the attention is necessarily directed to the ambiguous terms assumed in the first assignment, by propounding a proposition general or universal in its character, and afterwards conceding a modification or change in that proposition inconsistent not merely with its scope and extent, but with its essential force and operation. For instance, it is first stated that "the cause of action is an alleged decree of an alleged court of equity, whereas an action at law cannot be maintained in this court on such a decree." We can interpret this proposition to have no other intelligible meaning than this, and to be comprehended in no sense more restricted than this, namely, that an action at law cannot be maintained in a court of law when the cause of action shall be a decree of the court of equity. In other words, that the character of the foun-

dation, or cause of action, namely, its being a decree of a court of equity, must, in every such instance, deprive the court of law of cognizance of the cause. The proposition, thus generally put, is then followed by a qualification in these words, "at least without an averment in pleading, that the decree within its territorial jurisdiction is of equal efficacy with a judgment at law." By this language the universality of the previous proposition is modified, or rather contradicted, for it contains an obvious concession, that provided a particular efficiency can be affirmed with regard to it, an action at law may be maintained even upon a decree of a court of equity.

We will first examine the correctness of the general position, that an action at law cannot be maintained upon a decree in equity; and will, in the next place, inquire how far the jurisdiction of the court pronouncing this decree, and the efficiency of its proceedings with reference to the parties before it, may be inferred or rightfully taken notice of, from its style or character, or from proper judicial knowledge of the subject-matter of its cognizance, independently of a particular special averment.

We are aware that at one period courts of equity were said not to be courts of record, and their decrees were not allowed to rank with judgments at law, with respect to conflicting claims of creditors, or in the administration of estates; but these opinions, the fruits of jealousy in the old common lawyers, would now hardly be seriously urged, and much less seriously admitted, after a practice so long and so well settled, as that which confers on courts of equity in cases of difficulty and intricacy in the administration of estates, the power of marshalling assets, and in the exercise of that power the right of controlling the order in which creditors, either legal or equitable, shall be ranked in the prosecution of their claims. The relative dignity of courts of equity, and the binding effect of their decrees, when given within the pale of their regular constitution and jurisdiction, are no longer subjects for doubt or question.

We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance. It would follow, therefore, that wherever the latter, received with regard to its dignity and conclusiveness as a record, would constitute the foundation for proceedings to enforce it, the former must be held as of equal authority. These are conclusions which reason and justice and consistency sustain, and an investigation will show them to be supported by express adjudica-

tion. It is true that, owing to the peculiar character of equity jurisprudence, there are instances of decisions by courts of equity which can be enforced only by the authority and proceedings of these courts. Such, for example, is the class of cases for specific performances; or wherever the decision of the court is to be fulfilled by some personal act of a party, and not by the mere payment of an ascertained sum of money. But this arises from the nature of the act decreed to be performed, and from the peculiar or extraordinary power of the court to enforce it, and has no relation whatsoever to the comparative dignity or authority between judgments at law and decrees in equity.

We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other.

The case of Sadler *v.* Robins, 1 Campbell, 253, was an action upon a decree of the High Court of Chancery in the Island of Jamaica, for a sum of money; "first deducting thereout the full costs of the said defendants expended in the said suit, to be taxed by one of the masters of the said court; and also deducting thereout all and every other payment which S. & R., or either of them, might on or before the 1st day of January, 1806, show to the satisfaction of the said master, they or either of them had paid, &c." In this case Lord Ellenborough said, "had the decree been perfected, I would have given effect to it as to a judgment at law. The one may be the consideration for an assumpsit equally with the other. But the law implies a promise to pay a definite, not an indefinite sum."

The case of Henly *v.* Soper, 8 Barn. & Cress. 16; of Dubois *v.* Dubois, 6 Cowen, 496, and of McKim *v.* Odom, 3 Fairfield, 94, are all expressly to the point, that the action of debt may be maintained equally upon a decree in chancery as upon a judgment at law. But if this question had been left in doubt by other tribunals, it must be regarded as settled for itself by this court, in the explicit language of its decision in the case of Hopkins *v.* Lee, 6 Wheat. 109, where it is declared as a general rule, "that a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or in any other court. Hence a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to a

farther controversy concerning the points decided between the parties to such suit. In this there is, and ought to be no difference between a verdict and judgment in a court at law and a decree of a court of equity. They both stand upon the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation. It is therefore not confined in England or in this country to judgments of the same court, or to the decisions of courts of concurrent jurisdiction; but extends to matters litigated before competent tribunals in foreign countries." The case of Dubois v. Dubois, 6 Cowen, was an action of debt upon a decree for a specific sum, by a surrogate of one of the counties of the State of New York. One of the objections in that case was, that the action of debt could not be maintained; and another that no jurisdiction was shown by the declaration. The Supreme Court, in its opinion, say: "The principal question raised is, whether debt will lie. The general rule is, that this form of action is proper for any debt of record, or by specialty, or for any sum certain. It has been decided that debt lies upon a decree for the payment of money made by a court of chancery in another State, and no doubt the action will lie upon such a decree in our domestic courts of equity. The decree of the surrogate, unappealed from, is conclusive, and determines forever the rights of the parties. It may be enforced by imprisonment, and is certainly evidence of a debt due; whether the surrogate's court be a court of record need not be decided. It has often been said, that a court of chancery is not a court of record. It is sufficient that a decree in either court, unappealed from, is final — debt will lie." In opposition to the doctrine we have laid down, the case of Carpenter v. Thornton, from 3 Barn. & Ald. 52, has been cited, to show that the action of debt will not lie upon a decree of a court of equity. But with respect to the case of Carpenter v. Thornton it must be remarked, that Lord Tenterden, who decided that case, has, in the subsequent case of Henly v. Soper, 8 Barn. & Cress. 20, explicitly denied that the former case can be correctly understood as ruling any such doctrine or principle as that for which it has been here adduced. In Henly v. Soper, his lordship says of Carpenter v. Thornton, "I think it does not establish the broad principle for which it is cited. It appears by the report that I then expressed myself with much caution, and I do not find that I ever said that a decree of a court of equity fixing the balance due on a partnership account could not be enforced in a court of law

unless the items of the account could be sued for. My judgment proceeded on the particular circumstances of that case; the bill was for the specific performance of an agreement, which is a matter entirely of equitable jurisdiction. But it is a general rule that if a partnership account be settled, and a balance struck by due authority, that balance may be recovered in an action at law." In support of the objection that the action in this case is founded on a decree in chancery could not be maintained, the counsel for the plaintiff in error has cited the case of Hugh *v.* Higgs and Wife, reported in 8 Wheat. 697. This is a short case, presenting no precise statement of the facts involved in it, and as far as the facts are disclosed by the report, they are given in a somewhat confused and ambiguous form. It is true that the objection to the action, as founded on a decree in chancery, is said by the court to have been urged in its broadest extent. But if we look to the decision of this court, and the reasoning upon which that decision is rested, we find the objection to the judgment of the Circuit Court, or rather the principle of that objection, narrowed and brought considerably within the extent of the objection itself. For this court say that the judgment of the Circuit Court must be reversed for error in the opinion which declares, that the action is maintainable on the decretal order of the Court of Chancery. It might very well be error to allow the action of debt upon a decretal order of the chancery, and yet perfectly regular to sustain such an action upon the final decree. The former is subject to revision and modification, the latter is conclusive upon the rights of the parties. There is yet another ground on which this case of Hugh *v.* Higgs and Wife, so imperfectly stated, might form an exception to the rule which authorizes actions of debt upon decrees in equity. In the case last mentioned, the action at law was brought and the judgment rendered within the regular limits of the equity jurisdiction of the court, and to the full extent of which limits the Court of Equity had the power to enforce its decrees. Under these circumstances it might well be ruled, that a party having the right to avail himself directly of the power and process of the court, should not capriciously relinquish that right, and harass his adversary by a new and useless litigation. An exception like this is perfectly consistent with the rule that where the decree of the Court of Equity cannot be enforced by its own process, and within the regular bounds of its jurisdiction, such decree when regular and final, and when especially it ascertains and declares the simple pecuniary responsibility of a party, may, and for the purposes of justice must be, the foundation of an action at law against that party whose responsibility has been thus ascertained. Upon

this principle it is that the courts of law in England, whilst they have been inclined to restrict the plaintiff to the proper process of the Court of Equity for the purpose of enforcing the decrees of the court within the bounds of its jurisdiction, have undeviatingly maintained the right of action upon decrees pronounced by the colonial courts. The process of the colonial courts could not run into the mother country, but this fact did not impair the rights settled by the decrees of those courts or render them less binding or final as between the parties. On the contrary, it is assigned as the special reason why the courts of law should take cognizance of such causes without which an entire failure of justice would ensue.

For this rule of decision in the English courts the cases of Sadler *v.* Robins, and of Henly *v.* Soper, may again be recurred to; and, for its adoption by courts in our own country, may be cited Post *v.* Neafie, 3 Caines's Rep. 22, and Dubois *v.* Dubois, and McKim *v.* Odom, already mentioned.

Having disposed of the general proposition in the first assignment of causes of demurrer by the plaintiff in error, we will next inquire into the force of the condition or modification he has annexed to it, in the alleged necessity for an express averment in pleading of the efficacy or legal obligation of the decree within the territorial jurisdiction of the court by whom the decree has been pronounced.

Of the binding obligation, and conclusiveness of decrees in equity where the parties and the subject-matter of such decrees are within the regular cognizance of the court pronouncing them, and of their equality in dignity and authority with judgments at law, we have already spoken. It remains for us only to consider what may be legally intended or concluded from the pleadings in this cause as to the territorial extent of jurisdiction in the court whose decree is made the foundation of this action.

The declaration avers, "That at a general term of the Supreme Court in equity for the State of New York, one of the United States of America, held at the village of Cooperstown in the State of New York, on the 1st Monday in November, in the year 1848, it was ordered, adjudged, and decreed, &c., and farther, that on the 25th of November, 1848, the complainant's costs were taxed, &c., as by the said decree duly signed and enrolled at a special term of the said Supreme Court, &c., and now remaining in the office, &c., reference being thereto had, will appear."

It is undeniably true in pleading, that where a suit is instituted in a court of limited and special jurisdiction, it is indispensable to aver that the cause of action arose within such restricted jurisdiction; but it is equally true, with regard to

superior courts, or courts of general jurisdiction, that every presumption is in favor of their right to hold pleas, and that if an exception to their power or jurisdiction is designed, it must be averred, and shown as matter of defence. Such is the general rule as laid down by Chitty, vol. 1, p. 442. So too in the case of Shumway *v.* Stillman, in 4 Cowen, 296. The Supreme Court of New York, speaking with reference to a judgment rendered in another State, says: "every presumption is in favor of the judgment. The record is *primâ facie* evidence of it, and will be held conclusive until clearly and explicitly disproved." And in farther affirmation of the doctrine here laid down, we hold that the Courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and that with respect to these, nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively. In the case before us the declaration avers that the decree on which the action is founded was a decree of the Supreme Court in equity of the State of New York — of a court whose jurisdiction in equity was supreme, not over a section of the State; but that it was the Supreme Court as to subjects of equity of the State, that is, of the entire State; and its decrees being ranked, in our opinion, as equal in dignity and obligation with judgments at law, its decree in the case before us was of equal efficacy with any such judgment throughout its territorial jurisdiction, or, in other words, throughout the extent of the State.

The second and third causes of demurrer assigned by the plaintiff in error, are essentially comprised in the first assignment, and are mere subdivisions of that assignment; and in disposing therefore of the first, the second and third causes of demurrer are in effect necessarily passed upon. We are of the opinion that the demurrer of the plaintiff in error was properly overruled, and that the judgment of the Circuit Court 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 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 affirmed, with costs and interest, until paid, at the same rate per annum that similar judgments bear in the courts of the State of Maryland.

EDWARD P. FOURNIQUET AND WIFE, AND MARTIN W. EWING AND WIFE, APPELLANTS, *v.* JOHN PERKINS.

Where a case in equity was referred to a Master, which came again before the court upon exceptions to the Master's report, the court had a right to change its opinion from that which it had expressed upon the interlocutory order, and to dismiss the bill. All previous interlocutory orders were open for revision.

The decree of dismissal was right in itself, because it conformed to a decision of this court in a branch of the same case, which decision was given in the interval between the interlocutory order and final decree of the Circuit Court.

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

The controversy between the parties had been at several different times, in various shapes before this court, as will be seen by reference to 6 Howard, 206, 7 Howard, 160, and 14 Howard, 313.

The case in 6 Howard was this: The Circuit Court had decreed, on the 12th of April, 1847, that a community of acquests and gains had existed between Perkins and wife, during the marriage, and that the present appellants, representing Mrs. Perkins, were entitled to an account. Accordingly, the matter was referred to a master to ascertain the landed property, and to divide it and report an account. This was held by this court to be an interlocutory order only, and not a final decree, and the appeal was dismissed. 6 Howard, 208. The mandate sent from this court, after reciting the decree or order appealed from, and the reference to a master, concluded thus: "You therefore are hereby commanded that such further proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding."

Under this mandate the master took up the reference, and made a report awarding a large sum of money and a large amount of land to Fourniquet and wife and Ewing and wife. Both parties filed exceptions to the report. These exceptions were before the court, upon argument, in February and March, 1852.

In the mean time, viz. at January term, 1849, the case of Fourniquet et al. *v.* Perkins was decided by this court as reported in 7 Howard, 160. The Circuit Court appeared to consider this case as deciding the points involved in a different way from that in which it had itself decided them when referring the case to a master to state an account. Upon hearing the exceptions, it therefore reversed the former decree, and dismissed the bill.

The complainants appealed to this court.

It may be proper to mention that whilst this appeal was pending another branch of the case reached this court, which is reported in 14 Howard, 313.

The appeal was argued by *Mr. Henderson*, for the appellants, and by *Mr. Benjamin* and *Mr. Johnson*, for the appellee.

Mr. Henderson contended that it was entirely irregular to dismis the bill, when the only point before the court was the exceptions to the master's report: and that, even if such an order was proper at such a time, still the reasons upon which it was founded, were insufficient. He then proceeded to distinguish the case from that in 7 Howard, and went into a minute examination of it upon the merits. The first proposition is the only one which it is thought necessary to insert in this report, namely:

We concede the point as not debatable, that an interlocutory decree, before enrolment, or before sanctioned on appeal, (where appealable,) continues subject to the chancellor's power, to review, amend, or set aside, at any time before final decree.

But a rightful power must be rightly exercised, or the power becomes usurpation.

Now the exceptions only were at hearing before the court. (See Ch. R. 83.) This "decretal order" had been enrolled, Rule 85. See 1 Vez. R. 93; 1 Stark. Ev. 245.

The case, therefore, was in no attitude for a rehearing to be entertained, certainly not at that time.

But a rehearing cannot be granted except on petition. 11 Ves. 602; Stor. Eq. Pl., § 426 and n.; 17 Ves. 178; 19 Ch. R. 201; 3 Ed. Ch. 479, 480; 7 Paige, 382; Walk. Ch. R. 356; 2 Haywood's R. 175; 1 Paige's Ch. 39; 2 Hill, 156; and Ch. Rule 88.

And as one petition for a rehearing was overruled in 1847, this is a reason why a rehearing should not have been entertained again; especially for the same cause. 16 Ves. 214; 3 Ed. Ch. 479, 480; Walk. Ch. R. 309.

Especially shall not a rehearing be allowed after the party has proceeded to take an account before the master. 3 J. Ch. R. 365, 366; 11 Ves. 602; 3 Barb. S. C. R. 232.

The case of Consequa *v.* Fanning, 3 J. Ch. 364, is not dissimilar to the case before the court, as it was there a decretal order to account, and the defendants had attended the master; and after report returned, filed petition for rehearing. It was granted, but on stringent terms. See the case.

The case of Hunter *v.* Carmichael, 12 Sm. & M. Miss. Rep. 726, is very like the present case, though less objectionable, where the chancellor set aside an interlocutory decree (but did not dis-

miss the bill) without motion, petition, or other cause assigned, or appearing on record. The case is carefully considered by the Supreme Court, with its accustomed ability. In their opinion, they say:

"The order seems without any foundation to support it. No petition is filed, no proofs exhibited, no ground laid, no reasons assigned, no excuse offered for delay, no cause of any kind shown. This seems to us not the exercise of a "sound judicial discretion," but the exertion of power without legal warrant. If this order be sustained, then the rights of the parties, in some degree, rest not upon fixed and established rules of law, but upon the varying opinions of the court. The parties could not know on what to repose, and certain reliance on judicial proceedings would be greatly diminished. We do not mean to say it is not in the power of the Chancery Court to set aside an interlocutory decree, but only that some cause must be shown sufficient to authorize the act. Where there is error upon the face of the decree, or report under it, that is in itself sufficient ground for the court to act on. But no such error appears in this case. . . . . The order setting aside the interlocutory decree without cause, is erroneous. It is therefore reversed, and cause remanded for further proceedings."

A very similar case is that of Moore *v.* Hilton, 12 Leigh's Rep. 30. The court say that where new evidence is brought forward as a ground to change an interlocutory decree, the application must be made on motion, or notice to rehear the cause on the new evidence, or by petition for rehearing.

The counsel for the defendant in error replied to this argument.

The counsel for appellants concedes that an interlocutory decree continues subject to the chancellor's power to review, amend, or set aside, at any time before final decree; but he urges that the power must be rightfully exercised, or it becomes usurpation.

Taking the position of the counsel as correct, the question recurs, whether this power was rightfully exercised; and on his own statement, connected with the record, it appears that the court heard his argument on the merits, and became satisfied on a review of its opinion, and on the authority of two cases decided since the interlocutory decree was rendered, that it had erred in its construction of the releases, and its decision on their effect as a legal bar to the complainants' demand, and therefore corrected its error and dismissed the complainants' bill. In this view of the merits, the court below has since been sustained by the opinion of this court in 14 Howard. If appellants' position be

sustained, it would now be necessary to reverse the final decree of the lower court, and to send the case back with directions to carry out the erroneous interlocutory decree to an erroneous final decree, in order that this court might then reverse the erroneous final decree rendered in accordance with its own mandate, and restore the final decree which it had previously reversed.

The complainants' brief, after urging the irregularity of the action of the lower court in reversing its interlocutory decree, is confined to reiterating the argument and authorities already adduced in the case decided in 14 How. As the court has already passed judgment on the subject, we respectfully refer to the argument for defendant, and the decision in that cause, as conclusive of the present controversy.

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

This case came before the court some years ago, on an appeal from an interlocutory order of the Circuit Court, which stated that the appellants were entitled to recover certain claims set out in their bill, and directed an account to be taken by the master. It is reported 6 How. 206. The appeal was dismissed, upon the ground that an appeal would not lie from an interlocutory order, and the case was remanded to the court below, with directions to proceed to a final decree. Upon receiving this mandate the Circuit Court proceeded to take the account upon the principles stated in its interlocutory order; and when the report of the master came in, exceptions were taken to it on both sides. At the argument of these exceptions, it appears that the court reconsidered the opinion it had expressed on the merits in the interlocutory order; and believing that opinon to be incorrect, dismissed the complainants' bill. The case now before us is an appeal from that decree.

The decree is undoubtedly right. For it conforms to the opinions expressed by this court in relation to the matters now in controversy in the case between Fourniquet and wife and the present appellee, reported 7 How. 160; and again in the case between these appellants and Perkins the appellee, in the case reported in 14 How. 313. It is unnecessary to state here the facts in the present case, or the matters in dispute, as they are fully set out in the cases referred to; and especially in the one last mentioned. For, in that case, the parties and the matters in dispute were the same with those now before the court.

The counsel for the appellants however objects to the decree of dismissal, because it was made, at the argument upon the exceptions to the master's report, and is contrary to the opinion on the merits expressed by the court in its interlocutory order.

RT.

Thurston.

The case was at final
exceptions; and all of the
the merits, were open
court. This court so
aforesaid mentioned, was
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J. Worth-

The plaintiff's title rested on a concession by the Spanish government in 1796, which was confirmed by a decree of the Supreme Court of the United States on the 21st January, 1836, on an appeal from the District Court of Missouri, which exercised jurisdiction of the subject-matter, under the provisions of the act of Congress of May 26th, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims." The petition was filed by the claimant, Antoine Soulard, on the 22d August, 1824.

In January, 1825, an amended petition was filed by Antoine Soulard, who afterwards died; and on the 4th Monday of March following, the proceedings were revived in the name of the widow and heirs of the said Soulard, and such proceedings were had that a decree was rendered against the petitioners by the District Court on the 4th Monday of December, 1825, from which an appeal to the Supreme Court of the United States was taken within one year from its rendition, where, on the 21st January, 1836, the decree of the District Court was reversed, and the claim of the petitioners was confirmed for all the land claimed, except that which had been sold by the United States before the filing of the petition in the case.

In pursuance to this decree, the land claimed and confirmed was surveyed, and the survey returned to the Commissioner of the General Land Office; on which, on the 22d December, 1845, a patent was issued to the petitioners, under whom the plaintiff claims. The land sued for is comprehended within the limits of the survey, and in the patent of Soulard's widow and heirs. No notice in writing, stating the nature and extent of his claim, was ever delivered by Soulard to the Recorder of Land Titles under any of the acts of Congress in relation to that subject. The defendant relied on patents from the United States issued in the year 1836, founded on entries made in the year 1834, while the case of Soulard, widow and heirs, against the United States, was pending in the Supreme Court; which patents embraced the land in controversy.

On the trial in the State Circuit Court, the counsel for the plaintiff prayed the court to instruct the jury as follows: —

First. That the decree of confirmation, made by the Supreme Court of the United States on the 21st day of January, 1836, to Julia Soulard, widow, and James G. Soulard and others, heirs of Antoine Soulard, deceased, relates back to the time of filing the petition for confirmation, and passes to the confirmees the title to the land thereby confirmed, so as to cut out all titles and claims thereto originating after the filing of said petition.

Second. If the jury believe from the evidence that the land

sued for was patented by the United States on the 22d day of December, 1845, to the widow and heirs of Antoine Soulard, deceased; that such patent was issued for land surveyed for said patentees in pursuance of a decree of confirmation made by the Supreme Court of the United States; and that such decree of confirmation was founded on a petition for a confirmation filed in the United States Court for the District of Missouri, on the 22d day of August, 1824, such patent conveyed to the patentees a better title to the land sued for than that derived from an entry of the same made after the said 22d of August, 1824, or from a patent issued on such entry.

Third. If the jury believe from the evidence that Antoine Soulard, on the 22d day of August, 1824, petitioned the District Court of the State of Missouri for the confirmation of his title to a claim for 10,000 arpens of land; that said Antoine Soulard died, and the suit was revived and prosecuted in the name of his widow and children; that the said District Court decreed against the said claim; that said suit was appealed to the Supreme Court of the United States, within one year from the time of the rendition of said decree by the District Court; that said Supreme Court afterwards decided in favor of the said claim, and by a decree confirmed the same to said widow and heirs; that the surveyor of public lands for the State of Missouri caused the land specified in said decree to be surveyed for said confirmees;—if the jury find these facts to be true, then the said widow and heirs of Antoine Soulard had, by virtue thereof, a better title to the land included in such survey than the defendant can have to any part of it by virtue of an entry made after the said 22d of August, 1824, or by virtue of a patent issued on said entry.

Fourth. The title under the confirmation of the Supreme Court of the United States to the representatives of Antoine Soulard is a better title than that of the defendant.

Fifth. The act of May the 26th, 1824, passed by the Congress of the United States, reserved from sale the lands included within the bounds of all claims of the character embraced within the provisions of the first section of that act, from the time of the filing of the petition for confirmation of such claims in the District Court of Missouri, until such time as said claims should be finally decided against the claimants.

Sixth. Any entry of land made within the limits of any claim, of the character embraced within the provisions of the first section of the act of May 26th, 1824, after the filing of the petition of the claimant in the District Court, as provided for by said act, and before said claim shall be finally decided against the claimant, is a void entry, and the patent issued thereon is a

void patent. Which instructions the court refused to give; to which refusal the plaintiff then and there at the time excepted.

And the court, on motion of defendant, gave the following instructions, to wit:—

1. If notice of the Soulard claim was not filed with the Recorder of Land Titles in St. Louis prior to the first day of July, 1808, then said claim was not by law reserved from sale; and, if not reserved from sale by law, was subjected to sale as other public lands.

2. If Soulard's claim was not reserved from sale, then the entry of the defendant, if made according to law, being older, is a better title than the plaintiff's confirmation.

3. The patent of the defendant is *primâ facie* evidence that this entry was regular and lawful.

4. The act of Congress of 26th May, 1824, under which Soulard's claim was confirmed, did reserve from sale the land covered by said claim, and any sales of such lands regularly made prior to the confirmation, conveys to the purchaser a better title than said confirmation, such claim not having been filed with the recorder prior to July 1st, 1808.

5. The commencement of a suit by Soulard in the United States Court, for the purpose of obtaining a confirmation of his claim, did not operate as notice of his claim, so as to affect a title otherwise regularly obtained from the United States; and sales of such land, made after the commencement of this suit, stands upon the same ground as if made before such suit was commenced.

To the giving of which instructions the plaintiff then and there at the time excepted.

Upon these exceptions the case went up to the Supreme Court of Missouri, where the judgment of the court below was affirmed. And to review this decision the case was brought here.

It was argued by *Mr. Geyer*, for the plaintiff in error, and *Mr. Wells*, for the defendant in error

Mr. Geyer, for the plaintiff in error.

The Supreme Court of the State of Missouri on the appeal, decided that the claim of Antoine Soulard, at the date of the act of 1824, had no legal existence; the United States were under no obligation, moral or political, to make any provision for its recognition or confirmation; it was forfeited, by reason of its owner failing to give notice of it within the time prescribed by law. That the act of 1824 conferred a gratuity, and the claimants under it, especially those in the class of Soulard, were applicant to the bounty or favor of Congress. The land

claimed was public land, liable to sale and entry as other public lands, pending the suit.

The plaintiff in error submits that the decree of confirmation made by the court on the 21st of January, 1836, vested in Julia Soulard, widow, and James G. Soulard, and the other heirs of Antoine Soulard, deceased, all the title of the United States in the land in controversy, as it was at the commencement of the suit, and consequently that the sale pending the suit was void.

1. The act of Congress, of May 26, 1824, under which the proceedings were had, was not designed to confer gratuities upon claimants, but to provide a remedy by which legal, just, and *bonâ fide* claims might be established. "The mischief intended to be provided for by the act, was the inchoate or incomplete condition of titles having a fair, and just, and legal inception, under either the French or Spanish governments of Louisiana, but which by reason of the abdication or superseding of their governments, and by that cause only, had not been completed." The United States *v.* Reynes, 9 Howard, 127, 145; 4 Stat. at Large, 52.

2. It may be conceded that the claim of Soulard was barred as against the United States by the neglect to file notice thereof, as required by the act of March 3, 1807, yet as the bar was removed by the act of May 26, 1824, and the land remained undisposed of, the claim was restored to its original standing, precisely as if the act of 1807 had not passed. The act of 1824 enables all claimants, under incomplete titles, having a fair, legal, and just origin, to bring such titles before the courts of the United States, and there establish them by proof of the legality and justice of their origin and character, without regard to any proceedings or notice under previous acts of Congress.

3. The effect of the act of 1824, is to reserve from sale and location the lands embraced by any incomplete title, within the description of the first section, until the final decision of the case where a suit is prosecuted, and for two years where the claimant fails to prosecute his claim under the act. See sections 5 and 7, and the case of Stoddard *v.* Chambers, 2 Howard, 284.

Mr. Wells, for defendant in error.

Did the court err in refusing to give the instructions prayed for by the plaintiff, or in giving those for the defendant?

1. It is clear that Soulard's claim was not reserved from sale by the acts of 1811 or 1818, or, indeed, by any other act prior to that of May 26, 1824; for the only condition upon which such reservations were made, was that notice of the claim should have been filed with the Recorder of Land Titles, on or before the 1st of July, 1808. Of this claim no such notice had

ever been filed. It stood then by the terms of the acts of the 2d March, 1805, and of March 3, 1807, a barred claim. The fifth section of the latter act provided that "the rights of such persons as shall neglect to file such notices within the time therein limited (the 1st July, 1808,) shall, so far as they are derived from, or founded on any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law or equity whatever." The claim then, at the date of the act of 1824, was wholly destitute of merit. Whatever claims it might originally have had upon the justice of the government, had long since been lost by the laches of the claimant, and by the lapse of time. Its confirmation to him then was a mere naked gratuity.

2. The act of May 26, 1824, did not make any express provision for the reservation of this or any other claim. Its provisions extended to two classes of claims — those which had been filed with the recorder, as required by law, and which were reserved by the acts of 1811 and 1818, and those which had not been so filed and reserved. And, indeed, it is the only act of Congress that has ever opened the door for confirmation to this latter class, since they were barred.

The fifth section of the act provides, "That any claim to lands, tenements, or hereditaments, within the provisions of this act, which shall not be brought by petition before said courts, within two years from the passing of this act, or which after being brought before the said courts, shall on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and in equity, and no other action at common law or proceeding in equity shall ever thereafter be sustained in any court whatever in relation to said claims."

This provision can only relate to the class of claims which had, by former laws, been reserved from sale. As to the other class, they were already, by the act of 1807, barred, and no new legislation was required to bar them. Those which had been reserved must continue to stand reserved until some act was passed to take off the reservation. This fifth section effectually secured that object. It could not have been intended to bar a claim already barred, and liable to be sold as other public land.

But the fifth section only barred the claims from future adjudication. It did not provide for the sale of the lands within those claims. When the claim ceased to be held up for adjudication, it became necessary, according to the policy of Congress, that the land should be offered for sale as other public land.

And accordingly the seventh section of the act was introduced for that purpose. It reads thus: "That in each and every case tried under the provisions of this act, which shall be finally decided against the claimant, and in each and every case in which any claim cognizable under the terms of this act, shall be barred by virtue of any of the provisions contained therein, the land specified in such claim shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district."

It is this section which it is supposed operated by implication to establish the reservation of Soulard's claim. But it is clear that it could not relate to that class of claims. It relates to claims barred by the provisions of this act. Soulard's claim was not barred by this act, for it had been barred many years before by the acts of 1805, 1806, and 1807. It had been incorporated with the other public lands, and surveyed, and offered for sale with them. No new legislation was required to put it in the market, for it was already in market, and as stated by the petitioner himself in his petition to the district court, "the quantity of one thousand nine hundred and forty-seven acres and thirty-five hundredths, had been definitively sold by the United States," and he gives the names of the persons to whom sold. See Record, page 7.

The language of the act is, "shall forthwith be held and taken as a part of the public lands of the United States." This language is appropriate when applied to lands which had always been reserved from sale; which had never been in market; which had been treated as private property, and never "held and taken as a part of the public lands of the United States," but can have no proper application to those lands which had in every respect been subject to all the laws relating to public lands since 1808.

3. But there are other provisions of the act of 1814, which preclude the idea that it was intended by Congress, that the title acquired by the claimant should ever be brought into conflict with sales made by the United States.

The sixth section provides that the clerk of the court shall furnish the successful claimant with a copy of the decree, who shall deliver it to the Surveyor of Public Lands in Missouri. And the surveyor shall cause the same to be surveyed. The eleventh section then provides, "That if in any case it should so happen that the lands, tenements, or hereditaments, decreed to any claimant under the provisions of this act, shall have been sold by the United States or otherwise disposed of, or if the same shall not have been heretofore located in each and

every such case, it shall and may be lawful for the party interested to enter after the same shall have been offered at public sale, the like quantity of lands in parcels, conformable to sectional divisions and subdivisions, in any land-office in the State of Missouri," &c.

Now in order to understand more clearly the import of the phrase in this section, "lands, tenements, or hereditaments, decreed to any claimant," it will be necessary to examine for a moment the provisions of the first section. By that section the claimant was not only required to set out his own title in full, but also "the name or names of any person or persons claiming the same or any part thereof by a different title from that of the petitioner." This was done by Soulard in his petition. He showed that 1,947.35-100 arpens had been sold by the United States, to other persons, before his suit was brought. He did not claim this land, but claimed the residue of the 10,000 arpens. It could not, then, have been this land, already sold, which the act of Congress supposed might be "decreed to the complainant." This could not have been decreed to him under any circumstances. He did not ask for it, nor could he demand it, for it had already been lawfully sold to other persons. It was then a part of the residue that the statute contemplated might be decreed to him, when it had already been sold by the United States, and it was this for which this section provided. To give the act this construction leaves it in harmony with all the legislation of Congress on the subject. It has been the uniform policy of Congress to protect those to whom they have sold for a valuable consideration. To say that Congress, by this provision, intended to protect those entries only which had been made before the suit was brought, is to impute to that body the folly of passing a law which, so far at least as this class of cases are affected, was wholly unnecessary. These entries were lawful and valid, and needed no legislation to protect them from subsequent grants. But to construe the provision to extend to entries made at any time prior to the decree, is to place the act of 1824 upon the ground of the act of July 4, 1836, and, it is believed all other acts for the confirmation of such claims. In the case of Menard's heirs *v.* Massie, this court has held that the second section of that act protects all lands sold by the United States. In that case (8 Howard, 308,) the Court says:

"From the first act, passed in 1805, up to the present time, Congress has never allowed to these claims any standing other than mere orders of survey, and promises to give title; and which promises addressed themselves to the sovereign power in its political and legislative capacity, and which must act before the courts of justice could interfere to protect the claim. And

so this court has uniformly held. The title of Cerre, having no standing in court before it was confirmed, it must of necessity take date from its confirmation, and cannot relate back so as to overreach the patents made in 1826 and 1827." These remarks apply with eminent force to Soulard's claim. It was a claim which had been barred, and abandoned by the claimant for twenty years.

In the case cited, the Spanish claim had been filed with the recorder, and was so far within the provisions of the acts reserving such claims. But it had never been surveyed. In relation to this branch of the case, the court remarks: "In reserving lands from sale, it was necessary to know where they were situated, and how far they interfered with the public surveys. Either the President or some other officer must have had the power to designate the lands as those adjoining to salt springs, or lead mines; or it must have appeared in some public office appertaining to the Land Department, what the boundaries of reserved lands were; and if it did not appear, no notice of the claim could be taken by the surveyors, nor by the registers and receivers, when making sales." 8 Howard, 309.

I request the court to note the fact, apparent from the record, that no record or memorandum of this claim was to be found in any office belonging to the Land Department, except in Soulard's old book of Spanish surveys. There he states in his petition he recorded it. But no attention was ever given by surveyors or other officers, to the surveys of claims not recorded. No copy of such surveys were ever sent to the Register's office. Even if Congress had in terms required him to withhold this land from sale, it would have been impossible for him to do so. He could not know where it was.

When the act of February 17, 1818, passed just before the land sales in Missouri, requiring certain claims to be reserved from sale, an order was issued from the Land Department directing the Recorder of Land Titles to furnish to the several registers descriptive lists of such land within their respective districts, as the act required, should be withheld from sale. Had this not been done, the registers would have been unable to carry into effect the act of 1818. As it was, large quantities of those lands were sold through mistake, and even these sales were protected by the second section of the act of July 4, 1836. But in this case the register had no such information. Congress could not have intended that he should suspend any of his sales, or adequate provision would have been made to enable him to do so. So obvious was this view of the law, that the learned judge, in delivering the opinion of this court in the case, citing Menard's Heirs *v.* Massey, p. 307, says: "It was

therefore manifest that claims resting on the first incipient steps must depend for their sanction and completion upon the sovereign power, and to this course claimants had no just cause to object, as their condition was the same under the Spanish government. No standing, therefore, in any ordinary judicial tribunal has ever been allowed to these claims, until Congress has confirmed them and vested the title in the claimant. Such, undoubtedly, is the doctrine assumed by our legislation. To go no further, the act of May 26, 1824, allowing claimants a right to present their claims in a court of justice, pronounces on their true character. It declares that the claim presented for adjudication must be such a one as 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 the sovereignty not been transferred to the United States; and by the 6th section, when a decree has been had favorable to the claim, a survey of the land shall be ordered and a patent issue therefor; and by section eleventh, if the decree shall be in the claimant's favor, and the land has been sold by the United States or otherwise disposed of, the interested party shall be allowed to enter an equal quantity of land elsewhere."

This admits of no comment.

4th. But it is said that the filing of his petition for confirmation, by Soulard, in the District Court, was notice, and that no one could purchase the land in prejudice of his right.

The rule here invoked is this: When a party commences judicial proceedings for the purpose of establishing his right to a particular piece of property, no one is permitted to purchase that property of another, and claim to be an innocent purchaser, without notice. The pendency of his suit is notice of all the right the plaintiff has. But in the case of Soulard he had no right or title whatever, to the lands for which he sued. It belonged to the government and not to him; and if it belonged to the government, then the government might lawfully sell it to any one before it granted to him. He petitioned for a grant of the land, and when he obtained his grant, he acquired only the title which the government then had. His petition to the court placed him on the ground of all other applicants for a grant of land, the title to which was in the government. He who first obtains the title, and not he who first applies, will hold it.

With these remarks, and the able argument of the learned judge who delivered the opinion of the Supreme Court of Missouri, the defendant in error submits this case.

Mr. Justice CATRON delivered the opinion of the court.

This cause comes here by writ of error to the Supreme Court

of Missouri, under the twenty-fifth section of the Judiciary Act. The error assumed to have been committed below, is that the court misconstrued the act of May 26, 1824, enabling claimants to lands in Missouri, to institute proceedings to try the validity of their claims.

The action being an ejectment, and the defendant in possession by virtue of patents from the United States, the only question is whether the plaintiff has a better legal title.

The plaintiff relies on a decree of this court, made in 1836, in favor of Soulard's heirs against the United States for 10,000 arpens of land including the premises sued for. The decree is of younger date than the entries of the defendant, which were made in 1834, and are a good title to sustain or defend an ejectment in Missouri.

Soulard's claim was filed in the District Court, in August, 1824, and a confirmation demanded, but which was refused, and the petition dismissed in 1825; from this decree an appeal was prosecuted, and in 1836, a decree was rendered by this court confirming the claim. And the question here is, whether the decree in the Supreme Court related back to the date of filing the petition against the United States in the District Court. If it did, then the plaintiff is entitled to recover; and if it did not, then the judgment below must be affirmed.

The act of March 3, 1807, declared that all claims to lands should be void unless notice of the claim, &c., should be filed with the Recorder of Land Titles, prior to the first of July, 1808. Soulard's claim was not filed with the recorder, nor was it presented to any tribunal for action on it, till suit was brought in 1824, in the District Court. Up to that time, the land claimed was subject to sale. This is admitted: But the argument for the plaintiff is, that the act of 1824 removed the bar, and restored the claim to its original standing as if the act of 1807 had not been passed. Admitting this to be true, still it proves nothing, as the United States could beyond question have sold this land before 1807, and passed the legal title; and hence the removal of the bar, imposed by that act, left the land equally open to sale at any time after 1807, as it was before that time.

The act of February 17, 1818, laid off local land districts in Missouri, one of which embraced the land in dispute, and provided for the sale of public lands, from time to time, in each district. But an exception was made according to the act of 1811: 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 Recorder of Land Titles, and filed in his office.

The claims thus reserved from sale were the ones Congress supposed would come before the District Court and be adjudicated under the act of 1824; and as they stood protected from sale, no further provision was made by the act to protect such claims as that of Soulard, which had never been recorded.

Having given no additional protection by the act of 1824, and Congress having the power to grant the land, or to cause it to be done, through the department of public lands, the Commissioner of the General Land Office (June 25, 1831) ordered the registers and receivers of the various land districts in Missouri to proceed to sell the lands, not adjudicated under the act of 1824, which had been subject to adjudication: holding that, notwithstanding the provisions of the acts of 1811 and 1818, all claims not brought before the court, or if brought, not prosecuted to a final decision in three years by reason of neglect on the part of the claimant, were subject to be offered at public sale. Volume of Instructions and Opinions, No. 704. Under this established construction, the land in question was sold to the defendant. He could not know that Soulard's heirs claimed the land, as their claim was nowhere recorded in any office appertaining to the department of public lands; and if he had known that such claim existed, still the land court in Missouri had ceased to exist on the 26th of May, 1830, four years before he purchased: Soulard's claim had been rejected in that court, and had been pending on appeal in the Supreme Court, for nearly ten years after the suit was instituted; whereas the act of 1824, required that it should be prosecuted to a final decision within three years. Thus stand the equities of the defendant. But another consideration is conclusive of this case: The act of May 24, 1828, § 2, provides, that confirmations had by virtue of the act of 1824, and patents issued thereon, should only operate as relinquishments on the part of the United States, and should in nowise affect the right or title, either in law or equity, of adverse claimants to the same land. The act spoke of confirmations by decree, and declared that the decree should operate prospectively; and consequently embraced a case, where the land was acquired by purchase from the United States before the decree was made, unless the acts of 1811 and 1818 protected the land from sale. For these reasons, we agree with the Supreme Court of Missouri, that the defendant has the older and better legal title, and order the judgment to be affirmed.

Order.

This cause came on to be heard on this 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.

GEORGE W. AND HENRY SIZER, PLAINTIFFS IN ERROR, *v.* WILLIAM V. MANY.

Where a judgment in a patent case was affirmed by this court with a blank in the record for costs, and the Circuit Court afterwards taxed these costs at a sum less than two thousand dollars, and allowed a writ of error to this court, this writ must be dismissed on motion.

The writ of error brings up only the proceedings subsequent to the mandate; and there is no jurisdiction where the amount is less than two thousand dollars, either under the general law or the discretion allowed by the patent law. The latter only relates to cases which involve the construction of the patent laws and the claims and rights of patentees under them.

As a matter of practice this court decides, that it is proper for circuit courts to allow costs to be taxed, *nunc pro tunc*, after the receipt of the mandate from this court.

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

Mr. George T. Curtis, on behalf of the defendant in error, moved to dismiss the writ of error for the want of jurisdiction.

The circumstances were these:

At the October term, in the year 1848, of the Circuit Court of the United States for Massachusetts District, Many, the defendant in error, recovered a judgment against the plaintiffs in error, in an action for the infringement of letters-patent, which was entered and recorded in the words following:

"It is thereupon considered by the court that the said William V. Many recover against the said George W. and Henry Sizer the sum of seventeen hundred and thirty-three dollars and seventy-five cents damages, and costs of suit taxed at ."

The said Sizers thereupon, at the same term of the Circuit Court, sued out a writ of error to this court, for the purpose of having the said judgment revised. This writ of error was duly entered and prosecuted in this court, and at the December term, 1851, the judgment of the Circuit Court was affirmed by a divided court, and therefore it is not reported in Howard.

The mandate which went down, recited the judgment of the Circuit Court as above given, and then proceeded thus:

"You therefore are hereby commanded that such execution and proceedings be had in said cause as, according to right

and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding."

On the receipt of this mandate, the attorney for the defendant in error (the original plaintiff below) presented the same to the Circuit Court, held by the district judge, and applied for leave to have the costs in the action taxed and inserted in the blank left in the original record of the judgment. This motion was refused by the district judge.

The defendant in error thereupon, at the December term of this court, in the year 1852, applied to this court for a *mandamus* to direct the court below to tax and allow his costs in the original action, amounting to $1,811.59. The court refused the application, for reasons which appear in the case. Ex parte Many, 14 Howard, 24.

In May, 1853, *Mr. Curtis*, counsel for Many, renewed his motion to the district judge, setting out in writing the mandate of this court in the original cause, and the amount of the costs, and praying the court to make an order allowing of their taxation and insertion in the original judgment; and praying for execution as directed by the mandate of this court.

Opposition was made to this motion by Sizer et al., but the motion was granted, as appears by the following extract from the record. It is proper to remark that the court was held by the district judge alone, Mr. Justice Curtis having been of counsel and not sitting. The costs in the Circuit Court amounted to $1,811.59.

And the said Sizer et al., by their counsel, objected to the granting of the said motion for an allocatur as to the said costs, or to their being inserted in the judgment, and claimed and requested that if the court should allow the said costs, and direct the clerk to insert the amount in the record of said judgment, then the defendants should have a right to sue out a writ of error, and for that purpose, that the court here should either certify that it is reasonable that there should be such writ of error, or should add interest upon the amount of said costs from the time of the rendition of the original judgment to the present time, so as to make the amount more than two thousand dollars, and that no execution should issue if, within ten days, a writ of error should be sued out, and security given according to law; to which claims and requests, made by the defendants, the plaintiffs objected, and insisted upon the said motion.

And now the court having considered the said motion filed by the plaintiff, and the objections, claims, and requests made by the defendants, and deeming it to be the legal right of the plaintiff to have the said costs allowed, and the amount thereof inserted in the original judgment in this cause, and that it is

not within the discretion of the court to allow or disallow the same, it is ordered by the court that the said costs, as taxed in said motion, be allowed, and that the amount thereof be inserted in the original judgment in this cause.

And the court here doth deem it reasonable that the said defendants should be allowed to bring a writ of error to the Supreme Court; and it is further ordered by the court, that execution, as prayed for in said motion of the plaintiff, shall issue after the expiration of ten days, Sundays exclusive, from the making of the order, unless the said defendant shall, within said ten days, give security according to law, and serve a writ of error, by leaving a copy thereof for the plaintiff in the office of the clerk of this court; and if such security should be given, and such service made within ten days, then that execution should not issue until the further order of the court.

By the court, H. W. FULLER, *Clerk.*

The writ of error was sued out and brought all these proceedings up to this court.

The motion to dismiss was argued by *Mr. Curtis*, in favor of it, and by *Mr. Robb*, against it.

Mr. Curtis. The writ of error now before the court, although it brings up the proceedings in the Circuit Court prior to the mandate in the original cause, in contemplation of law can present for revision here solely the question, whether the Circuit Court erred in making the order by which the costs were allowed and directed to be inserted in the original judgment.

Over this question this court can have no jurisdiction, because,

1. The amount in controversy is less than $2,000.

The sole amount, or item, in controversy under the motion of the plaintiff below, and involved in the order of the Circuit Court thereon, was the costs prayed for, being $1,811.59.

The original judgment had been reviewed in this court by the first writ of error; and after a mandate has issued from this court, affirming a judgment below, and directing execution, a second writ of error can bring up nothing but the proceedings subsequent to the mandate. Ex parte Sibbald, 12 Pet. 488, 492. Browder *v.* McArthur, 7 Wheat. 58.

It cannot be pretended that this court can acquire jurisdiction of this writ of error upon the ground that the court below has allowed it in the exercise of a discretion conferred by statute, (July 4, 1836, sec. 17,) in patent cases, where the amount in controversy is less than $2,000. The settled construction of that statute is, that it confers a discretion on the courts below, to allow writs of error in cases where the amount in controversy

is less than $2,000, for the purpose of having some question settled that involves the construction of the patent acts. Hogg *v.* Emerson, 6 How. 439, 478; Wilson *v.* Sandford, 10 How. 99. The court below, by allowing the first writ of error, which brought up the original judgment for a revision of the merits of the case, had exhausted all the discretion that the statute confers; and the question of allowing the plaintiff's costs to be taxed *nunc pro tunc*, and inserted in the judgment, had nothing to do with the construction of the patent laws.

Again, this court cannot take jurisdiction of this writ of error, because,

2. The order of the court below, although in form a final order or judgment, is, in fact and substance, an interlocutory order. The part of the order of which the plaintiffs in error complain, is that allowing the costs; and this was asked and allowed as a proceeding *nunc pro tunc*, and therefore was in contemplation of law prior to the final judgment from which the first writ of error was prosecuted. That part of the order which allows the execution, in case the writ of error is not prosecuted within ten days, is not a final judgment, in the sense of the Judiciary Act.

Mr. Robb made the following points:

1. The amount in dispute between the parties exceeds the sum of $2,000, although the amount of costs allowed by the court below to be inserted in the judgment, by way of amendment, is less than that sum. The necessary result of the allowance of the amendment is to subject the plaintiff to the payment of $2,300, and upwards.

2. The defendant in error cannot by a voluntary *remittitur* of the excess above $2,000, against the consent of the plaintiffs in error, defeat their right to a writ of error from this court.

3. This court will not regard the order of the court below, allowing the amendment as a proceeding *nunc pro tunc*, and as of the October term, 1848, of that court, if thereby the right of appeal to this court will be defeated.

4. The proceedings of the court below, in the execution of the mandate, are the subject of revision by this court. And it is error in the inferior court to grant any relief whatever after the mandate, or to examine it for any other purpose than execution. Ex parte Sibbald, 12 Pet. 492.

And the order or judgment purporting to be pursuant to and in execution of the mandate will be reviewed by this court. And if it appear by the record that such order is at variance with the mandate, the court will exercise jurisdiction for the purpose of examining into the grounds of such variance. The variance in this case is matter of substance. In contemplation of law, a

judgment for a sum expressed as damages and "costs to be taxed," or taxed at , is a judgment for damages alone, and execution can issue only for that sum. Cook et al. *v.* Brister, 4 Har. 73, and cases cited. This court will exercise jurisdiction over such proceedings, although the additional relief erroneously granted in the court below be less in amount than $2,000.

5. This cause is now for the first time properly before this court upon the entire record, and the previous writ of error and the proceedings thereon in this court were without jurisdiction, because the judgment of the Circuit Court upon which it was brought was not final. When costs are taxed upon a judgment, such taxation is to be considered as the period at which final judgment is pronounced. Salter *v.* Slade, 3 Nev. & M. 717; Butler *v.* Bulkeley, 8 Moore, 104; 1 Bing. 233; Godson *v.* Lloyd, 1 Gale, 244; Wright *v.* Lewis, 4 Jur. 1112, B. c.; Blackburn *v.* Kymer, 1 Chas. Marshal, 278. And the order of the court allowing the costs to be taxed should be treated as the completion of the judgment of the Circuit Court in the cause.

6. The present writ of error, therefore, is properly allowed by the court below in the exercise of the discretion conferred by the 17th section of the act of July 4, 1836.

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

A motion has been made to dismiss the writ of error in this case for want of jurisdiction.

The case as it comes before us is this: Many, the defendant in error, in the year 1848, recovered a judgment in the Circuit Court for the District of Massachusetts, against the plaintiffs in error, in an action for the infringement of certain letters-patent. The verdict and judgment was for less than $2,000, but the writ of error to remove the case to this court was allowed under the patent law of 1836. From some oversight or accident the costs were not taxed in the Circuit Court before the transcript of the record was transmitted to this court. And the judgment as it stood upon the transcript was for the damages awarded by the jury, and costs of suit — leaving a blank space open for the insertion of the amount of the costs.

The judgment of the Circuit Court was affirmed at the December term, 1851, and the usual mandate sent down directing execution.

Upon the receipt of the mandate by the Circuit Court the defendant in error applied for leave to have the costs taxed and the amount inserted in the blank left for that purpose in the original record of the judgment. The motion was refused. And thereupon the defendant in error at December term, 1852, applied to

this court for a *mandamus* directing the court below to tax and allow his costs in the original action, amounting, as he alleged, to $1,811.59. But the court refused the motion, upon the ground that a *mandamus* could not lawfully be issued to a Circuit Court to guide its judgment in the taxation of costs.

At a subsequent term of the Circuit Court, the defendant in error renewed his motion, for an order allowing the taxation of these costs and their insertion in the original judgment; and the court thereupon allowed the taxation of costs, and directed the amount above mentioned to be inserted in the original judgment. But the court at the same time allowed a writ of error from their decision, and ordered that this second writ of error should operate as a *supersedeas* of the execution prayed for, if sued out within the time fixed by law. It is this writ of error that is now before the court, and which the defendant in error has moved to dismiss.

It has been settled, by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or reëxamined upon the second; and there is nothing therefore now before the court but the taxation of costs. 7 Wheat. 58; 12 Pat. 488, 492.

The sum taxed being less than $2,000, no writ of error will lie under the act of 1789. This act gives no jurisdiction to this court over the judgment of a Circuit Court, where the judgment is for less than that sum.

Neither can the allowance of the writ by the Circuit Court give jurisdiction, where the only question is the amount of costs to be taxed; and the amount allowed is less than $2,000. The discretionary power in this respect vested in the circuit courts by the act of July 4, 1836, sec. 17, is evidently confined to cases which involve the construction of the patent laws, and the claims and rights of patentees under them. But the amount of costs which either party shall be entitled to recover is not regulated by these laws. The costs claimed are allowed or refused in controversies arising under the patent acts, upon the same principles and by the same laws, which govern the court in the taxation of costs in any other case that may come before it. The same laws, therefore, must be applied to them in relation to the writ of error, and must limit the jurisdiction of this court as in other cases.

The writ of error must therefore be dismissed for want of jurisdiction. But as the question raised in this case may often occur in the circuit courts; and it is important that the prac-

tice should be uniform, it is proper to say, that we consider the decision of the Circuit Court allowing those costs to be taxed after the receipt of the mandate from this court, to have been correct, and conformable to the general practice of the courts. The costs are perhaps never in fact taxed until after the judgment is rendered; and in many cases, cannot be taxed until afterwards. And where this is the case the amount ascertained is usually, under the direction of the court, entered *nunc pro tunc* as a part of the original judgment. And this mode of proceeding is necessary for the purposes of justice, in order to afford the necessary time to examine and decide upon the several items of costs, to which the successful party is lawfully entitled.

Order.

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

PIERRE CLAUDE PIQUIGNOT, PLAINTIFF IN ERROR, *v.* THE PENNSYLVANIA RAILROAD COMPANY.

Under the twenty-second section of the Judiciary Act of 1789, this court cannot reverse the judgment of the court below, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court.

In Pennsylvania it is not usual to make a record of the judgment in any legal form. But there is no necessity that the courts of the United States should follow such careless precedents.

Where a suit was brought in which the plaintiff was described as a citizen of France, against the Pennsylvania Railroad Company, without any averment that the defendants were a corporation under the laws of Pennsylvania, or that the place of business of the corporation was there, or that its corporators, managers, or directors were citizens of Pennsylvania, the absence of such an averment was fatal to the jurisdiction of the court.

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

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

It was submitted, upon printed arguments, by *Mr. Kennedy* and *Mr. Alden*, for the plaintiff in error, and *Mr. Snowden*, for the defendants in error. But as the point of jurisdiction was not mentioned in the arguments, which were directed exclusively to other points, it is not thought necessary to give them.

Mr. Justice GRIER delivered the opinion of the court.

The caption of this suit, and the declaration, describe the plaintiff as a citizen of France, but contain no averment as to the citizenship of the defendant. Nor does it state whether "The Pennsylvania Railroad Company" is a corporation or a private association, or the name of an individual. The declaration avers that the defendants are transporters of emigrants for hire, and undertook to convey the plaintiff and his wife from Philadelphia to Pittsburg, but did it in such a negligent and careless manner that his wife was frozen to death on her passage. The defendant pleaded in abatement, another action pending for the same cause of action between the same parties, in the District Court of Alleghany county. To this plea the plaintiff demurred; and the court gave "judgment upon the demurrer in favor of the defendants." Whereupon the plaintiff brought this writ of error.

The question raised by the plea in abatement, in this case, is one of considerable importance, and on which there is some conflict of opinion and decision, but the judgment of the court below on the plea is not subject to our revision on a writ of error.

The twenty-second section of the Judiciary Act, which defines what decrees or judgments in civil actions may be made the subjects of appeals or writ of error, provides, "that there shall be no reversal on such writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court."

The question of jurisdiction has not been made the subject of plea or exception, nor is it necessary, where it is patent on the face of the record. The judgment of the court, so far as the record is concerned, does not distinctly show whether the court quashed the writ on the plea in abatement, or dismissed the suit for want of jurisdiction, as it might well have done. In Pennsylvania, it is not usual to make a record of the judgment in legal form. The word "judgment" for the party in whose favor it is, being the usual minute made by the clerk, from which a formal record of judgment may be made, but seldom or ever is made. It stands as a symbol to represent what the judgment ought to be, and therefore can never be erroneous. But there is no necessity that the courts of the United States should follow such careless precedents.

On a demurrer the court will look to the first error in pleading, and if the declaration does not show that the court has jurisdiction of the parties, it may dismiss the cause on that ground. In this case the declaration states the plaintiff to be a citizen of France, but gives no character as to the citizenship of the defendant. The name is most probably not intended to

designate an individual; if not, the record does not state that it is a corporation incorporated by the laws of Pennsylvania, or having its place of business there, or that its corporators, managers, or directors are citizens of Pennsylvania, nor can the want of such averment be supplied by inference from the name. It is true, the act of Congress describes the jurisdiction of the court to be "where an alien is a party," without describing the character of the other party; and the pleader may have been led into the error by looking no farther. But the constitution which is the superior law, defines the jurisdiction to be, "between citizens of a state, and foreign states, citizens, or subjects;" and, although it has been decided, (Mason *v.* The Blaireau, 2 Cranch, 264,) that the courts of the United States will entertain jurisdiction where all the parties are aliens if none of them object to it, yet it does not appear in this case that the defendant is an alien.

It follows, therefore, that whatever construction be put on this record, the judgment of the court below must be affirmed.

Order.

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

WILLIAM ROBERTSON, TRUSTEE OF THE COMMERCIAL BANK OF NATCHEZ, PLAINTIFF IN ERROR, *v.* HENRY R. COULTER, AND JAMES RICHARDS, EXECUTORS OF JOSEPH COLLINS, DECEASED.

In the State of Mississippi, a judgment of forfeiture was rendered against the Commercial Bank of Natchez, and a trustee appointed to take charge of all promissory notes in possession of the bank.

The trustee brought an action upon one of these promissory notes.

The defendant pleaded that the plaintiff, as trustee, had collected and received of the debts, effects, and property of the bank, an amount of money sufficient to pay the debts of the bank, and all costs, charges, and expenses incident to the performance of the trust.

To this plea the plaintiff demurred.

The action was brought in a State Court, and the highest court of the State overruled the demurrer, and gave judgment for the defendant.

This court has no jurisdiction under the twenty-fifth section of the Judiciary, Act to

review this decision. The question was merely one of construction of a statute of the State, as to the extent of the powers of the trustee under the statute.

This case was brought up from the High Court of Errors and Appeals of the State of Mississippi, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

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

Mr. Lawrence, for the defendants in error, moved to dismiss the writ for want of jurisdiction, inasmuch as there does not appear to have been drawn in question any treaty or law of the United States, and the State law, (the validity of which was affirmed by the court below,) was in no respect repugnant to the Constitution of the United States.

This motion was argued by *Mr. Lawrence*, in support of it, and by *Mr. Porter* and *Mr. Wharton*, against it.

Mr. Lawrence. The act of 1843, of the Mississippi legislature prescribing the mode of proceeding against delinquent banks, (Hutch. Code, 329,) had provided that an information in the nature of a *quo warranto* might be filed against banks suspected of having violated their charter, and upon trial and proof a judgment of forfeiture should be pronounced; upon which judgment of forfeiture it was made the duty of the court to appoint a trustee to take charge of the books and assets, and to collect all debts due such banks, and to apply the same to the payment of the debts of such banks in such manner as should thereafter be directed by law.

Under this act, judgment of forfeiture had been obtained against the Commercial Bank of Natchez in the Adams County Court, the plaintiff in this suit had been appointed the trustee, all the debts of the bank had been paid, and all costs and charges incident to the trust, discharged when the present suit was instituted. The pleas which the defendant put in, raised the question as to the extent and nature of the trust created by the act of 1843: whether, on the one hand, the trustee was a mere officer of the court which appointed him for the simple purpose of receiving and collecting the assets of the bank for the purpose of paying the debts of the bank; or whether, on the other hand, he was constituted a full and complete representative of the bank for the benefit of stockholders as well as of debtors of the bank. The highest court of Mississippi have decided that the intention of the legislature, in the act of 1843, was simply to constitute an officer to collect the debts due to the bank for the sole purpose of paying the debts due from the bank, and that when that object was accomplished the trust was extinct, leaving the stockholders where the common law left them upon the dissolution of a corporation.

It is difficult to see, from this simple statement of the case, what possible ground there is for the jurisdiction of this court. It is nothing more than the exposition, by the highest judicial tribunal of a State, of the meaning of a legislative act of that State. It is not contended that the act of 1843, itself is invalid, for the plaintiff derives all his authority from that act. It is not pretended that the act of 1843, as construed by the court, takes away any right secured by any previous act of the legislature. All that is maintained is, that because the Court of Appeals have not thought that the act of 1843 gives to Mr. Robertson, as trustee, quite as extensive powers as he supposes that act to give him, therefore this construction of the act has taken from him a right which his own construction had invested him with, and consequently this court has jurisdiction to overrule that construction.

It will be seen, therefore, upon the face of the record, that the high court of Mississippi was employed in ascertaining what were the powers of a trustee under the act of 1843, what was the nature and extent of the trust, and whether, under that act, the trust was limited to preservation of the rights of the creditors of the bank. And the court decided that the act of 1843 saved from the common-law consequences of forfeiture, the debts due to the bank for the benefit of the creditors of the bank, and for no other purpose; that upon the true construction of the act of 1843, the trust being a limited official trust, was discharged and extinguished when the object for which it was created was attained; that the trustee had no power remaining after the trust was discharged. All of which was the mere construction of a legislative act by the judicial tribunals of a State, which construction this court have no more jurisdiction to inquire into and reverse upon this writ of error, than they would have to reverse the judgment of the Queen's Bench upon the construction of an act of parliament.

As however a very metaphysical argument has been incorporated into the record under the form of a petition, it is proper to examine its soundness, so far as it may touch the jurisdiction of this court.

The substance of that argument is, that by the common law debts to and from a bank were not extinguished by its dissolution, but only that they could not be enforced because there was no longer a party in existence for or against whom to enforce them. That the moment a representative of the bank is created by law, those debts are revived or continued in full vigor. From which two premises the conclusion is leaped to, that the law which takes away from such representative a right to collect for the benefit of all persons concerned in the bank, would be unconstitutional and void.

Now we deny both the premises in this argument, and yet say that if they were admitted the conclusion would not follow; because where the creation and limitation of rights are both derived from and contained within the same legislative act, no such constitutional question can arise. If the rights were created by one act, and the limitation or restriction were made by another and subsequent one, then there might arise a question as to the validity of such subsequent act. And such was the very predicament in the Commercial Bank *v.* Chambers, 8 S. & M. 1. In that case the court decided that under the act of 1843, the trust was for the benefit of creditors, and that the trustee being invested with the power to sue and collect for the benefit of creditors, who had an interest in the fund, that this right became vested by the act of 1843, and that the subsequent act of 1846, taking away the right to sue for and collect for the benefit of creditors was so far void. But in this case the whole matter is contained in the same law. And the discussion below, and the decision of the court, was to determine the result of that whole law.

But it will be perceived that the argument of Mr. Yerger assumes what the whole current of decisions, and especially those of Mississippi, contradict, namely, that the dissolution of a corporation does not extinguish the debts due to and from it. See the cases cited in the decision of the court, 2 Cushman, 321.

But especially will it be seen, that the argument assumes that which was the question under discussion in the court below. It is a pure *petitio principii.* Mr. Yerger takes for granted that the trustee appointed by the court, under the act of 1843, was a full and complete representative, for all purposes, and for the benefit of all, of the extinct corporation. Now, that was the very question in the court below; and, so far from agreeing with the view of Mr. Yerger, the court below decided, as the court had decided in 8 S. & M. 1, that the trustee was not, upon the true construction of that act, a full representative of the bank, but was an official trustee to carry out the object of the act, namely, the payment of the creditors of the bank. And this court in effect decided the same thing in the case of Peale *v.* Phipps, 14 How. 374.

As to that part of the argument which seems to deny the competency of the legislature to preserve so much of the effects of a dissolved bank from the effects of forfeiture as may pay the debts of the bank, leaving the interests of the stockholders to their fate at common law, I shall say but a word. If the legislature should deem it a matter of sound policy and justice, to preserve from destruction the debts due to creditors who were innocent of any of the acts which called for a forfeiture of the

charter, and at the same time to leave just where they were those persons who had abused their trust, and made it necessary for the judicial tribunals to declare that trust at an end, certainly it would be within the legislative power to do so. The interests of stockholders are distinct from those of creditors. The policy of making a distinction between them in the conservative intervention of the legislature is very apparent. It is then a simple question of construction whether or not in fact the legislature has so done.

Mr. Porter and *Mr. Wharton*, against the motion.

It will be observed that the plea does not question the right of the plaintiff to bring the suit. It expressly sets forth that after his appointment, "and after the commencement of this suit, he, the said plaintiff, collected and received" "a large amount of money sufficient to pay," &c. Stated in other words, the defendants' position is, that the plaintiff had a clear title to the notes and a perfect right to bring the suit, but that afterwards, because other debtors paid their debts, it became unnecessary and consequently unlawful to prosecute the action.

Let it be observed that this plea strikes directly at the rights of the stockholders. If, as alleged, the debts of the bank are paid, these are the only parties to be affected by the decision of the court on the plea. The property of this large class of claimants, who are distributed as we may suppose over the whole Union, is thus left in the possession of those most expert in obtaining this property on solemn contracts to pay it back, made with the authorized agents of the stockholders. It is, therefore, respectfully urged that the decision of the Court of Appeals affects the rights of the stockholders.

The plaintiff contends that the construction given by the latter court to the statute of 1843, impairs the obligation of the contract entered into by the drawer of these notes. This court will, it is true, adopt the construction given to the statute by the Court of Appeals, but if that construction impair the obligation of a contract, this court will certainly reverse the decision of the inferior court. The authorities on this point are so numerous as to require no citation.

On a motion like the present, to dismiss the writ for want of jurisdiction, we suppose it sufficient to show that the case presents a fair legal question on the constitutionality of the Mississippi law. The motion can be applicable only where there is a clear, absolute want of jurisdiction. If the question were to some extent doubtful, it should stand over until the case came up regularly for argument. But we maintain that this court has jurisdiction.

If the title to the debt passed to the plaintiff, it would be a violation of the constitutional provision respecting the obligation of contracts, to allow the defendant to avoid his obligation on the ground assumed by him and sustained by the Court of Appeals, namely, that since the institution of the suit, the plaintiff had collected so large an amount of money as to render it unnecessary to collect this money from the defendant. Such a plea admits the contract. It admits that the plaintiff had once a right to sue upon it and to collect the debt secured by it. The fact relied on is alleged to have arisen, not only after the contract had been made, but after the action upon it had been commenced. The obstacle thus interposed is that the plaintiff, as trustee, does not need the money for certain indicated purposes. The decision of the Court of Appeals is then made discharging the defendant from liability on the note. If there was any contract whatever, (which the plea admits) is not this impairing its obligation? Is it not destroying the contract altogether?

Can it be doubted that the title to the debt did pass to the plaintiff? If it had been intended to extinguish it, this would have been done. The death of the corporation did not extinguish the debt morally, and the statute in terms does not do so, but merely removes a legal difficulty by designating the person who is to sue for it. The very same statute which destroyed the bank, preserved the debt alive, vested the ownership of it in the plaintiff, and, by implication, required him to sue for it. He was fully authorized to recover it; when recovered, he was directed to apply it in a particular manner — to do a future act which in no way concerns the defendant, for the recovery discharges him. It seems clear, therefore, that the debt did remain, and did pass to the plaintiff. If it remained at all, it remained as a unit. It could not remain for the half, and not for the whole. There is no instance of a contract being thus cut into pieces by legislative action. If recoverable at all, the whole is recoverable. If the contract stood, the amount of money which it secured must be determined by the contract, and not by the caprice, dishonesty, or energy of every other man in the community who had made similar contracts. It would be as reasonable to prescribe that a debt should remain, but that the amount of it should depend on the state of the weather at some future time, and that, too, without naming a time.

In the defendant's brief it is suggested that the plaintiff cannot question the validity of the act of 1843, because he derives his authority from it. Certainly he cannot, and his position does not require that he should. That act empowers him to collect the debts due to the bank, and to apply the same to the payment of the debts of the bank. The act does not declare

that after this point has been attained, he shall have no power to collect, or that he shall then begin to pay back to the debtors, sums previously received. If we are right in supposing the contract an entirety, and the debt a unit, the very power to collect any amount entitles him to collect the whole. For the surplus, he would be liable as any other trustee, to the parties having rightful claims upon it.

These parties are the stockholders. This construction commends itself to our sense of justice. It was the duty of the legislature, when that body forfeited the charter of the bank, to protect the property in which individuals were interested. The rights of the State were satisfied by the divestiture of the chartered privileges of the bank. The presumption is, that the legislature intended to do what was right, by protecting private property, and not to inflict needless and wanton injury on individual rights. The construction contended for by the defendants and adopted by the Court of Appeals is, that this debt, and all others similarly situated, are absolutely forfeited, and that the stockholders, on whose behalf the contracts were made, shall suffer the loss. Against so unjust a result, every fair presumption should be made.

It will be seen, by reference to the arguments which accompany the record, that the points here taken were made in the court below. It was there argued that so much of the act of 1843 as prevented a recovery for the benefit of stockholders, and restricted it to the benefit of the creditors, was void. We beg leave to refer to those arguments, and to make them a part of this brief.

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

This case is brought here by writ of error directed to the High Court of Errors and Appeals of the State of Mississippi, under the 25th section of the act of 1789; upon the ground that a law of that State, under which this decision was made, impairs the obligation of contracts.

It is an action of assumpsit. The plaintiff declares on a promissory note made by Collins, in his lifetime, to the Commercial Bank of Natchez. The declaration avers that after the execution of the note, and before the commencement of this suit, a judgment of forfeiture was rendered against the bank on the 12th of December, 1845, according to a statute of the State in such case made and provided; and that the plaintiff was appointed by the court trustee, and as such took possession of this note; and that by means thereof and by force of the statute of the State, Collins became liable to pay him the money.

The defendants pleaded that the plaintiff, as trustee, had col-

lected and received of the debts, effects, and property of the bank, an amount of money sufficient to pay the debts of the bank, and all costs, charges, and expenses incident to the performance of the trust. To this plea the plaintiff demurred.

The Court of Appeals overruled the demurrer, and gave judgment for the defendant, upon the ground that the plea was a full and complete bar to the enforcement of the right set out in the declaration. And this judgment is now brought here for revision by writ of error.

A motion has been made to dismiss the writ for want of jurisdiction. And in the argument of this motion, a question has been raised whether, by the common law, the debts due to a bank at the time of the forfeiture of its charter would not be extinguished, upon the dissolution of the corporation, and the creditors without remedy. And cases have been referred to in the Mississippi Reports, in which it has been decided that by the common law (previous to any State legislation on the subject) upon the dissolution of a banking corporation, its real estate reverted to the grantor, and its personal property belonged to the State; that the debts due to it were extinguished, and the creditors without remedy against the assets or any of them which belonged to the bank at the time of the forfeiture.

But this question is not before us upon this writ of error, and we express no opinion upon it. The suit is not brought by a creditor of the bank, seeking to recover a debt due to him by the corporation at the time of its dissolution. But it is brought by a trustee appointed by a court of the State, under the authority of a statute of the State; and the question before the State court, which the pleadings presented, was whether the trustee was authorized, by the law under which he was appointed, to collect more money from the debtors of the corporation than was necessary to pay its debts, and the expenses of the trust.

Now, in authorizing the appointment of a trustee where a banking corporation was dissolved, the State had undoubtedly a right to restrict his power within such limits as it thought proper. And the trustee could exercise no power over the assets or credits of the bank beyond that which the law authorized. The Court of Appeals, it appears, decided that the statute did not authorize him to collect more than was sufficient to pay the debts of the corporation and the costs and charges of the trust. And, as the demurrer to the plea admitted that he had collected enough for that purpose, the court held that he could not maintain a suit against the defendants to recover more.

The question therefore presented to the State court was merely as to the powers of a trustee, appointed by virtue of a statute of Mississippi. His powers depended upon the construc-

tion of the statute. And we have no right to inquire whether the State court expounded it correctly or not. We are bound to receive their construction as the true one. And this statute, as expounded by the court, does not affect the rights of the creditors of the bank or the stockholders. The plaintiff does not claim a right to the money under a contract made by him; but under the powers and rights vested in him by the statute. And if the statute clothes him with the power to collect the debts and deal with the assets of the bank to a certain amount only, and for certain purposes, we do not see how such a limitation of his authority interferes in any degree with the obligation of contracts.

The writ of error to this court must consequently be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record, from the High Court of Errors and Appeals of the State of Mississippi, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

REUBEN CHAPMAN, GOVERNOR, &c., FOR THE USE OF JOHN B. LEAVITT AND RUFUS LEAVITT, PLAINTIFF IN ERROR, *v.* ALEXANDER SMITH, BOLLING HALL, MALCOLM SMITH, AND JOHN G. GRAHAM.

By the laws of Alabama, where property is taken in execution, if the sheriff does not make the money, the plaintiff is allowed to suggest to the court that the money might have been made with due diligence, and thereupon the court is directed to frame an issue in order to try the fact.

In a suit upon a sheriff's bond, where the plea was that this proceeding had been resorted to by the plaintiff and a verdict found for the sheriff, a replication to this plea alleging that the property in question in that trial was not the same property mentioned in the breach assigned in the declaration, was a bad replication and demurrable.

Where the sheriff pleaded that the property which he had taken in execution, was not the property of the defendant, against whom he had process, and the plaintiff demurred to this plea, the demurrer was properly overruled.

THIS case was brought up by writ of error from the District Court of the United States, for the Middle District of Alabama.

It was a suit upon a sheriff's bond. Alexander Smith was the sheriff, and the other defendants in error his sureties. The Leavitts were citizens of New York.

It was altogether a case of special pleading. There were fourteen breaches assigned in the declaration, ten pleas, with replications and demurrers on both sides. There were demurrers to the breaches, demurrers to the pleas, and demurrers to the replications, upon which sometimes one party obtained a judgment, and sometimes the other; and whilst all this was going on between the principals, the sureties kept up an outside war of their own, by pleading the Statute of Limitations which led to a succession of other pleadings. The record contained thirty-eight printed pages, which were occupied exclusively with pleas, replications, demurrers, joinders, and judgments upon them; and finally the case came up to this court upon two judgments upon demurrers. In giving a narrative of all this, the controversy between the plaintiffs and the sureties will be detached from the tangled history, and left out of this report.

The facts of the case, upon which this system of pleading arose, were these:

On the 28th of September, 1839, John W. and Rufus Leavitt obtained a judgment against Jeremiah M. Frion, in the Circuit Court of the County of Coosa, Alabama, for $3,472.

On the 17th of the ensuing October, a writ of *fieri facias* was issued, and placed, on the 24th, in the hands of Alexander Smith, the sheriff.

The return day of this writ was the fourth Monday in March, 1840, when the sheriff returned that he had levied, on the 1st February, 1840, upon dry goods, hardware, carriages, &c.

On some day after this, but when the record did not show, the time of the sheriff expired, and on the 12th of September, 1840, the sheriff, by leave of the said Circuit Court, first had and obtained, altered, or amended his said return on said writ by adding thereto the following words and figures, to wit:

"The above goods have been claimed by A. B. Dawson and Samuel Frion, assignees of J. M. Frion, defendant in execution, and claim bond given to William J. Campbell, now sheriff, and my successor in office, September 12, 1840.

"A. Smith, late Sheriff."

It is now necessary, before the next step in the narrative is referred to, to mention two statutes of Alabama, which are so minutely stated in the opinion of the court, that they may be succinctly mentioned here. One is, that if a person, other than the debtor, claims the property levied upon, he may make affidavit that he is the owner, and give bond that it shall be forthcoming, whereupon the sheriff shall suspend the sale. The other is, that the plaintiff in the suit may make a suggestion to the next court, that the money could have been made by the sheriff by the exercise of due diligence, whereupon the court shall order

an issue to be framed to determine the fact whether or not due diligence was used. We now proceed with the narrative.

At the April term, 1843, of the Circuit Court for the County of Coosa, John W. and Rufus Leavitt made a suggestion, in conformity with the above statute, that the money might have been made by the sheriff, if he had used due diligence; and thereupon an issue was made up between them and the sheriff, who denied the allegation.

At September term, 1847, this issue was tried and resulted in a verdict by a jury in favor of the sheriff.

In October, 1848, J. W. and R. Leavitt, using the name of the Governor, to whom the bond was given, brought this suit against the sheriff and his sureties, upon the official bond, in the District Court of the United States for the Middle District of Alabama.

The declaration assigned fourteen breaches.

First. That the Leavitts, at the Fall term of 1839 of the Circuit Court of Coosa County, recovered judgment against one Frion, for $3,472; that a *fi. fa.* issued thereon, and came to the hands of the said Smith; that although there were goods, &c., of the said Frion, out of which the said judgment might have been levied, and of which the said Smith had notice, yet he neglected and refused to levy, &c.

Second. That Smith did seize certain goods, and might have levied the money by sale, and neglected to sell.

Third. That he seized goods which he might have sold, but did not, and returned the levy on the goods.

Fourth. That he seized, might have sold, but did not; — returned that he had levied. Afterwards, on 12th September, 1840, amended his return by adding that the goods had been claimed, &c. Averring amended return to be false, because no claim was made before the return day of the writ.

Fifth. Same as last, except that it averred that the amended return was false, because no claim on oath was made.

Sixth. Same as fourth, except averring that no bond was given by claimants.

Seventh. That the amended return was false, because no person claimed the property, and made oath, and no person claimed the same and gave bond according to the statute.

Eighth. Seizure, claim, duty of sheriff to prepare bond, but did not.

Ninth. Seizure, claim, no bond taken, goods delivered to claimants and wasted by them.

Tenth. Seizure, claim, no bond taken, goods delivered to claimants and by them consumed and wasted, and no part of

the goods delivered to the Leavitts, nor any part of the damages paid to them.

Eleventh. Same, except that it is alleged that Smith suffered goods to be wasted, &c.

Twelfth. Same as last.

Thirteenth. Seizure, claim, bond, and, by negligence of Smith, bond lost.

Fourteenth. Same as last, except that the bond taken was not returned.

Spring Term, 1850. The defendants demurred to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th breaches.

To the 1st, 2d, and 3d breaches, the defendants pleaded that the said Leavitts, in the Circuit Court of Coosa County, according to the statute of Alabama, suggested the issuing of the *fi. fa.*; that it came to the hands of Smith to be executed; that he might by due diligence have made the money and did not; that an issue was made up whether Smith by due diligence could have made the money, &c.; that the issue was tried and found for Smith, for whom judgment passed, &c. And the defendants aver, that the writ of execution mentioned in the breaches, and that mentioned in the suggestion, were one and the same; and that the alleged neglects and defaults mentioned in both, were one and the same, and not different.

The plaintiff filed a joinder in the demurrer to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th breaches.

To the three pleas put in by the defendants to the first, second, and third breach, the plaintiff put in a replication that the defaults, in the said pleas mentioned, were not the same defaults mentioned in the breaches.

The defendants demurred to this replication, and the plaintiff joined in the demurrers.

At the *Full term* of 1850, the court sustained the defendants' demurrer to the 8th and 13th breaches of the plaintiff, and overruled it as to the 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th, and 14th breaches, and that the defendants have leave to plead to the last-named breaches.

The demurrer of the defendants to the replication of the plaintiff to the plea of the defendants to the 1st, 2d, and 3d breaches, was sustained. And on motion, the plaintiff had leave to amend the 8th and 13th breaches of the declaration.

December Term, 1849. The demurrer of the defendants to some of the breaches, having been overruled, they now filed a plea to the 4th, 5th, 6th, and 7th breaches. They set forth the suggestion to the court, the issue, trial, and verdict. They aver

that upon that trial the truth of the amended return was brought up, and that the verdict found the amended return to be a true return; and that this is the same as the amended return mentioned in the breaches.

And the defendant also filed pleas to the 9th, 10th, 11th, 12th, and 14th breaches, their demurrers to which had been overruled. The first plea, called the sixth in number from the beginning, set forth, that after the levy, the goods were claimed by one A. B. Dawson, and one Samuel Frion, as assignees of J. M. Frion; that an affidavit was made by Dawson; that Dawson and Samuel Frion gave a bond; that the affidavit and bond were duly returned to court; that the suit of the Leavitts against the claimants was put upon the docket; that at the Fall term of 1840, the plaintiffs refused farther to prosecute their levy; whereupon the court ordered the goods to be restored to the claimants.

Seventh plea — to same breaches, same in substance nearly as preceding.

Eight plea — nearly same.

Ninth. That the property taken in execution was not the property of Jeremiah M. Frion, the defendant in the suit.

Tenth — not guilty of the several breaches.

The plaintiff demurred to the 4th, 6th, 7th, 8th, 9th, and 10th pleas.

Spring Term, 1851. The plaintiff's demurrer to the 4th, 8th, 9th, and 10th pleas was overruled; the demurrer to the 7th plea was sustained; the demurrer to the 6th plea, as a plea to the 9th, 10th, 11th, and 12th breaches was sustained; the demurrer to said 6th plea as a plea to the 14th breach was overruled.

The plaintiff had leave to reply to the pleas, the demurrer to which was overruled; and the defendants had leave to amend the pleas, the demurrer to which was sustained.

May Term, 1851. The defendants filed an amended 7th plea to the 9th, 10th, 11th, and 12th breaches in the declaration. The plea averred that before the return day of the execution, the goods were claimed by Dawson and Frion, and an affidavit made by Dawson; that the execution and claim were returned to the court, and a suit docketed between the Leavitts as plaintiffs, and Dawson and Frion as defendants; that at the Fall term of 1840, the Leavitts refused to make up an issue; that the court thereupon ordered the goods to be restored to the claimants; that they were accordingly restored.

The plaintiffs demurred to this amended plea, which demurrer was overruled, and then the plaintiffs filed a replication.

The replication averred that after the return day of the writ, to wit, on the second day of the term, Dawson made his affida-

vit that the goods were not the property of Jeremiah M. Frion, but were the property of himself and Samuel Frion; that, on that day, Dawson and Samuel Frion, together with one Graham, executed their bond to the plaintiffs in the sum of $3,479, conditioned to pay all damages that the jury might assess against the obligors; that they also executed another bond to one William J. Campbell for a like sum with a like condition; that before that day Smith had ceased to be sheriff, and that Campbell was the sheriff; that the plaintiffs moved the court to dismiss the claim of Dawson and Frion, on the ground of the insufficiency of the claim-bonds, which motion was overruled; that at the Fall term a judgment of nonsuit was rendered against the plaintiffs for declining to make up an issue; that the judgment thus rendered against them referred to the claim-bonds above described and not in any claim-suit commenced by said affidavit described in the said amended 7th plea of defendant, nor in any other or different claim-suit; that the affidavit described in said 7th amended plea was never returned to said court, either before or after the return of said writ of *fieri facias*; that the plaintiff never knew or had any notice until the year 1847, that said last-mentioned affidavit had been made; that the said goods levied upon, as aforesaid, were delivered to the said Dawson and Samuel, by Campbell, in obedience to the said last-mentioned judgment or order of said court, without this, that they were delivered to them by the said Alexander in obedience to any other judgment or order of said court; that the plaintiffs prosecuted their writ of error to the Supreme Court of said State to reverse said last-mentioned judgment, and that the said judgment was, by said Supreme Court, at January term, 1842, reversed and remanded to said Circuit Court; that at the Fall term of said Circuit Court for 1842, the said claim put in as aforesaid by said Dawson and Samuel, was, by the consideration and judgment of said court, dismissed, because of the insufficiency of the said last-mentioned claim-bonds, the said Dawson and Samuel declining and refusing to execute other claim-bond or bonds as they were required to do by the said Circuit Court; and plaintiff avers that the said last-mentioned judgment remains in full force, not reversed, annulled, or set aside in any way. All which the said plaintiff is ready to verify; wherefore he prays judgment, and his debt and damages by him sustained, by reason of the facts set out in said 9th, 10th, 11th, and 12th breaches, to be adjudged to him.

December Term, 1851. The defendants demurred to this replication of the plaintiff to the seventh amended plea.

The court then pronounced its final judgment, as follows:

This day came the parties, by their attorneys, and thereupon

came or to be heard the demurrer of the plaintiff to the amended 7th plea of the defendants to the 9th, 10th, 11th, and 12th, breaches of the plaintiffs; and, after argument had, it seems to the court that the said plea is sufficient in law, &c.; it is therefore considered by the court that the said demurrer be overruled. And thereupon the plaintiff filed his replication to the said amended 7th plea, and the defendants filed their demurrer to the said replication, and, after argument, it seems to the court that the said replication is insufficient, &c.; it is therefore considered by the court that the said demurrer be sustained, and that the said defendants go hence without day, &c., and recover of the said John W. and Rufus Leavitt, the persons for whose use this suit is brought, their costs in this behalf expended, for which execution may issue, &c.

The plaintiffs sued out a writ of error, and brought the case up to this court. It came up upon the correctness of the judgment of the court below in sustaining the defendant's demurrer to the replication of the plaintiff to the plea upon the 1st, 2d, and 3d breaches, and also in sustaining the demurrer of the defendants to plaintiff's replication to the 7th amended plea.

It was submitted on a printed brief by *Mr. Prior*, for the plaintiffs in error, and argued by *Mr. Badger*, for the defendants in error.

Mr. Prior. The replication to the plea No. 2, to the three first breaches is good. The matter of the plea is a summary proceeding under a statute. Clay's Digest, 218, § 85.

The jurisdiction in summary proceedings under a statute, in derogation of the common law, is strictly construed and limited to cases within the letter of the statute. Smith *v.* Leavitts, 10 Ala. 92; Leavitt *v.* Smith, 14 Ala. 279.

The 2d and 3d breaches are for neglecting to sell the goods. This replication is an answer to the plea as to these breaches, unless it be held that the jurisdiction of the court, in the summary proceeding set out in the plea, is coextensive with the common-law jurisdiction, in the present action, so far as the jurisdiction embraces the matters of these two breaches. For the summary proceeding to operate as an estoppel, in the present action, the subject-matter in the two proceedings must be identical; and this court must take judicial notice of the identity, notwithstanding their identity is denied by the replication. If any question can be determined by the court under these breaches, which could not have been determined in the summary proceeding, then the replication is good. The proceeding embraced the neglect to make the money only. Other questions may be tried under these breaches. People *v.* Ten Eyck, 13 Wend. 448; Aireton *v.* Davis, 9 Bing. 740.

The 4th, 5th, 6th, and 7th breaches are for a false return. The plea, that the truth of the return had been tried and determined in a summary proceeding is bad. The sheriff's return can be contradicted by a party to the writ in an action for a false return, only. 46 Law Library, 283, 327.

The return was competent evidence in the trial of the summary proceeding, and as it could not be contradicted by the plaintiffs, who were parties to the writ, it was conclusive of the facts set out in the return. The return of the claim, on the trial, was a full protection to the sheriff from the liability created by the levy. When the claim was made by Dawson, the sheriff was bound to suspend proceedings on the levy. Clay's Digest, 211, § 52; Ib. 213, § 62; so much of the act of 1812, (Clay's Digest, § 52,) as requires two bonds, is repealed by the act of 1828, (Ib. 213, § 62); Bradford v. Dawson, 2 Ala. 203; Hughes v. Rhea, 1 Ala. 609.

But these breaches are for a false return, the only proceeding in which the truth of the return can be tried. The judgment in the summary proceeding is no bar, therefore, to these breaches, and the demurrer to the fourth plea ought to be sustained.

The 8th breach is for neglect to take claim-bond, when Dawson claimed the goods levied on. The demurrer to this breach ought to be overruled. The breach is a good one. Lane v. Harrison, 6 Munf. 573; ——— v. Bevan, 5 B. & C. 284; 4 Tyrw. 272; Clopton v. Hoppin, 6 Ad. & E. 468, (51 E. C. L.)

The 13th breach is for loss of the bond, and the demurrer ought to be overruled. See above cases.

The 9th, 10th, 11th, and 12th breaches are for not taking claim-bond from Dawson. Clay's Digest, 211, § 52; Ib. 213, § 62.

Neither the amended 7th plea, nor the 8th plea, is a good defence to these breaches; and the demurrer to the 8th plea ought to be sustained; and the demurrer of the defendants to the replication to the amended 7th plea ought to be overruled. The demurrer will reach back to the defect in the plea. The gist of the plea is that the plaintiffs in the claim suit refused to prosecute their levy, and that the goods were restored to the claimants by order of the court. This plea does not however aver that the sheriff took a claim-bond. These breaches are for not taking a bond. The plea does not answer the breaches. Unless there was a bond conforming to the requisition of the statute filed, with the execution and affidavit, there was no such cause in court as the plaintiffs could be compelled to prosecute. Leavitt v. Dawson and Friou, 4 Ala. 335; Leavitt v. Smith, 7 Ala. 179.

The breach of duty was the neglect to take bond before the

return day of the execution. On that day the plaintiff's right of action, for this breach of duty, was perfect. How do the matters of this plea bar this right? It may be that the plaintiffs refused to prosecute their levy in the claim-suit, because there was not a good claim-bond. They did refuse for this cause. Leavitt v. Dawson, 4 Ala. 335. How could the refusal of the plaintiffs to prosecute a suit which they did not institute, which they were not bound to prosecute, which was improperly in court, and improperly there by the breach of duty for which the sheriff is now sued, destroy the plaintiff's right to recover for this act of official misconduct?

But if this plea should be held good, then the replication avers that the judgment set out in this plea was rendered in a claim-suit, commenced after the return day of the execution, and therefore after plaintiff's right of action against the sheriff was perfect. The replication concluding with an *absque hoc*, is a full answer to the plea.

The 8th plea sets up, by way of estoppel, the judgment in a summary proceeding. Clay's Digest, 218, § 85.

The neglect to take a claim-bond before the return day of the execution, was a breach of duty for which plaintiffs could maintain an action; but for this breach of duty, they could not recover in this summary proceeding. Then how can they be barred by this plea? Smith v. Leavitts, 10 Ala. 92; Ib. 14 Ala. 279.

The gravamen of these breaches is not the loss or waste of the goods, but the neglect to take the bond. The plaintiffs could maintain an action against the sheriff for the loss of the goods by virtue only of the lien created by the execution. When the affidavit was made by Dawson, as alleged in these breaches, it was the duty of the sheriff to suspend proceedings on the levy. Clay's Digest, 211, § 52, and to prepare a bond for the claimant to sign; Ib. 213, § 62. Until he prepared and tendered the bond, and the claimant refused to execute it, the sheriff could not sell the goods. The lien of the plaintiffs on the goods was put in abeyance at the moment the sheriff's right to proceed on the levy was suspended. Both were suspended by the claim of Dawson, and could not be revived, except by the direct withdrawal of the claim by Dawson, or until, by refusing to execute the bond, he indicated his purpose to abandon the claim. Until the right of the plaintiffs, to have the goods sold, was revived by the withdrawal or the abandonment of the claim, the plaintiffs had no such interest in the goods as would entitle them to maintain an action against the sheriff for their loss or waste. The claim-bond, if one be made, is substituted for the lien on the goods. If the sheriff neglect to prepare the bond,

this does not destroy the right of the claimant to have a stay of proceedings on the levy. But this neglect is a breach of duty to the plaintiffs, for which they may maintain an action. The loss or waste of the goods is no injury to the plaintiffs when they had no right to have them sold, but is an injury to the true owners, for which they may sue and recover.

Now, as the plaintiff's lien on the goods has been destroyed, and he has not got a claim-bond as a substitute for the lien, he has been damaged. The claim destroyed the lien, not by act of the claimant, but by operation of law; Clay's Digest, 211, § 52; therefore the claimant is not liable for the destruction of the lien, except upon his bond. If the lien be suspended by the claim, and no bond be tendered to the claimant by the sheriff, the suspension continues until the return of the execution. The injury to the plaintiff is not the suspension of the lien, but the neglect to have the bond as a substitute for the lien.

The demurrer to the 6th plea to 14th breach, ought to be sustained.

The 9th plea is no answer to any of the breaches; not to the first three, for the defendant in the execution may have had other goods than those levied on; not to those for false return, for the plaintiff had a right to have a true return; not to those for neglect to take bond, nor to those for loss of the bond, for it was the duty of the sheriff to take the bond and to return it to the court. The neglect to take it, or the loss of it after it was taken, was a clear breach of duty.

Not guilty — not a good plea in debt.

Mr. Badger, after enumerating the breaches assigned in the declaration, proceeded with his argument.

To the 1st, 2d, and 3d breaches, the defendants pleaded that the said Leavitts, in the Circuit Court of Coosta County, according to the statute of Alabama, suggested the issuing of the *fi. fa.*; that it came to the hands of Smith to be executed; that he might, by due diligence, have made the money, and did not, &c.; that an issue was made up whether Smith, by due diligence, could have made the money, &c.; that the issue was tried and found for Smith, for whom judgment passed, &c.

To this plea plaintiff replied that the defaults in the said plea mentioned were not the same defaults mentioned in the breaches, to which replication the defendants demurred, and the court sustained the demurrer.

It is insisted, for the defendants in error, that the replication was bad in law, and was therefore properly overruled by the court.

The plaintiff ought, if he admitted the identity of the defaults, to have replied *nul tiel record;* if he denied that identity, to have new assigned.

Whenever defendant justifies, or in any manner discharges himself from liability for a charge or claim of the plaintiffs, it is the duty of the latter to new assign, if he insists that the matters justified are not the same as those for which he declares. Nothing can be clearer than this, if the reason for a new assignment be considered. That reason is, that the defendant is supposed to mistake the particular instance set forth by the plaintiff for some other of the same class, and therefore plaintiff should correct that mistake by averring by a new assignment, that he proceeds for another demand than that justified, &c., by the defendant, and this new assignment is in nature of a new declaration, or, in strictness, a particular expression of what the declaration designed, and which has been misunderstood by defendant. Therefore if the plaintiff, under such circumstances, do not new assign, and the defendant in proof supports his justification of any matter of the same general nature, he is entitled to a verdict.

See account of the nature, office, and purposes of a new assignment. 1 Chitty, 434, *et seq.* Manner of new assigning, page 439.

Defendant may plead to the newly assigned matter as to the declaration, page 441.

See, also, Mr. Stephens's account of new assignments. Stephens on Pl. Amer. Ed., page 220 to 227, and note 22, page 226. See, also, James *v.* Lingham, 35 Eng. C. L. R. 225; 5 Bing. N. C. 553; Branckner *v.* Molyneux, 9 Eng. C. L. 615; 1 Man. & Gran, 710; Moses *v.* Levy, (in error,) 45 Eng. C. L. 213; 4 Adol. & Ellis, N. S.

In which last case Lord Denman says: "Where the declaration points at one particular transaction, and the plea applies itself to one particular transaction of the same sort, different from that intended by the declaration, or where the plea narrows the declaration contrary to the intention of the declaration, a new assignment is necessary."

This is exactly our case. To allow the traverse, instead of the new assignment, would be directly contrary to authority, and would cause injustice to the defendant by depriving him of his right to plead anew to the true transaction intended by the plaintiff and mistaken by him.

The replication that the defaults are not the same, is bad. No such replication has been sustained by judicial authority in such a case as ours. Where, indeed, the defendant pleads a former recovery against him for the same cause of action, there

the replication, that it is not for the same cause of action, is good, and may be used instead of a new assignment; but the reason is, that the plea admits a liability as to the cause of action to have once existed, and alleges that it has been satisfied by the recovery, so that, if not so satisfied, it still exists. See Seddon *v.* Tutop, 6 T. R. 607; Note 22, page 226; 4th Amer. Ed. Stephens on Pl.

The difference between the two classes of cases is this: In one the defendant avers that there never was a right of action; in the other he admits a right of action and avers payment, that is, extinguishment by the judgment. In the former, a new assignment is necessary; in the latter, not. And by this plain distinction the cases in the books are reconciled.

The defendants demurred to the 8th and 13th breaches, and their demurrer was sustained.

It was rightly sustained. The 8th breach not showing that sureties were offered to sheriff, and without that he was not obliged to prepare a bond. Clay's Dig. page 213, § 62; Eiller *v.* Wood, 24 E. C. L. 464; Mann *v.* Vick, 1 Hawks's Rep. 427.

The 13th breach, showing that the amended return stating the taking of the claim-bond was made 20th September, 1840, by Smith, late sheriff, and the condition of the bond sued on, as set out in the declaration, showing that his office expired 22d February, preceding, and the said return, as set out in the said breach, showing that the claim-bond was given not to Smith, but to his successor in office, and, therefore, the custody of the said bond not belonging to Smith, the averment that by his negligence it was lost, is idle, inconsistent, and absurd, &c.

To the 4th, 5th, 6th, and 7th breaches, the defendants pleaded, that the Leavitts instituted proceedings in the Circuit Court of Coosa County, against Smith, according to the statute, &c., and an issue was made up and tried, upon which issue the truth of the amended return was tried, and the truth thereof found, and judgment rendered for Smith, &c. The plaintiff demurred to the said plea, and the court overruled the demurrer.

It is insisted for defendants in error, that this demurrer was properly overruled, because the verdict and judgment stated in the plea, were conclusive of the truth of the amended return set out in the breaches, the falsehood of which is the gist of these breaches — conclusive as to Smith, the sheriff, and in this action whatever concludes the Leavitts as against Smith, concludes the plaintiff as against him and the other defendants, his sureties. Gardner *v.* Buckbee, 3 Cowen, 126, and cases there cited; Leavitts *v.* Smith, 14 Ala. N. S. 279, 285; David-

son v. Stringfellow, 6 Ala. N. S. 34; Smith v. Leavitts, 10 Ala. N. S. 92, 192; Cummings v. McGehee, 9 Porter, 351.

And because, also, all these breaches show the amended return to have been made after the said Smith was out of office, and hence it does not affect either of the parties in this action. Evans v. State Bank, 13 Ala. N. S. 787.

The defendants by their 6th plea pleaded to the 9th, 10th, 11th, 12th, and 14th breaches, that after the seizure of the goods, a claim was interposed, affidavit made, bond given, and the same returned; that a motion was made to dismiss the claim for insufficiency of the bond; that motion was overruled, and such proceedings had that the court ordered goods, &c., to be delivered up to the claimants, and they were delivered accordingly. And the defendants by their 8th plea further pleaded, as to the 9th, 10th, 11th, and 12th breaches, that after the return of the execution, the Leavitts entered a suggestion according to the statute, that the money might have been made, &c., issue thereon, verdict for Smith, and judgment averring the identity of the execution and alleged defaults in the breaches with those set out in the suggestion, &c. The defendants, by their 9th plea, also pleaded severally to all the breaches, that the goods and chattels levied upon, as stated in the several breaches, were not the property of the defendant in the execution, nor subject to be taken for the payment, &c.; and also by their 10th plea, that said Smith was not guilty of the several defaults, &c.; and to these pleas plaintiff demurred.

The defendants, by their 7th plea, pleaded to the 9th, 10th, 11th, and 12th breaches, that the execution, with the levy and interposition of claim was returned, and the claim-suit between the claimants and the said Leavitts was duly entered, and afterwards such proceedings were had that the court ordered the property levied on to be delivered up to the claimants, which was done.

To this 7th plea the plaintiff replied: That claim was interposed; affidavit was made, and a bond made payable to the Leavitts, was made on the 23d March, 1840, being the second day of term, to which execution was returnable; that on the same day another bond was made payable to William J. Campbell; (both bonds are stated to have been executed by the claimants, but it is not stated by whom either was taken); that Smith ceased to be sheriff before the 23d March, and then parted with the possession of the goods to some one unknown, and when the affidavit and bond were made, Campbell, the new sheriff, had possession; that a motion to dismiss the claim was made for insufficiency of the bonds, was overruled, and judgment afterwards given for returning goods to claimants, at Fall

term, 1840, but not in any claim-suit commenced by the affidavit named in the plea. The replication then avers that the affidavit, mentioned in the plea, was never returned, and plaintiff had no notice of its execution until 1847; that the goods levied on were delivered to claimants by Campbell, with a formal traverse that they were delivered by Smith in obedience to any other judgment or order of the court. And the replication alleges that a writ of error was brought to the Supreme Court of Alabama upon the judgment which, in 1842, was reversed, and afterwards, in the Circuit Court of Coosa, the claim was dismissed, &c., and concludes with a verification, &c. To this replication defendants demurred.

As to the 9th, 10th, 11th, and 12th breaches, it is insisted, 1st. That the matter contained in the defendants' 6th plea is a good bar, for the order of the court directing the surrender of the goods was one which the law obliged the sheriff to obey, and must, therefore, protect him in obeying, (cases before cited from Alabama Reports,) and that this matter was also a good bar to the 14th breach.

2d. That the verdict and judgment in the suit of the Leavitts, by suggestion, against Smith, set out in the 8th plea, is a good bar, for the matters which are alleged in those breaches were proper to be offered, and would have tended to sustain the suit by suggestion, and therefore the very question here raised by these breaches has been in that suit decided; and it being found by the verdict and judgment that the goods were not subject to execution, the Leavitts have no interest in the inquiry, what became of them, &c. Cases before cited, particularly Gardner *v.* Buckbee, 3 Cowen, and Cummings *v.* McGehee, 9 Porter.

For these reasons, as well as defects in the breaches themselves, it is insisted that their demurrer to the 6th and 8th pleas was properly overruled.

It is further insisted that the 7th plea is a sufficient answer to the 9th, 10th, 11th, and 12th breaches; the order in the claim-writ being binding on the sheriff, and the replication thereto being insufficient, impertinent, and fatally defective. For, *First.* The replication neither admits nor denies directly the suit alleged in the plea, but is altogether evasive. *Secondly.* If replication is to be understood as denying it, it is bad because it can only be put in issue by *nul tiel record*; if to admit it, then the averments of the other proceedings, in the replication, are idle and immaterial. *Thirdly.* The replication tenders a formal traverse that Smith delivered up the goods to claimants under any other order or judgment of the court than that set out in the replication, and therefore seems to admit a

delivery by him under that order, and that order being a justification, the traverse tenders an immaterial issue. *Fourthly.* The plaintiff ought either to have replied *nul tiel record* of the order alleged in the plea, or admitting the record, have traversed the delivery under it, if he deemed the latter fact material. *Fifthly.* If goods delivered up under the order of the court, as the replication avers, it is immaterial in this suit by which hands the delivery was actually made, the plaintiffs charging the defendants on account of the seizure of the goods, and the order discharging Smith, whether obeyed by himself or his successor. *Sixthly.* The reversal of the order set out in the replication is immaterial, for the reversal cannot by relation make the sheriff a wrongdoer. Smith *v.* Leavitts, 10 Ala. 92; Leavitt *v.* Smith, 14 Ala. 284.

It is further insisted, that the 9th plea, that the goods levied upon, &c., were not the property of the defendant in execution, nor liable to be taken, &c., is a sufficient bar to all the breaches except the first.

The seizure under the execution does not conclude the sheriff as to the property in the goods — it amounts only to affirming his belief of ownership by the defendant in execution, and casts the burden of proof on him. He may notwithstanding aver and show that the goods were not subject to the execution, and such averment and proof discharges him from liability to the plaintiffs in execution in respect of such goods. Leavitt *v.* Smith, 7 Ala., N. S. 184, 185; Mason *v.* Watts, Ib. 703.

This plea being admitted by the demurrer, it is a matter immaterial to the plaintiff whether the goods were kept, or lost, surrendered to a claimant with or without a bond, or what became of them. Whoever has or may have a right to call upon the sheriff by reason of his disposition of the goods, the plaintiff has none — his whole right and interest therein being founded upon their supposed liability to the execution.

It is further insisted that the 10th plea — that Smith was not guilty of the defaults, &c., is a good answer to all the breaches.

Every breach avers a criminal violation of his duty by the sheriff, and, if true and sufficiently laid, would sustain an action on the case against the sheriff. The breaches are exactly equivalent to counts in an action on the case. The action is founded on the bond in order to call on the official sureties to make good the defaults of the sheriff, and no reason can be supposed why the legislature should design to require special pleading from the sureties and deny them the benefit of a general plea, by which the plaintiff is put to the proof of his whole allegation, while such requisition and denial do not apply to an action against the sheriff for the default. It would be more reasonable

to require such special plea in the latter action, the sheriff being cognizant of all the facts, than in the former, the sureties having no such knowledge. The only ground assumed on the other side is the technical one, that "not guilty" cannot be pleaded to an action of debt — but the position is not true.

In an action of debt on a recognizance for keeping the peace, suggesting an assault as the breach, the defendant may plead not guilty, *son assault demesne*, just as in an action of trespass for the assault. See form of plea, 7 Wentworth, 401.

So on debt in penal statute, and in debt against executors, suggesting *devastavit*. Coppin *v.* Carter, 1 T. R. 462; Wortley *v.* Herpingham, Cro. Eliz. 766; Ch. Pl. 3d Amer. Ed. 354; Langley *v.* Hayes, Mo. 302.

If such a plea is allowed in any action of debt, it should be in this. In action of debt on penal statute, &c., *nil debet* is a general issue, and puts the plaintiff on the proof of his whole case. If, then, the technical idea, that the plea of not guilty should not be allowed to an action of debt, does not prevent allowing the defendant in such action to plead such plea, surely it should not here, where there is no general issue which will put the plaintiff to full proof of his case. This is not an action *stricti juris*, like trespass, and should, in the liberty of pleading, be likened to an action on the case, according to Lord Mansfield's notion of that action. Ch. Pl. 357.

It should also be noted that the plaintiff in his first breach alleges a judgment and execution thereon, and in every succeeding breach refers to this one execution and the returns alleged to have been made thereon, and to the one term to which it was returnable. Hence it judicially appears that the whole gravamen of all the breaches is one and the same default, and not other and different defaults; from which it would seem to follow that what is an answer to one breach is an answer to every other. Usually when the breaches formally refer to "one other execution," or "a certain other judgment," the court is precluded from connecting one with the other breach, but must consider each as referring to a separate transaction; but here the plaintiff himself refers, in each succeeding breach, to the execution mentioned in the first, and without such reference being had, no valid breach is assigned, except to the first, and, therefore, by the form of pleading adopted by the plaintiff, he has not only enabled, but obliged the court to consider all the breaches as connected together, growing out of one official transaction, and substantially as alleging one and the same default.

Upon the whole, it is insisted for the defendant, that, for the reasons above stated, as well as for other defects in the breaches assigned, and in the replications of the plaintiff to the

defendants' pleas, the judgment for the defendant ought to be affirmed.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the District Court of the United States for the Middle District of Alabama.

The suit was brought upon an official bond given by Alexander Smith, as sheriff of Coosa county, and his sureties, conditioned that he would well and truly perform all and singular the duties of his office as required by the laws of the State.

The declaration sets out a judgment, recovered by J. W. and B. Leavitt at the Fall term of 1839, in the Circuit Court of the Second Circuit of the State of Alabama, against Jeremiah M. Frion, for the sum of $3,472: also an execution upon the same issued to the said Smith, as sheriff.

Fourteen breaches of the condition of the bond are assigned, for the purpose of charging the defendant and his sureties with the payment of the judgment.

In order to understand the purport and legal effect of these breaches, and the pleadings which follow them, it is proper to refer to two provisions in the statutes of Alabama that have a material bearing on the subject. One is, that when the sheriff shall levy an execution on property claimed by a person not a party to the execution, such person may make oath that he is the owner: and thereupon it shall be the duty of the sheriff to postpone the sale until the next term of the court; and such court shall require the parties concerned to make up an issue, under such rules as it may adopt, so as to try the right of property before a jury at the same term; and the sheriff shall make a return on the execution accordingly, provided the person claiming such property, or his attorney, shall give a bond to the sheriff with surety equal to the amount of the execution, conditioned to pay the plaintiff all damages which the jury on the trial of the right of property may assess against him, in case it should appear that such claim was made for the purpose of delay. Clay's Dig. 211, § 52.

It is further provided, that it shall be the duty of the sheriff to return the property levied on to the person out of whose possession it was taken upon such person entering into a bond with surety to the plaintiff in the execution in double the amount of the debt and costs, conditioned for delivery of the property to the sheriff whenever the claim of property so made shall be determined by the court. Ib.

It was subsequently provided that one bond might be taken with a condition embracing substantially the matters contained in the two above mentioned. Ib. 213, § 62.

The other provision is, that whenever the sheriff shall fail to make the money on the execution on or before the first day of the term of the court before which the execution is returnable, the plaintiff or his attorney shall suggest to the court that the money could have been made by the sheriff, with due diligence, and it shall be the duty of the court forthwith to cause an issue to be made up to try the fact; and if it shall be found by the jury that the money could have been made with due diligence, judgment shall be rendered against the sheriff, and his sureties, or any or either of them, for the money specified in the execution, together with ten per centum on the amount. Ib. 213, § 85.

There is, also, a similar provision in the case of the suggestion of a false return on the execution by the sheriff. Ib. 218, § 84.

We have said there are fourteen breaches assigned of the condition of the bond in question in the declaration.

The first is, that there were divers goods and chattels, lands and tenements of Frion, the defendant in the execution within its lifetime, out of which the sheriff could have levied the amount of the judgment: but that he had neglected to levy and collect the same.

Second and third, that he had levied upon sufficient goods and chattels of the defendant, but had neglected to sell the same, and collect the amount.

The fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth, that the return made upon the execution, namely, that the goods levied on had been claimed by A. B. Dawson and Samuel Frion, assignees of J. W. Frion, defendant in the execution, and claim-bond given to W. J. Campbell, now sheriff, and my successor in office — was false, setting out in various of these breaches the grounds of the falsity in the return, namely, either that no claim had been made to the property by Dawson and Frion, or if made, no affidavit, as required by the statute, had been furnished to the sheriff, or no bond had been required, or given; or that the proper affidavit had been made, but no bond given according to the requirement of the statute.

The thirteenth and fourteenth breaches admit an affidavit and bond, according to the statute; but charge that the claim-bond was lost by the negligence of the sheriff, and was not returned to the court with the execution at the return of the writ.

The defendants plead to the first, second, and third breaches, that at the April term of the court held in and for the county of Coosa, in 1840, the plaintiffs in the execution suggested to the court, according to the statute in such cases made and provided, after setting out the execution, and issuing of it to the

sheriff, and return of it without having levied the money thereon, that the same might have been collected, if due diligence had been used by the sheriff; that thereupon an issue was formed upon this suggestion; and, that upon the trial such proceedings were had that the jury found the same in favor of the defendants. The plea further avers that the alleged neglects, defaults and breaches of duty in the first, second, and third breaches assigned, and in said suggestion are the same, and not different.

To this plea the plaintiffs replied, that the matters, neglects, and defaults in the said three breaches assigned in the declaration, were not the same identical matters, neglects, and defaults as in said plea mentioned, and for and in respect to which the said judgment in said plea mentioned was recovered in manner and form as set forth.

To this replication there was a demurrer and joinder, and judgment for the defendants.

The defendants, also, plead to all the breaches severally, except the first, that the goods and chattels levied on as stated in said breaches at the time of the said levy, and at the time said execution came to the hands of the said Smith, sheriff, as aforesaid, were not the property of the said Jeremiah M. Frion, the defendant in the execution, and were not liable to be taken for the payment or satisfaction of the said judgment.

There was a demurrer to this plea, and joinder, and judgment for the defendants.

These two pleas cover all the breaches assigned in the declaration, and if they furnished answers to them, the judgment for the defendants in the court below should be sustained.

The first three breaches, as we have seen, were first that there were goods of the defendant in the execution, and of which the sheriff could have levied the money; but that not regarding his duty, he neglected, and refused so to do. Second and third, that he did make a levy upon the goods, but neglected and refused to sell the same.

The plea sets up that the plaintiffs made a suggestion, under the statute, to the court, at the return of the execution, that the sheriff could have collected the money thereon, if he had exercised due diligence in the execution of the writ; and upon this suggestion or allegation an issue was formed between the parties and tried by a jury, who found a verdict for the defendants, upon which a judgment was rendered.

The replication to this plea is that the matters, neglects, and defaults in the said three breaches in the declaration were not the same matters, neglects, and defaults in the said plea mentioned, and in respect to which the judgment was recovered.

We think the replication is bad, on the ground that it raises an issue of law, rather than one of fact. The matters in all three of the breaches were necessarily involved in the question of due and proper diligence on the part of the sheriff in the execution of the *fi. fa.* The omission to levy upon the goods, or to sell after the levy, fell directly within the issue and inquiry in that proceeding under the statute; and we are bound to presume were the subject of examination before the court and jury, and were passed upon by them. Where the facts in issue appear upon the record, either expressly or by necessary intendment, it is not competent to contradict them, as this would be contradicting the record itself. The judgment is conclusive upon these facts, between the same parties or privies, whenever properly pleaded. If the matters involved in the issue do not appear upon the record, then it is competent to ascertain them by proof *aliunde*. 2 Phillips's Ev. 15, 20, 21; C. & H. Notes, p. 13; Note 14; also p. 163 – 4 and cases.

Here we cannot help seeing, that the matters sought to be put in issue by the replication are those necessarily involved in the former trial; and to uphold it would be to permit the same facts to be agitated over again. Certainly, neglect to levy the money on the execution out of the defendant's goods within the sheriff's bailiwick, or neglect to sell them, and make the money after the levy, are facts bearing directly on the former issue; and one criterion for trying whether the matters or cause of action be the same as in the former suit, is, that the same evidence will sustain both actions. 2 Phillips's Ev. 16; C. & H. Notes, p. 19, note 17.

The issue upon the suggestion, that the sheriff could have levied the money on the execution with the exercise of due diligence, is a very broad one. It is held, by the courts of Alabama, that the sheriff may discharge himself from responsibility by showing due diligence; and to enable him to do this nothing more is necessary than to traverse the facts contained in the suggestion. But, if the defence consists of new matter or matters of avoidance, he must then plead it. 3 Ala. R. 28.

It is difficult to conceive of a broader issue for the purpose of charging this officer with neglect or default in the course of his duty under the execution.

Then, as to the plea that the goods levied on were not the goods of the defendant in the execution, and not liable to the satisfaction of the judgment. This the demurrer admits. Of course, the sheriff had no authority to make the levy, and stood responsible himself to the owner, as a trespasser, as soon as the seizure took place. In the face of this admission on the record, it is impossible to hold him liable for the value of the goods.

The plea answers the material allegation in each of the assignments of breaches, and without which the assignment would be substantially defective, namely, the seizure of the goods on the execution. The allegations as to no claim having been made to the property by third persons, and no affidavit taken, or bond given, or if given that it was lost, are matters depending upon the levy. If that is denied or avoided, the several breaches are fully answered.

Now, the seizure of the goods of a third person, on the execution, does not change the title or make them the goods of the defendant on the execution. The only effect is, if after this the sheriff returns the execution *nulla bona*, the burden is thrown upon him in a suit for a false return to show that the goods were not the defendant's, and therefore not liable to the execution. Magne *v.* Seymour, 5 Wend. R. 309; 1 B. & C. 514.

The same principle was held in Mason et al. *v.* Watts, 7 Ala. R. 703. That was a case arising out of a suggestion against the sheriff and his sureties, under the statute to which we have referred, and in a case where the goods had been seized, and a return upon the execution accordingly. The suggestion was met that the goods were not the property of the defendant in the execution.

The court say, that the sheriff may excuse himself by showing that the defendant in the execution had no property in the goods levied upon. That the reason for this is, that the sheriff, by levying upon the goods of a third person, becomes a trespasser, and being so, the law does not impose on him the duty of holding the goods after he has ascertained their true ownership. Another observation in that case is applicable here. The court says it may be, if a loss results to the plaintiff by being cast in costs, or otherwise, from the neglect of the sheriff to retain the affidavit of claim, or bond executed by the claimant, he may be liable in an action on the case, but not for the value of the property levied on. Although the suit on the bond in this case, according to the practice in the courts of Alabama, may be regarded as a substitute for this action, still no such ground or cause of action is set out in any of the assignments of breaches, and of course no opportunity given to answer it. We are satisfied, therefore, that the plea is a full answer to all the breaches assigned to which it refers, and has been pleaded.

There are many other pleas, replications, and issues of law raised upon them, arising out of the useless number of breaches assigned in the declaration, and which have very much tangled and complicated the pleadings in the record; but we do not propose to examine or express any opinion upon them, as upon the whole record we see a complete defence to all the

causes of action set forth in the declaration, it would be an idle and profitless waste of time to enter upon their examination, and, besides, whatever might be our conclusions, they would not vary the result. Stephens's Pl. 153, 176.

The judgment of the court below is affirmed.

Order.

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

IN THE MATTER OF JOSIAH S. STAFFORD AND JEANNETTE KIRKLAND, HIS WIFE, APPELLANTS, *v.* THE UNION BANK OF LOUISIANA.

Where an appeal was taken from a decree in chancery, which decree was made by the court below during the sitting of this court in term time, the appellant is allowed until the next term to file the record; and a motion to dismiss the appeal, made at the present term, before the case has been regularly entered upon the docket, cannot be entertained, nor can a motion to award a *procedendo*.

This court, however, having a knowledge of the case, will express its views upon an important point of practice.

Where the appeal is intended to operate as a *supersedeas*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law.

The two facts, namely, first that the receiver appointed by the court below had given bond to a large amount, and second, that the persons to whom the property had been hired had given security for its safe keeping and delivery, do not affect the above result.

The security must, notwithstanding, be equal to the amount of the decree.

A mode of relief suggested.

THIS was an appeal from the District Court of the United States for the State of Texas.

It will be seen, by a reference to 12 How. 327, that this case was formerly before this court, and that the decree of the court below (dismissing the bill filed by the Union Bank) was reversed.

In the execution of the mandate of this court, the District Court of Texas passed a decree on the 25th of February, 1854, from which Stafford and wife appealed. *Mr. Hale* and *Mr. Coxe*, on behalf of the Union Bank, moved to dismiss the appeal, for the following reasons:—

This motion is made to dismiss the appeal in this cause, and to award a *procedendo* to the District Court, on the ground that the appeal bond given by the appellants is not sufficient to stay the execution of the decree.

The cause was originally commenced by the Union Bank of Louisiana against Josiah S. Stafford and wife, in the District Court for the District of Texas, for the purpose of foreclosing a mortgage on certain negro slaves. A decree having been rendered by the District Court against the complainant dismissing the bill, an appeal was taken to this court, and at the December term, 1851, the decree of the District Court was reversed, and the cause remanded, with directions to that court to enter a decree in favor of the complainants. Union Bank of Louisiana *v.* Stafford and Wife, 12 How. 327, 343. No term of the District Court was held until July, 1853, when some objections being raised by the defendants to the proposed form of the decree, and to the report of the master on the receiver's accounts, the court took the whole matter under consideration until the next term. The objections to the master's reports having been waived, a final decree was rendered on the 25th of February, 1854, by which it was directed that the sums accruing from the hire of the slaves in the custody of the receiver, *pendente lite*, amounting to $25,379.39, should be paid by the receiver to the complainant, and credited on the total amount due by the defendants; and that in case the defendants failed to pay over the balance remaining due after such credit, amounting to $39,877.13, on the first day of July, 1854, they should be foreclosed of their equity of redemption, and the master should seize and sell the mortgaged slaves at public auction, on the 3d of the same month, after giving three months' notice by advertisement of the time, place, and terms of sale, and should pay to the complainant out of the proceeds of the sale the foregoing sum of $39,877.13, in satisfaction of the debt.

It appears, then, as well by the decree as by the report of the master, which was confirmed, that on the first day of July, 1854, when the foreclosure was to take effect, the debt, interest, and costs, due to the complainant, would amount to $65,256.52.

On the 7th of March, 1854, the tenth day after the entry of the above decree, the defendants prayed an appeal, and the following order was made by the court:

"On this day came the defendants, by their counsel, and prayed an appeal to the next term of the Supreme Court of the United States, to be held in Washington City, on the first Monday in December next, from the decree of the court rendered in favor of complainants against defendants; and to them it is granted, upon condition that the defendants enter into a good

and sufficient bond, with good and sufficient surety in the penal sum of ten thousand dollars, conditioned that they prosecute their appeal with effect, and answer all damages and costs, if they fail to make their plea good. And thereupon the defendants, in open court, tendered a bond with L. C. Stanley, Patrick Perry, and William H. Clark, as sureties in the sum of ten thousand dollars, and the court having inspected the bond, and being satisfied it is in conformity to law and the order of the court herein, and that the sureties are good and sufficient, it is now ordered that the bond be approved and filed. It is ordered to be entered that the bond of appeal taken and filed in this cause operates as a *supersedeas* to the decree of the court."

On the same day, the appeal-bond referred to in the order was filed. The complainant objected to the bond being received to supersede or stay the decree, because the penalty was much less than the amount of the decree, and was wholly insufficient, but this objection was overruled.

On the 11th of March, 1854, notice was given to the defendants and their counsel that the present motion would be made, and this notice, with the acknowledgment of service, is herewith filed.

This motion is similar to that presented to this court in the case of Catlett *v.* Brodie, 9 Wheat. 553. The act of March 3, 1803, adopts in appeals the same rules that are applied to writs of error, (The San Pedro, 2 Wheat. 132,) and the 22d section of the Judiciary Act provides that "every justice or judge signing a citation or writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." In the case above cited, it is said, "It has been supposed at the argument that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is, that this is not the true interpretation of the language. The word 'damages' is here used not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid, after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought on such bond, it follows of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only, and for such amount only is the obligee entitled to judgment."

This language applies to the present case.

It was, however, urged with success in the District Court,

that inasmuch as the receiver had given two bonds, each in the penalty of twenty thousand dollars, for the faithful discharge of his duties, and as the mortgaged slaves were in the possession of hirers, who had also given bonds in the joint penalty of eighty thousand dollars, for the safe keeping and delivery of such slaves, the complainant had no right to require any further security from the defendants than sufficient to cover the special damages which might be imposed by this court for delay. This conclusion is directly opposed to the reasoning of the court in Catlett *v.* Brodie. It is evident that, notwithstanding the bonds given by the receiver and the hirers, the complainant is exposed by the appeal to the danger of losing the whole of the debt. The sureties on these bonds may become insolvent; the money in the hands of the receiver may be squandered; the slaves may die or run away. And, in the language of the court: Whatever losses the complainant may sustain, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Indeed, if the construction put upon the act by this court is applicable in any case, it must be in all, and no special circumstances can constitute an exception.

It may be objected that this motion cannot be entertained, at this time, because the appeal has been taken to the next regular term. But neither the acts of Congress which regulate practice in this court, nor the rules adopted for its government, imply that a motion of this kind cannot be made before the cause is required to be docketed. On the contrary, it is a well established principle that, at the moment of the appeal, and by that act alone, the cause is virtually removed to this court; and the jurisdiction thus vested may, of course, be exercised generally. Wylie *v.* Coxe, 14 How. 1. Every consideration would seem to induce the action of the court on motions of this character — the urgency of the case — the injury sustained by the appellee — the delay of justice — the danger of renewed and vexatious appeals; and in no instance can stronger reasons be offered than in this, where the amount of the appeal bond is but ten thousand dollars, and the debt is sixty-five thousand; and where the decree from which the new appeal is prayed, is in exact conformity with the former mandate of this court.

But if there would be any objection to the dismissal of the appeal at this time, there can be none to the award of a *procedendo* to the court below, to enforce the decree by the issuance of an order of sale. The District Court has directed the stay of all proceedings; and if such a result was not the lawful consequence of the appeal, this court must be competent to require the execution of what is, in fact, nothing but its own decree.

Mr. Justice M'LEAN delivered the opinion of the court.

This is an appeal from the District Court of Texas, and a motion is made to dismiss it, on the ground that security has been given in the sum of ten thousand dollars only, when the sum decreed to be paid was sixty-five thousand dollars. And a *procedendo* is prayed, commanding the District Court to execute the decree.

Notice of this motion was acknowledged by the counsel for the appellant the 11th of March, 1854.

As the appeal was taken since the commencement of the present term, the appellant is not bound to file the record until the next term.

By the decree in the District Court, a mortgage on a large number of slaves, to secure the payment of a debt due to the Union Bank of Louisiana, was foreclosed. A receiver having been previously appointed, who hired out the slaves and received the hire, he was directed by the decree to pay to the bank the sum of twenty-five thousand three hundred and twenty-nine dollars and thirty-nine cents, moneys in his hands, and that the residue of the money due, amounting to the sum of thirty-nine thousand eight hundred and seventy-seven dollars and thirteen cents, should be paid on the first day of July next, and if not so paid, that the slaves should be seized and sold.

On the 7th of March, 1854, the tenth day after the decree was entered, the defendants prayed an appeal, which was granted, and on the same day a bond was given in the penal sum of ten thousand dollars, as required by the court.

As the appeal has not been regularly entered on the docket, and as the appellant is not bound to enter it until next term, a motion to dismiss it cannot be entertained. But as the record is before us, which states the facts on which the motion is founded, the court will suggest their views of the law, in regard to an important point of practice.

The act of 1803 places appeals in chancery on the same footing as writs of error. And in the case of Catlett *v.* Brodie, 9 Wheat. 553, this court held, that security must be given on a writ of error, to operate as a *supersedeas* for the amount of the judgment. By the act of 12th December, 1794, when a stay of execution is not desired, security shall be given only to answer costs.

A motion was made, in the District Court, to dismiss the allowance of the appeal, on the ground that security in the amount of the decree had not been given. This was opposed by the counsel of the appellant, and it was alleged, as the receiver had given two bonds, each in the penalty of twenty thousand dollars, for the faithful discharge of his duties, and as the

mortgaged slaves were in possession of persons who had hired them, who had given bonds in the joint penalty of eighty thousand dollars, for the safe keeping and delivery of the slaves, that no further security, under the statute, ought to be required to entitle the appellant to a *supersedeas* against the decree. The court overruled the motion.

The decision of this court, in the case above cited, was, that the words of the act, "sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good," do not refer to "the nature of the claim upon which the original judgment is founded, but that they are descriptive of the indemnity which the defendant is entitled to, if the judgment be affirmed." And the court further say, "whatever losses he, the defendant in error, may sustain by the judgment not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security."

If this construction of the statute be adhered to, the amount of the bond given on the appeal must be the amount of the judgment or decree. There is no discretion to be exercised by the judge taking the bond, where the appeal or writ of error is to operate as a *supersedeas*. This rule was established in 1817, and it has been adhered to ever since.

The hardship of this rule, on the appellant, is more imaginary than real. Suppose the appellant had given ample personal security on the original obligation for the payment of the money, and the sureties were sued with the principal, would they be excused from giving bail on an appeal or writ of error, as the act requires? And how does such a case differ from the one before us, where mortgage has been given on personal property.

If the receiver has given security, in forty thousand dollars, faithfully to pay over the money in his hands; and if those persons who employed the slaves have given bond in eighty thousand dollars, for the safe keeping and delivery of them, and the sureties are good, the appellant can have no difficulty in giving the security on his appeal, to the amount of the decree in the District Court. It is true the property is taken out of his possession and control, but it is in possession of persons who gave bonds for its safe keeping and delivery when required, a part of it in payment of the decree, and the residue to be sold in satisfaction of the balance of the decree. In this condition of the property, if the transaction be *bonâ fide*, (and it must be presumed to be fair, as the arrangement was made under the order of the court,) the responsibility on the appeal bond, can be little

more than nominal. The state of the property affords more safety to the security on the appeal bond than if the property and money were in possession of the appellants, and under their control. A double mortgage is on the property, that it shall be faithfully applied to the payment of the decree.

The appeal is for the benefit of the appellant. A decree in the District Court has been entered against him, and there is, in the custody of the law, a sufficient amount of money and property to pay the amount decreed. An appeal suspends the payment some one or two years, and as this is done for the benefit of the appellants and at their instance, is it not equitable that the risk should be provided for by them? The law has so decided, by requiring security to be given to the amount of the decree, without reference to the nature of the suit. The provision of the act, as construed by this court, is not a matter over which the court can exercise a discretion. The language is mandatory, and must be complied with. We can know nothing of the responsibility of the receiver or of the hirers of the slaves, nor is it proper that we should inquire into their circumstances and the responsibility of the sureties, with the view of substituting them for the security on the appeal, which the law requires.

For the reasons stated, the court cannot dismiss the appeal, nor award a *procedendo*. A more appropriate remedy would seem to be a rule on the district judge, to show cause why a *mandamus* should not be issued; but this can be done only on motion.

Mr. Justice CATRON.

The case was decided in the District Court, in March last, and during the present term of this court, and an appeal taken to our next term; consequently the cause is not here, nor have we any power to dismiss it. The motion to dismiss must therefore be overruled. But I do not agree to the opinion expressed by a majority of my brother judges, advising the appellees what course to pursue against the district judge: First, Because we have no case before us authorizing such an expression of opinion; and I am opposed to a mere dictum attempting to settle so grave a matter of practice. And Secondly, My opinion is that the statute referred to does not govern a case in equity, where property is pursued under a mortgage, and the mortgaged property, at the complainant's instance, has been taken into the hands of the court, and so remains at the time of the appeal.

If the property, from its perishable nature, had been by interlocutory decree converted into money, and this was in court,

then, I think, no security to cover its contingent loss should be required; and here twenty-five thousand dollars has been earned, previous to the suit, by the mortgaged slaves, and is in court.

That this mortgagor is stripped of his property, and cannot give security for so large an amount, is manifest, and to construe the act of Congress as if this was a simple judgment at law, would operate most harshly.

Motion overruled.

CHARLES DAVENPORT ET AL., HEIRS OF JOHN DAVENPORT, DECEASED, *v.* F. FLETCHER ET AL.

1. Where the judgment is not properly described in the writ of error;
2. Where the bond is given to a person who is not a party to the judgment;
3. Where the citation issued, is issued to a person who is not a party; — the writ of error will be dismissed on motion.

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

It will be necessary to state only the judgment, and such of the other subsequent proceedings as gave rise to the motion to dismiss, and the judgment of the court thereon.

On the 23d of June, 1848, the Circuit Court pronounced a judgment which is thus recited in the writ of possession, which was issued on the 21st of July, 1848.

Whereas Felicite Fletcher, Maria Antonia Fletcher, Augustine Cuesta, Javiera Cuesta, and Felicite Cuesta y Fletcher, complainants, against Charles Davenport, Erasmus A. Ellis, Margaret Davenport, wife of Peter McKittrick, John Phellip Edgar Davenport, and Elizabeth Davenport, wife of Celestine Maxent, deceased, heirs of John Davenport, deceased, defendants, on the 23d day of June, A. D. 1848, by the judgment of the Circuit Court of the United States, for the fifth Circuit and District of Louisiana, &c. &c. &c.

The petition for the writ of error was in the names of the above defendants, and alleged further, that since said final judgment the original plaintiffs in the petition named, had parted with their interest in the said judgment to Charles McMicken, a citizen of the State of Ohio, and he hath been subrogated to the rights of the plaintiffs in the case, as doth appear by the record in this cause. The petition then prayed that the "original plaintiffs herein, as well also as the said Charles McMicken, may be made parties hereto and duly cited," &c. &c. &c.

The writ of error began as follows:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between F. Fletcher et al. and Charles Davenport et al., heirs of John Davenport, deceased, a manifest error hath happened to the great damage of the said Charles Davenport et al., heirs of John Davenport, deceased, as by their complaint appears, &c., &c., &c.

Citations were issued to Felicite Cuesta y Fletcher, wife of Jose Desadario Harravo; to Augustine Cuesta; to Javiera Cuesta; to Maria Antonia Fletcher, otherwise called Maria Antonia Fletcher Hipp; to Felicite Fletcher, otherwise called Felicite Fletcher Hipp; and to Charles McMicken.

The bond was given by a portion only of the plaintiffs in error, and exclusively to Charles McMicken.

On the 12th of December, 1853, *Mr. Perin*, on behalf of the defendants in error, moved to dismiss the writ of error for several reasons, amongst which were the two following, which are the only ones necessary now to be mentioned.

1st. That there is a misjoinder of the defendants in error, in adding Charles McMicken in the petition for writ of error, whereas the name of the said McMicken does not appear as a party in the record.

2d. That there is a variance between the petition for the writ of error and the writ itself, in this, that the writ does not contain the same number of defendants as the petition, omitting all the six names contained in the petition except that of Charles Davenport. And there is also a variance between the petition and citation, and between the writ and citation, in this, that the each citation does not contain the name of but one of the defendants in error.

On the 6th of January, 1854, *Mr. Duncan*, on behalf of the plaintiffs in error, filed an affidavit suggesting a diminution of the record, and obtained a *certiorari;* the return of which was as follows:

"*F. Fletcher et al.* v. *John Davenport's Heirs.* *No.* 1320.

"On the joint motion of *F. Perin*, of counsel for the plaintiffs in the above suit, and of *S. S. Prentiss*, of counsel for Charles McMicken, and on exhibiting to the court an authentic act of transfer of the judgment rendered in this case, from said plaintiffs to said Charles McMicken, dated October 19th, 1848, and filed in the office of L. T. Caire, notary public of the city of New Orleans, — It is ordered by the court, that the said judgment shall stand transferred on the records of this court, as it is

in said act of transfer; and that all subsequent proceedings in this case relating to the said judgment, shall be conducted and carried on in the name of the original plaintiffs, for the use and benefit of the said Charles McMicken, and at his expense."

All which is now certified to the honorable the Supreme Court of the United States, in obedience to the mandate herewith returned.

Witness my hand, and the seal of said court, at New Orleans, Louisiana, this 1st March, A. D. 1854.

[SEAL.] J. W. GURLEY, *Clerk.*

The motion to dismiss was argued by *Mr. Perin*, for the defendants in error, and by *Mr. Duncan* and *Mr. Coxe*, for the plaintiffs in error.

Mr. Justice McLEAN delivered the opinion of the court.

A motion has been made for a dismissal of this cause.

1. Because the judgment is not properly described in the writ of error.

2. Because the bond is given to a person who is not a party to the judgment.

3. Because the citation issued, is issued to a person who is not a party.

The objections are all founded in fact, and upon the authority of Samuel Smyth *v.* Strader, Perine & Co., 12 How. 327. The case is dismissed, with leave, however, to the counsel for the plaintiffs, to move for its reinstatement, during the present term.

JAMES ADAMS, EXECUTOR OF THOMAS LAW, DECEASED, AND HENRY MAY, ADMINISTRATOR OF EDMUND AND THOMAS LAW, APPELLANTS, *v.* JOSEPH E. LAW, BY HIS NEXT FRIEND, MARY ROBINSON.

In order to act as a *supersedeas* upon a decree in chancery, the appeal bond must be filed within ten days after the rendition of the decree. In the present case, where the bond was not filed in time, a motion for a *supersedeas* is not sustained by sufficient reasons, and consequently must be overruled.

So, also, a motion is overruled to dismiss the appeal, upon the ground that the real parties in the case, were not made parties to the appeal. The error is a mere clerical omission of certain words.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

Two motions were made in respect to it. One by *Mr. Coxe*.

to dismiss the appeal, and issue a *procedendo*, and the other by *Mr. Lawrence*, on behalf of the appellants, for a writ of *supersedeas*, directed to the court below, for the purpose of staying the execution of the decree.

Mr. Coxe's motion was as follows:

It is now moved by Richard S. Coxe, solicitor of Lloyd N. Rogers, administrator of Elizabeth P. C. Law, deceased, and Edmund Law Rogers and Eleanora A. Rogers, surviving children of Lloyd N. Rogers and Elizabeth P. C. Law, his wife, and of the representative of William Blane, deceased, that this appeal be dismissed.

1. There is no case as above entitled, and the real parties interested in the case of which a record is filed, are not made parties to this appeal, namely, the said Lloyd N. Rogers, administrator, &c., Edmund Law Rogers and Eleanora A. Rogers, and the executors of William Blane, in whose favor the decree of the Circuit Court appears to have been made.

2. That it appearing from the certificate of the clerk of said Circuit Court, that an appeal was duly prayed by said appellants, from the decree entered in this cause, and that it was duly allowed, and an appeal bond, in the penal sum of $200, approved 9th December, 1853, is the only appeal bond filed in the case, and such bond does not appear to have been given to the party defendant, in the above entitled case.

And upon the facts appearing in the certificate of the clerk of said Circuit Court, that no good and sufficient appeal bond has been filed, so as by law to operate as a *supersedeas*.

And whereas it also appears as aforesaid, that the said James Adams, trustee, is and has been in contempt, in consequence of his neglect and omission to perform and obey the order of said Circuit Court made on the 18th December, 1852; and that said Circuit Court has omitted and neglected to enforce said order and decree against the said James Adams, trustee as aforesaid; it is now further moved by said solicitor, that a writ of *procedendo* do issue from this court, to be directed to the said Circuit Court, directing and commanding said court to proceed forthwith to enforce, by appropriate process, the said order and decree of said Circuit Court.

Mr. Lawrence's motion was as follows:

The appellants in this case, by their counsel, respectfully submit to this court,

That in consequence of a mistake and surprise, the facts in regard to which fully appear in the affidavits herewith filed, they failed to file a *supersedeas* bond within ten days after the final decree was entered therein in the Circuit Court; that the fund

in controversy is now in the hands of the trustee appointed by the said court, and securely invested to the satisfaction of all the parties to said cause; that the said appellants have offered in the said court to give bond in double the amount of the sums decreed to be paid; that the parties to whom the said moneys have been decreed to be paid reside out of the said District of Columbia, and the Circuit Court has refused to grant the *supersedeas* on application formally made in that court for that purpose, and thereupon they move this Honorable Court for a writ of *supersedeas* to the Circuit Court of the District of Columbia, to stay execution of the decree heretofore rendered by the said court in this cause, and from which an appeal hath been prayed to this court, on such terms as to your Honors may seem meet.

These motions were argued by *Mr. May* and *Mr. Bradley*, in support of the motion of *Mr. Lawrence*, for a *supersedeas*, and by *Mr. Coxe* and *Mr. Carlyle*, in support of *Mr. Coxe's* motion, to dismiss the appeal.

The facts are stated in the opinion of the court.

Mr. May and *Mr. Bradley* contended

1. That this court has power to interfere. In Hardeman *v.* Anderson, 4 How. 640, there was a neglect of the clerk. Here there was no neglect, but the hearing below was irregular, and a surprise upon Mr. May, who had no solicitor in court. When set down for hearing, the case ought to have been put on the order book.

2. The hearing was irregular. The case ought not to have come on until the next term. Maryland Chanc. Prac. 112.

3. If the money is paid according to the decree, it will go beyond the jurisdiction of the court, and may be lost. In such a case, the court will interfere. 6 Har. & Johns. 333; 3 Dan. Ch. Pr. 1611. We offer to submit to any terms which the court may direct.

Mr. Coxe and *Mr. Carlyle* contended that the appeal should be dismissed. The case arose upon marriage settlements, and was referred to the auditor. It was then set down for hearing by consent. Maryland Chancery Practice had nothing to do with the case. Adams had $61,000, in his hands since June twelvemonth. He has only given bond as executor, and not as trustee. We obtained a rule upon him to show cause why he should not pay over the money, and that question is not decided to this day.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery, from the decree of the Circuit Court for the District of Columbia.

A motion is made by the appellant's counsel for a *supersedeas*, on the ground that the hearing of the case in the Circuit Court was brought on irregularly, and the decree entered in the absence of the principal counsel for the defendants below; that by reason of this, an appeal-bond was not filed within ten days from the allowance of the appeal.

Mr. May, who makes this motion, states that he is the administrator of the estate of Thomas and Edmund Law, children of John Law, who in their lifetime were parties to the suit; and that he intended to appeal from the decree of the Circuit Court, if against him; that he had no notice of the cause being set for hearing; that he left the United States on public business, and was absent several months; that on his return he learned that a final decree had been entered against him, and that he had authorized no one to consent to the hearing of the cause out of its regular course.

It appears that two other counsel who appeared for other defendants, consented to the hearing in order that the cause might be taken to the Supreme Court, for ultimate decision; and these counsel understood the cause was to be appealed to the Supreme Court by consent, and that security for the money decreed to be paid would not be required. But both of these gentlemen state that, in giving their assent to the hearing, they did not represent Mr. May, not being authorized to do so.

The suit in the Circuit Court was entitled, "Joseph E. Law by his next friend, Mary Robinson, *v.* Thomas Law and others, and James Adams, executor of Thomas Law." The controversy arose under the will of Thomas Law, deceased, and among other things the court decreed that James Adams, the trustee in the cause, who had sold certain property under the order of the court and had the proceeds in his hands, exceeding the sum of sixty-one thousand dollars, should pay over the money to the persons named in the decree, as entitled to the same. This decree was entered the 18th day of December, 1852; and an appeal to the Supreme Court of the United States was prayed on the same day. An appeal-bond, in the sum of two hundred dollars, was filed the 9th of December, 1853.

The twenty-third section of the act of 1789, provides, "that a writ of error shall be a *supersedeas*, and stay execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of, until the expiration of which term of ten days the execution shall not issue in any case where a writ of error may be a *supersedeas*. By the second section of the act of March 3, 1803, appeals are

declared to be "subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error."

Under this provision an appeal in chancery must be perfected, by giving an appeal-bond within the ten days, to act as a *supersedeas*. In Wallen *v.* Williams, 7 Cranch, 278, the court refused to quash an execution issued by the court below to enforce its decree, pending a writ of error, as the writ was not a *supersedeas* to the decree. In the Dos Hermanos, 10 Wheat. 311, where the appeal was prayed within the five years limitation, the appeal-bond being accepted by the court after that period, was held good, as having relation to the time of the appeal. "The mode of taking security and the time of perfecting it," the court say, "are matters of discretion, to be regulated by the court." But this cannot apply to a case, where the appeal operates as a *supersedeas*. It must be brought strictly within the provisions of the law.

The appeal, in this case, was prayed on the same day the decree was entered; but the bond was not given until nearly a year afterwards. The appeal must be perfected within the ten days after the decree was entered, to operate as a *supersedeas*. To supersede a judgment at law, the writ of error must be filed and bond given within the ten days. And the same rule is applied by the act of 1803, to appeals in chancery.

The case of Hardeman & Perkins *v.* Anderson, 4 How. 642, is relied on as an authority under which a *supersedeas* may be issued in this case. In that case it appeared from the record, that the writ of error was issued and bond given within ten days after the judgment, and that the clerk of the District Court promised to transmit the record to the Supreme Court. It was transmitted, but by some delay was not received until a few days after the adjournment of the court, at the ensuing term. Before the adjournment, a certificate of the judgment having been obtained by the plaintiff's counsel, in the judgment, on motion the cause was, under the rule of the court, docketed and dismissed. At the next term, on motion sustained by an affidavit, showing that the defendant in the judgment had not been negligent in the cause, it was ordered to be docketed, and a writ of *supersedeas* was issued, not on the second writ of error which had been issued, but to give effect to the first writ. After the dismissal of the cause at the previous term, execution was issued on the judgment, and it was necessary, after the cause was entered upon the docket, to supersede that execution.

It does not appear from the facts in the case now before us, that it can be brought within any decision of this court. Whatever may have been the understanding of the counsel who ap-

peared in the defence, in the Circuit Court, as to an appeal of the case to the Supreme Court, by consent and without security, it is not made to appear that the counsel of the complainants assented to such an arrangement.

By the order of the Circuit Court, a copy of the decree was served on James Adams, the trustee; and also a rule to show cause why an attachment should not issue against him for not paying over to the parties the sums of money as required by the decree. His answer to the rule was filed, and a motion being made for an attachment, it was taken under consideration, and has not yet been decided.

This Court cannot presume that the Circuit Court, in the exercise of their discretion, will take any step in regard to the decree, which shall place the fund at hazard or beyond the exercise of the appellate powers of this Court.

The motion for a *supersedeas*, by the counsel for the plaintiffs in error, is overruled.

The Court also overrule, under the circumstances, the motion of the defendant's counsel in error, for a *procedendo*.

A motion is also made, by defendant's counsel, to dismiss the appeal on the ground, "that there is no case, as entitled on the record; and that the real parties interested in the case, of which a record is filed, are not made parties to the appeal."

After the decree was pronounced in the Circuit Court, the record states: "From which decree an appeal was prayed to the Supreme Court of the United States, on the 18th December, 1852, and to them it was granted." The word "defendants" is omitted in this prayer, but that must have been a clerical omission, as it appears the appeal was "granted to them," that is to the defendants.

The title of the case, if incorrectly entered on the docket of this court, may and should be corrected by the record filed. There is nothing in the record to show that the appeal by the defendants was not prayed by all of them. The motion to dismiss is therefore overruled.

Order upon the motion to dismiss.

On consideration of the motion to dismiss this case, and for a writ of *procedendo*, filed by Mr. Coxe, in this case, on the 16th ultimo, and of the arguments of counsel thereupon had, as well against as in support of said motion. It is now here ordered by the court that said motion be, and the same is hereby overruled.

Order upon the motion for a supersedeas.

On consideration of the motion for a *supersedeas*. filed by

Mr. Lawrence in this case on the 16th ultimo, and of the arguments of counsel thereupon had as well against as in support of the motion; it is now here ordered by the Court, that said motion be, and the same is hereby overruled.

JOHN STUART, JOSEPH STUART, JAMES STUART, AND WILLIAM H. SCOTT, PLAINTIFFS IN ERROR, *v.* HUGH MAXWELL.

The twentieth section of the Tariff Act of 1842 provides, that on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable. (5 Stat. at L. 566.)

This section was not repealed by the general clause in the Tariff Act of 1846, by which all acts, and parts of acts, repugnant to the provisions of that act, (1846,) were repealed.

Consequently, where goods were entered as being manufactures of linen and cotton, it was proper to impose upon them a duty of twenty-five per cent. *ad valorem*, such being the duty imposed upon cotton articles, in Schedule D, by the Tariff Act of 1846. (9 Stat. at L. 46.)

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

The plaintiffs in error, who were plaintiffs below, sued the collector to recover moneys for duties, paid under protest, alleged to have been overcharged at the port of New York, in July, 1849. Verdict and judgment for defendant.

The plaintiffs made entry at the custom-house of goods as being "manufactures of linen and cotton." The appraisers reported them to be manufactures of cotton and flax.

Upon such goods collector Maxwell charged duties at the rate of 25 per cent. *ad valorem*, according to the 20th section of the act of 30th August, 1842, which enacted, " . . . . . And on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." 5 Stat. at Large, by Little & Brown, p. 566, chap. 270.

The collector applied this 20th section to Schedule D, of the act of 30th July, 1846; (9 Stat. at Large, by Little & Brown, p. 46, chap. 74,) by which a duty of twenty-five per cent. *ad valorem* was imposed on "cotton laces, cotton insertings, cotton trimming laces, cotton laces and braids, ... ; manufactures composed wholly of cotton, not otherwise provided for;" being so instructed by the acting Secretary of the Treasury, by circular of May 8th, 1848.

The plaintiffs, in their protest, contended, "that under existing laws, said goods are liable to a duty of twenty per cent. as a non-enumerated article," . . . . . "under the 30th section of the tariff of 30th of July, 1846," dated 25th July, 1849, and 8th January, 1850.

The plaintiffs proved by witnesses, that the goods entered at the customs in schedule A, were reported by the appraisers as manufactures of cotton and flax; that he paid the duties thereon at the rate of twenty-five per cent. *ad valorem;* that they were manufactures composed of cotton and flax; "that the proportion of flax in the goods varies considerably, being in some about a half, in others about a third or a fourth; but that the flax is the material of chief value in the goods; that the appraisers' report of the goods as 'manufactures of flax and cotton,' means that the fabrics were composed of linen and cotton combined. None of them were manufactures of cotton or flax alone."

The plaintiffs' counsel prayed the court to instruct, "that if the jury shall find from the evidence that the goods in question were manufactures of 'linen and cotton combined,' and not 'manufactures composed wholly of cotton,' then that duty was exacted at the rate of twenty-five per cent. *ad valorem*, when the goods were subject only to twenty per cent. *ad valorem*, as a non-enumerated article, under the 3d section of the tariff of 1846." That instruction the court refused:

And charged the jury, that if they believe the goods in question are manufactures of flax and cotton combined, then, inasmuch as the 20th section of the tariff of 1842, directs that "on all articles from two or more materials the duty shall be assessed at the highest rate at which any of its component parts may be chargeable, the goods in question are subject to the same charge as articles enumerated under schedule D, as if manufactures composed wholly of cotton not otherwise provided for, and that they are therefore not articles subject to the duty of twenty per cent. only under 3d section of the tariff of 1846."

To the refusal to charge as moved by plaintiffs, and to the charge as given to the jury, the plaintiffs excepted.

Upon this exception the case came up to this court.

It was argued by *Mr. John S. McCullok*, for the plaintiffs in error, and by *Mr. Cushing*, (Attorney-General,) for the defendant.

Mr. McCullok filed a voluminous brief, from which the reporter can only make an extract, and selects that point upon which the decision of the court appeared chiefly to turn, namely the 4th point in the brief; and upon this point he is obliged

to omit the arguments and illustrations under the heads B and C.

The points made by Mr. McCullok, were the following:

The Court erred in refusing to rule, as prayed by the plaintiffs, that the goods being "manufactures of cotton and linen combined," and not "manufactures composed wholly of cotton," were subject to only twenty per cent. *ad valorem*, as "non-enumerated articles," under section 3d of the tariff of 1846; and also in charging the jury that "the goods were liable to twenty-five per cent. duty under schedule D, as if they were manufactures composed wholly of cotton, because the 20th section of the tariff of 1842 directed that in all articles manufactured from two or more materials, the duty shall be assessed at the highest rate at which any of the component parts may be chargeable," for the following reasons, to wit:

1st. The tariff of 1846, by its first section, substitutes the rates of duty thereby assessed upon the merchandise specifically enumerated in its schedules from A to H, in lieu of the duties theretofore imposed by all previous laws on the articles therein enumerated, and on such articles as were then exempt from duty.

2d. The tariff of 1846 specially enumerates, in its schedule I, all articles that should be exempt from duty.

3d. All articles not specially enumerated in the schedules from A to I of the Tariff of 1846, pay a duty of twenty per cent. only, and no more.

4th. The provisions of the 20th section, tariff of 1842, which require that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable," are inconsistent with and repugnant to, — (a.) The object and policy of the tariff of 1846; (b.) The provisions of section 1 and schedules D and E of the tariff of 1846; (c.) The 3d section of the tariff of 1846.

5th. But the 20th section of the Tariff of 1842 is not merely a principle or rule of construction, and it cannot, when applied to the act of 1846, bring any article not specially named within any of the schedules from A to I, of 1846, nor take any article out of the provision of section 3, which imposes twenty per cent. on all articles not enumerated in said act of 1846.

(a.) The object and policy of the act of 1846 do not permit the 20th sect. of the tariff of 1842 to operate on the 3d sect. of 1846.

The act of 1841, c. 24, (5 L. U. S. 463, 464,) is the first act in which this clause occurs; and the act of 1841 had for its object the carrying out of the policy of the Compromise Act of 1833 c. 55, (4 L. U. S. 629,) and by its first section provides, that "on articles then (11th Sept. 1841) exempt from duty," or

"then paying less than twenty per cent. *ad valorem*," there should be levied and paid (after the 30th Sept. 1841) a duty of twenty per cent. *ad valorem*," except on the articles thereby exempted by name, &c. Then by its 2d section, 1841, c. 24, directs, "That on every enumerated article, similar in material, quality, texture, or use, to any enumerated article chargeable with duty, there shall be levied the same rate of duty which is levied on the enumerated article which it most resembles, &c.; and if it resembles equally two or more enumerated articles on which different rates of duty are now chargeable, there shall be levied the same rate of duty as is chargeable on the articles which it resembles, paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable;" this is followed by two provisos, namely: 1st. That if a duty higher than twenty per cent. shall be levied under the section, it shall not affect the disposition of the proceeds of the public lands. 2d. That no higher rate than twenty per cent. shall be charged on any unmanufactured article.

The act of 1841 does not profess to change the object of the Compromise Act, but aims at the levying of an uniform rate of twenty per cent. *ad valorem*, which was the uniform rate which the biennial reductions under the Compromise Act intended to effect. See 1833, c. 55, 4 L. U. S. 629.

The 20th section of tariff 1842, is identical in words with the act of 1841, § 2, except that the "now" and the two provisos are dropped.

The terms, "non-enumerated articles," used in the act of 1841, then mean "articles" not specially named in the tariffs of 1832, July 14th, and 1833, c. 55.

The same terms, "non-enumerated articles," used in § 20, tariff of 1842, have necessarily relation to § 10 of the act of 1842, which declares — "That on all articles not herein enumerated or provided for, there shall be levied, collected, and paid a duty of twenty per cent. *ad valorem*." The act of 1842, c. 270, by its sections from 1 to 9, inclusive, had substituted the duties therein specified on the articles thereby enumerated in lieu of the rates theretofore existing; and by its sections 10 and 20, prescribed twenty per cent. for articles not specially named or enumerated in said act, with the direction, that if higher duties could be exacted by reason of the material, texture, quality, use or fabric of articles not enumerated in said act, such higher rates of duty should be taken.

The words of the 20th section are in the present tense. They are "the same rate of duty which is levied and charged," and the

terms therein of "may be chargeable," can only relate to the charging by said act, because: 1st, it repealed all other rates theretofore laid, §§ 1 and 26; and 2d, all revenue acts in fixing rates of duty speak of the rates established in said acts, or in former acts; and 3d, to make provisions prospective rules for finding rates, express words of future efficacy must be employed. See Mills *v.* St. Clair Co. et al. 8 How. 569; Amer. Fur Co. *v.* U. S. 2 Peters, 358.

And in § 20 of tariff of 1842, no prospective words to control the rates that might thereafter be levied exist.

There never were any rules established by acts of Congress, nor by judicial decisions, by which it was laid down as a principle, "that if any article were composed of two or more materials it should, to favor commerce, be rated according to that component which was subject to the lowest rate of duty." The whole of the tariff acts of the United States proceed upon this plan — 1st, enumerating the articles subjected to given rates of duty; 2d, enumerating those exempted; and 3d, fixing an uniform rate or rates on articles not specially enumerated.

The courts have as uniformly held, that the only rules for finding the rates of duty were to look for the article: "1st. Among those named by species or class. 2d. Among those exempted. And 3d. If not there found, it was non-enumerated." Such have been the decisions in Elliott *v.* Swartwout, 10 Pet. 137; Hardy *v.* Hoyt, 13 Pet. 292. The rules have been by the courts recognized to be these: 1st. The commercial name or class is to govern, and if the article belong equally well to two classes, the lowest tax shall be taken, (ex. flax-seed and linseed, schedules E and G, tariff, 1846.) 2d. That a slight difference in the make of the article shall not exclude it from its class. See Hall *v.* Hoyt, Ex. Doc. No. 49, 26th Cong. sect. 18, p. 33; Elliott *v.* Swartwout, 10 Pet. 137; 4 Cranch, 1; 5 Cranch, 284.

3d. That an article must have its entire fabric composed of hemp or flax to fall within the description of a manufacture of flax or hemp. See Hoyt *v.* Haight, Ex. Doc. No. 49, 26th Cong. sect. 1, p. 36.

4th. That an article composed of two materials, such as hemp and flax, if manufacturers of hemp or flax be not specially enumerated as a class, is a non-enumerated article. See Hoyt *v.* Haight, Ex. Doc. No. 49, 26th Cong. sect. 1, p. 36.

5th. That if an article is not, at the time of the passage of the Tariff Act, known by the name or class used in the tariff, then it is a non-enumerated article; and the use to which it may be put makes no difference. See Curtis *v.* Martin, 3 How. 106, — article, Cotton Bagging.

A comparison of the rates of duty assessed by the tariff of

1842, with those assessed by the tariff of 1846, has been authentically made, and is contained in Ex. Senate Doc. No. 227, 29 Cong. 1 S. pp. 78 to 100. And by an attentive examination of that document, it will be perceived that in the tariffs from 1789 to 1816 the rates were laid very uniformly; that from 1816 to 1833 they gradually increased; that the tariff of 1842 is the most discriminative in favor of American manufactures, and laid higher duties than any other tariff of the United States.

The act of 1846, then, from this comparison, merits the title which it bears, namely, "An act reducing the duty on imports and for other purposes." The object and design of the act of 1846 was, then,

1st. to reduce the duties on imports.

2d. Thereby to increase the revenue, in view of the Mexican war, &c.

3d. To specify all articles by name, and subject them to duty thereby; to exempt some few from duty, and to provide an uniform rate for all not enumerated.

The title of a revenue act guides in its interpretation. Strad ling *v.* Morgan, Plow. 203; King *v.* Cartwright, 4 T. R. 490; The King *v.* G. Marks, et al. 3 East, 160; Rex *v.* Inhabitants of Gwenop, 3 T. R. 133.

So the preamble is also a guide to the interpretation of such an act. Salkeld *v.* Johnson, 1 Hare, 207; Emanuel *v.* Constable, 3 Russ. 436; Foster *v.* Banbury, 3 Sim. 40; U. S. *v.* Palmer, 3 Wheat. 610; State *v.* Stephenson, 2 Bail. 334; Burgett *v.* Burgett, 1 Ham. 469.

Looking back over the statute-book at the act of 1841, it was evidently framed upon the idea of the Compromise Act of 1833, and its second section enacts the rules of similitude and highest duty paying the component only with reference to articles which were then not enumerated by the then existing tariff acts.

And the act of 1842 was intended to levy the highest possible rates on all manufactures, with the view of protecting domestic manufactures, and hence it enacted by section 20 that similitude and highest duty paying component, as by that act assessed, should be grafted upon the 10th section, which assessed twenty per cent. *ad valorem* "on all articles not therein enumerated or provided for." This is conclusively shown when the 10th and 20th sections are read as one section, according to the rule that requires one clause to be read with other clauses, in order to determine the sense of the words used. Crespigny *v.* Wittenoom, 4 T. R. 791; 4 Bing. 196; The Emily and Caroline, 9 Wheat. 384; 1 Inst. 381; Stowell *v.* Zouch, Plow. 365; 1 Show. R. 108; Rex *v.* Burchett, Hard. 344.

Mr. Cushing, (Attorney-General,) contended that there was no error in the instructions of the Circuit Court.

Linen is itself a manufacture, a thing made by art, a cloth made of flax or hemp, not a material for manufacture. The entry made by the plaintiffs at the custom-house of their goods, as "manufactures of linen and cotton," was an absurd description, a vulgarity which could not change the materials of which the goods were manufactured, a stratagem which could not elude the revenue laws, nor stop the official appraisers from reporting the truth, that the goods so entered, were manufactures of cotton and flax. So the appraisers reported, so the plaintiff's own witnesses proved.

The 20th section of the act of 30th August, 1842, is in force. It is not repealed by the act of 30th July, 1846.

The 11th section of the act of 30th July, 1846, enacts, "That all acts and parts of acts repugnant to the provisions of this act be, and the same are, hereby repealed." There is nothing in this act of 1846 repugnant to the provisions of the 20th section of the act of 30th August, 1842. They can stand together with consistency.

In Wood *v.* United States, 16 Peters, 362, 363, this court stated the rule, that, "It is not sufficient to establish that subsequent laws cover some, or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy. And it may be added, that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous, to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud, should be deemed repealed, merely because in subsequent laws, other powers and authorities are given to custom-house officers, and other modes of proceeding are allowed to be had by them, before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary inference in all such cases is, that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may be equally within the reach of each. There certainly, under such circumstances, ought to be a manifest total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designed to abrogate, the former."

The law does not favor repeals by implication; nor is it to be allowed, unless the repugnancy be quite plain; and although the acts be seemingly repugnant, yet they should, if possible, have such construction that the latter may not be a repeal of the former by implication. Bac. Abr. Stat. D; Foster's Case, 11 Coke, 63; Weston's Case, 1 Dyer, 347; Snell *v.* Bridgewater Cotton Gin Man. Co. 24 Pick. 296, 298; Dwarris on Statutes, ed. 1848, p. 531, 533; Smith's Commentaries, ch. 19.

"A later statute on a given subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject-matter." Per Shaw, C. J., Goddard *v.* Barton, 20 Pick. 407, 410.

"Acts *in pari materia* are to be taken together as one law, and are to be so construed, that every provision in them may, if possible, stand. Courts, therefore, should be scrupulous how they give sanction to supposed repeals by implication." Per Wilde, J., Haynes *v.* Jenks, 2 Pick. 172, 176.

Therefore, it seems clear, that the 20th section of the act of 1842 is in force.

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law." United States *v.* Freeman, 3 Howard, 564; Ailesbury *v.* Pattison, 1 Doug. 30; Rex *v.* Loxdale and others, 1 Burr. 447; Bac. Abr. Statute I, pl. 21, 22, 23, 24.

From these authorities, the 20th section of the act of 1842, and the act of 1846, July 30th, relating to duties on imports, "are to be taken together, as if they were one law." By the law, a duty of twenty-five per cent. *ad valorem* is imposed on goods mentioned in schedule D, which comprises manufactures of cotton; and a duty of twenty per cent. *ad valorem* is imposed on goods mentioned in schedule E, which comprises manufactures of flax, and manufactures of hemp. But the goods entered by the plaintiff at the custom house, which are the subjects of this suit, were manufactures composed of cotton and flax, partly of the one material and partly of the other. None of them were composed wholly of flax, nor wholly of cotton, but compounded of both. Therefore, by the said 20th section, the duties upon such articles, manufactured from the two materials of cotton and flax were chargeable with the duty "assessed at the highest rates at which any of its component parts may be chargeable."

The 3d section of the act of 1846, (Vol. 9, p. 46, chap. 74,)

which imposes "On all goods, wares and merchandise, imported from foreign countries, and not specially provided for in this act, a duty of twenty per centum *ad valorem*," must be understood as comprehending only such articles, whether simple or compound, manufactured or not manufactured, as are not of any of the materials charged with duties by the act of 1846.

If that 3d section be not so limited, and the said 20th section of the act of 1842 be not applied to all articles, manufactured from two or more of the materials charged with duty in the several schedules of the act of 1846, then the rates of duty above twenty per cent. may, in a great variety of articles, be evaded and reduced to twenty per cent. by manufacturers, entered under new names, composed of two or more materials, one or more of them chargeable with a duty of one hundred, or of forty, or of thirty, or of twenty-five per cent. *ad valorem*, and mixed with a material or materials chargeable with the lower rates of duty.

It is the necessary and proper understanding of this 3d section, that it be confined and limited as above mentioned, and that the 20th section of the act of 1842 be applied to all articles manufactured from two or more articles chargeable with duty. If the decision of the Circuit Court in this case is not sustained, we may expect a swarm of entries to be made at the custom houses, of manufactures under new names, in evasion of the duties above the rate of twenty per cent. *ad valorem* intended by the act of 1846. This suit to recover back duties above twenty per cent. *ad valorem* upon goods manufactured of cotton and flax, entered at the custom house as "manufactures of linen and cotton," and subject only to a duty of twenty per cent., as nondescripts in the several schedules A, B, C, D, E, F, and G, is the beginning of a stratagem to elude the revenue laws, which, if successful, may be continued and accompanied by others of the kind.

Mr. Justice CURTIS delivered the opinion of the court.

The plaintiffs in error brought their action in the Circuit Court of the United States for the Southern District of New York, against the defendant, who was formerly collector of the customs for the port of New York, to recover moneys alleged to have been illegally exacted as duties. The plaintiffs entered at the custom house certain goods as "manufactures of linen and cotton," and claimed to have them admitted on payment of the duty of twenty per cent. levied on unenumerated articles under the 3d section of the Tariff Act of 1846. The defendant insisted that the 20th section of the Tariff Act of 1842 was in force, and that by force of it these goods, being manufactured

partly of cotton, must be assessed twenty-five per cent., that being the duty imposed by the act of 1846 upon manufactures of cotton not otherwise provided for. If these articles are, for the purpose of fixing the amount of duty, deemed by law to be manufactures of cotton, it is not denied that the duty was rightly assessed. And whether they are to be so reckoned and treated, depends upon the question whether the 20th section of the act of 1842 was repealed by the Tariff Act of 1846.

That 20th section is as follows: "That there shall be levied, collected and paid on each and every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article it resembles paying the highest rate of duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

This section is a reënactment of the 2d section of the Tariff Act of 1841. 5 Stat. at Large, 464.

The repealing clause in the act of 1846, is, "that all acts and parts of acts repugnant to the provisions of this act be, and the same are hereby, repealed." It is alleged by the plaintiffs that repugnance exists between the 20th section of the act of 1842 and the act of 1846. The argument is, that the act of 1846 divides all imports into three classes; first, those specified which are to be free of duty; second, those specified which are required to pay different but specific rates of duty; third, those not specially provided for in the act, which are required to pay a duty of twenty per cent. *ad valorem;* that a manufacture of cotton and flax not being included, *nominatim*, among the imports which are to be exempted from, or subject to, duty, is necessarily embraced within the class of non-enumerated articles, and so are liable to a duty of twenty per cent. only; and that this argument is strengthened by the fact that, in Schedule D, manufactures composed wholly of cotton are taxed twenty-five per cent.; and that if it had been intended to tax manufactures composed partly of cotton and partly of flax with a duty of twenty-five per cent., they would have been specifically mentioned in this schedule; and that it is not admissible, under an

act which, in terms, levies a tax of only twenty per cent. upon all imports not specially provided for, to levy a tax of twenty-five per cent. upon an import not named or described in the act as liable to that rate of duty.

The force of this argument is admitted. It is drawn from sound principles of interpretation. But on a careful consideration of this case, we are of opinion that it ought not to prevail in the construction of this law.

The act of 1846 is a revenue law of the United States, and must be construed with reference to acts in *pari materia*, of which it forms only one part. This observance of a settled principle for the construction of statutes is absolutely necessary in the present state of the legislation of Congress on the subject of revenue. Without it, the public revenue could not be collected, and inextricable embarrassments and difficulties must constantly occur. We are obliged to look at the whole existing system, and consider the nature of the subject-matter of the enactment under consideration, in its relations to that system, in order to pronounce with safety upon its repugnancy to, or consistency with, any particular act of Congress.

In the first place, then, it must be observed, that the 20th section of the act of 1842 does not impose any particular rate of duty upon imports. It was designed to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great; and diversities may be expected to be made in fabrics adapted to the same rules, and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress by legislation to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted.

It does not seem to be any more repugnant to the provisions of the act of 1846 than the great number and variety of provisions of the revenue laws, whose object was to cause the revenue to be regularly and uniformly collected without evasion or escape. If this act of 1846 had in terms enacted the 20th section of the act of 1842, its provisions would not thereby have been rendered repugnant or conflicting. This section would then only have afforded a rule by which it could be determined ... rtain articles did substantially belong to and were to be ...l as coming under a particular schedule. This is appa- ... only from a consideration of the subject-matter of the

20th section, when compared with the act of 1846, but from the fact that this 20th section actually made part of an act whose subject-matter, and the outline of whose provisions, were the same as those of the act of 1846. The act of 1842 levied duties on certain imports specifically named. It declared certain other articles, also specifically named, to be exempt from duty, and it provided that a duty of twenty per cent. *ad valorem* should be levied on all articles not therein provided for. Yet this 20th section made a consistent part of that act. The 26th section of the act of 1842 provides, "that the laws existing on first day of June, 1842, shall extend to and be in force for the collection of the duties imposed by this act on goods, wares, and merchandise imported into the United States, and for the recovery, collection, distribution, and remission of all fines, penalties, and forfeitures, and for the allowance of the drawbacks by this act authorized, as fully and effectually as if every regulation, restriction, penalty, forfeiture, provision, clause, matter, and thing in the said laws contained had been inserted in and reënacted by this act."

The act of 1846 contains no corresponding provision. So that unless we construe the act of 1846 substantially as an amendment of the act of 1842, merely altering its provisions so far as the latter enactment is inconsistent with the former, the entire instrumentalities for the collection of the revenue under the act of 1846 would be wanting, and the duties which it requires to be paid could not be collected. It is quite apparent, therefore, that a great number and variety of provisions designed to protect the revenue against mistakes, evasions, and frauds, and to guard against doubts and questions, and to secure uniformity of rates in its collection, owe their present operation upon the duties levied by the law of 1846, to the vitality given to them by the law of 1842, and must be considered now to be the law because the act of 1842 made them, in effect, a part of its enactments, and because the act of 1846 does not interfere with that enactment by which they were made so. And it must be further observed, that these provisions of the 20th section of the act of 1842 are of the same nature as those thus left in force under the 26th section of the act of 1842, having been designed to remove doubts, to promote uniformity, and to check evasions and frauds.

There is nothing, therefore, in the general scope of the act of 1846 repugnant to the rules prescribed in this 20th section of the act of 1842. Is there in its particular phraseology?

It is strongly urged that there is; that the terms of the 3d section are wholly inconsistent with the attempt to bring any article under either of the schedules, by operation of any law

outside of the act of 1846. That this 3d section enacts, in clear terms, that a duty of twenty per cent. *ad valorem* shall be levied on all goods "not specially provided for in this act;" and that to levy a higher rate of duty, by force of a provision of some other act, is directly in conflict with the express words of the law. It must be admitted there is great force in this argument. It has received due consideration, and the result is, that in our opinion it is not decisive. In the first place it may be justly said, that if the act of 1846 has specially provided for manufactures of cotton, and has at the same time left in force a rule of law which enacts that all manufactures of which cotton is a component part shall be deemed to be manufactures of cotton, if not otherwise provided for, it has, in effect, provided for the latter. By providing for the principal thing, it has provided for all other things which the law declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designedly made to serve the uses and take the place of some article described, but some trifling and colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or known it under any commercial name. But it is substantially like a known article which is provided for. The law of 1842 then declares that it is to be deemed the same, and to be charged accordingly; that the act of 1846 has provided for it under the name of what it resembles. Besides, if the words "provided for in this act" were to have the restricted interpretation contended for, a like interpretation must be given to the same words in other revenue laws, and the most prejudicial consequences would follow; such consequences as clearly show it was not the intention of Congress to have these words so interpreted.

Thus the 26th section of the act of 1842, already cited, adopts existing laws for the collection of duties "imposed by this act," for the collection of penalties and remission of forfeitures, and the allowance of drawbacks "by this act authorized." Yet, as has already been said, it is by force of this adoption that the duties and penalties under the act of 1846 are collected. It is manifest that the structure of the revenue system of the United States is not such as to admit of this exact and rigid interpretation; that the real intention of the legislature cannot thus be reached. The true interpretation we consider to be this: the 26th section of the act of 1842 having reënacted the then existing laws, and applied them to the collection of duties levied by that act, when Congress, by the act of 1846, merely changed the rates of duty, without legislating concerning their collection, the laws in force on that subject are to be applied;

and this application is not restrained by the fact, that, when reënacted by the act of 1842, they were declared to be so for the purpose of collecting the duties by that act imposed. The new duties merely take the place of the old, and are to be acted on by existing laws as the former duties were acted on; and among these existing laws is that which affords a rule of denomination, so to speak; which determines under what designation in certain cases a manufacture shall come, and how it shall be ranked; when this has been determined, the act of 1846 levies the duty.

It is urged, that in the act of 1846, special provision is made for certain manufactures composed partly of cotton, and that this shows no general rule was in operation imposing a particular rate of duty on articles made partly of cotton. But that this would not be a safe inference is evident from the fact that the act of 1842 imposes the same rate of duty on manufactures of wool and of manufactures of which wool is a component part, worsted, and worsted and silk, cotton, or of which cotton shall be a component part; yet this act of 1842 contained the section now under consideration. It may be observed, also, that schedule D, in the act of 1846, after manufactures composed wholly of cotton, goes on to specify cotton laces, cotton insertings, trimming laces, and braids, &c.

It would not be safe for the court to draw any inference from the apparent tautology of those parts of a revenue law describing the subjects of duty. In most cases, the terms used being addressed to merchants, are to be understood in their mercantile sense, the ascertainment of which is matter of fact, depending on evidence; and that which may seem merely tautologous might turn out to be truly descriptive of different subjects.

On the whole, our opinion is, that there is no necessary repugnance between the act of 1846 and the 20th section of the act of 1842, and consequently the former did not repeal the latter, and the duty in question was rightly assessed. The judgment of the Circuit Court is therefore affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of 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 affirmed, with costs.

Mr. Justice GRIER dissented.

ALEXANDER CROSS, WILLIAM L. HOBSON, AND WILLIAM HOOPER, TRADING UNDER THE NAME AND STYLE OF CROSS, HOBSON, & COMPANY, PLAINTIFFS IN ERROR, *v.* EDWARD H. HARRISON.

In the war with Mexico, the port of San Francisco was conquered by the arms of the United States, in the year 1846, and shortly afterwards the United States had military possession of all of Upper California. Early in 1847 the President of the United States, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of the United States forces in California to exercise the belligerent rights of a conqueror, and to form a civil and military government for the conquered territory, with power to impose duties on imports and tonnage for the support of such government, and of the army, which had the conquest in possession.

This was done, and tonnage and import duties were levied under a war tariff, which had been established by the civil government for that purpose, until official notice was received by the civil and military Governor of California, that a treaty of peace had been made with Mexico, by which Upper California had been ceded to the United States.

Upon receiving this intelligence the governor directed that import and tonnage duties should thereafter be levied in conformity with such as were to be paid in the other ports of the United States, by the acts of Congress; and for such purpose he appointed the defendant in this suit, collector of the port of San Francisco.

The plaintiffs now seek to recover from him certain tonnage duties and imposts upon foreign merchandise paid by them to the defendant as collector between the 3d of February, 1848, (the date of the treaty of peace,) and the 13th of November, 1849, (when the collector appointed by the President, according to law, entered upon the duties of his office,) upon the ground that they had been illegally exacted.

The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease as a matter of course, or as a consequence of the restoration of peace; and it was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power, to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

The tonnage duties, and duties upon foreign goods imported into San Francisco, were legally demanded and lawfully collected by the civil governor, whilst the war continued, and afterwards, from the ratification of the treaty of peace until the revenue system of the United States was put into practical operation in California, under the acts of Congress, passed for that purpose.

THIS case came up, by writ of error, from the Circuit Court of the United States, for the Southern District of New York.

Cross, Hobson, & Co., brought an action of assumpsit to recover back from Harrison, moneys paid to him while acting as collector of customs at the port of San Francisco, in California, for tonnage on vessels and duties on merchandise, not of the growth, produce, or manufacture of the United States, imported by the plaintiffs from foreign places into California, and there landed, between February 3, 1848, and November 12, 1849.

The plea was *non assumpsit*, and the verdict and judgment were for Harrison, in January, 1852.

The bill of exceptions contained the substance of much testi-

mony offered by the plaintiff, (which it is not necessary to recite,) and also the whole of the Senate Document, No. 18, of the first session of the thirty-first Congress. The opinion of the court contains a statement of the material parts of this evidence.

The case was argued by *Mr. Richard T. Merrick* and *Mr. James W. McCullok*, upon a brief filed by himself and *Mr. John S. McCullok*, for the plaintiffs in error, upon which side there was also filed a brief by *Mr. Rockwell* and *Mr. Lawrence;* and by *Mr. Cushing*, (Attorney-General,) for the defendant in error.

The briefs on both sides were so elaborate that only a portion of each can be inserted; and those parts are selected which relate to the legality of continuing, after the peace, the government which had been established during the war.

The points for the plaintiffs in error, as stated by the *Messrs. McCullok*, were the following points:

1st. That on foreign goods or vessels brought into California, between the 3d of February, 1848, and the 3d of March, 1849, and between the 3d of March, 1849, and the 12th of November, 1849, duties did not accrue to the United States, and their exaction was therefore illegal.

2d. That on foreign goods and vessels brought into California between the 3d of February, 1848, and the 12th of November, 1849, the defendant had no authority by any treaty or law of the United States to collect duties, and their exaction was therefore illegal.

3d. Between the 3d of February, 1848, and the 12th of November, 1849, the defendant was not authorized, by any law of the United States, to require the plaintiffs to go with or send to a port within a collection district of the United States, foreign goods and vessels, and there pay duties, before the plaintiffs should bring the same into California; nor to put plaintiffs to elect between so doing and the paying of duties to the defendant.

4th. That after the 23d of February, 1849, when the plaintiffs protested against the exactions made, or to be made, the defendant was not justified in paying over the moneys theretofore or thereafter exacted to the use of the United States, or any other person.

5th. That the plaintiffs are entitled to the customary interest of California, on all sums exacted by defendant by duress, and against protest, on goods and vessels brought into California between the 3d February, 1848, and the 12th of November, 1849.

6th. That on the whole evidence, no part of the duties claimed were paid voluntarily, but each and every of them were exacted by compulsion and duress.

Under the foregoing points, the plaintiffs in error will rely upon the following authorities:

1st. Between the 3d of February, 1848, and the 12th of November, 1849, duties did not accrue to the United States in California.

(a.) The wisdom, goodness, and power necessary for the protection of the general welfare and peace of the people, are the only source from which is derived the authority to exercise the sovereignty of the nation. 1 Burlamaqui Nat. Law, c. 9, pp. 83, 89. And on these the power to reward and punish rests. Id. 93. The powers which the sovereign exercises, are those which relate to internal administration. 2 Burlamaqui, Pt. 3, c. 1, p. 152. And next, those which regulate foreign or external administrations. 2 Id. Pt. 4, c. 1, p. 220. Among this last class are the powers of making offensive or defensive war, of concluding treaties and alliances, of controlling the immigration of foreigners, and of regulating commerce. By the laws of war, the sovereign acquires the right to spoil, plunder, and destroy the goods of his enemy, and possess his lands. 2 Burlamaqui, Pt. 4, c. 7, p. 290, &c. In order to indemnify for the expenses of war out of his enemies' goods and lands, and while the conqueror continues in possession of the lands, he is sovereign over them, and of all within them; and may either admit the vanquished to the rights of subjects, or banish them as enemies from the country, for the sovereignty thus acquired is absolute. 2 Burlamaqui, Pt. 4, c. 8, § 12, p. 309. And from these rights of war flows the sovereign power of making treaties, equal or unequal, (2 Burlamaqui, Pt. 4, c. 9, pp. 314, 317, 319,) and whether in war or in peace — such treaties being unequal whenever they limit the powers of the foreign sovereign; as by stipulating that the conqueror's consent shall be had before the foreign sovereign can act in any given way. Id. § 13, p. 319.

The power to regulate foreign commerce necessarily includes, as one of its incidents, the power to lay imposts on foreign goods, or even to prohibit them entry, (Vattel's Law of Nations, Bk. 1, c. 8, p. 39,) whenever the welfare of the State demands it. The right to trade with a foreign nation is therefore conventional, and the treaty that cedes the right is the measure or limit thereof — dependent on the will of the foreign sovereign, and not a right of prescription. And a foreign nation may limit its foreign trade to itself, or to its own vessels, by treaty or otherwise. Vattel, Bk. 2, c. 2, p. 121.

During the flame of war, a nation may sell or abandon part of its public property, (Vattel, Bk. 1, c. 21, p. 105,) though, if the sovereign be not absolute, this may require the concurrence

of his coördinates, the people. The empire or sovereignty, and the domain or property, are not inseparable — for the nation may have its sovereignty but not its domain — which may be held in the possession of a foreign nation, either by war or treaty. Vattel, Bk. 1, c. 23, p. 118.

(b.) The sovereign who acquires a country by conquest or treaty, has the exclusive right to legislate in regard to it, and may impart this right to another; and the country so acquired may be retained in a subject condition, or be erected into a colony.

The laws of the conquered or ceded country remain, until changed by the sovereign conqueror, who may change the political form of government; but the laws of trade remain. Dwarr. on Stat. 907; Hall *v.* Campbell, Cowp. Rep. 204; Calvin's Case, 7 Rep. 176. And where the power to legislate therein has been granted by charter or statute to another, there the laws of the conqueror do not extend into such territories. Dwarris, 526, 527; 3 and 4 William 4, c. 93, relating to Governor and Council of India.

But where the country is acquired by the right of occupancy and discovery, and peopled by the subjects of the sovereign who makes the discovery, the colonists carry with them such laws of their sovereign as may be applicable to their condition. Dwarr. on Stat. 905; Attorney-General *v.* Stuart, 2 Meriv. Rep. 143.

All laws, beneficial to such colonies, go with the colonists; but penal laws, inflicting forfeitures and disabilities, never extend to colonies not *in esse*, (Dawes *v.* Painter, Freeman, 175; Dwarris, 527,) nor do laws of tithes, bankruptcy, mortmain, or police.

The laws of the sovereign, passed after the settlement of a country, whether ceded, conquered, or discovered, do not affect such colony unless specifically named; or, unless they relate to the exercise of the foreign powers of the sovereign, in regard to navigation, trade, revenue, and shipping. Dwarr. on Statutes, 527, 906; 1st Report of Commr's West Indies, Legal Inquiry, 2, 6; Parl. in Ireland, 12th Rep. 112.

Thus we find that, after the discovery of the North American Colonies, till the Revolution, Great Britain regulated the foreign trade of these her colonies, by various acts of parliament, passed to limit it to the vessels of British subjects and to British ports, and to encourage it. She controlled the tobacco trade by statutes — (1670, 22 and 23 Car. 2, c. 26; 1685, 1 James 2, c. 4; 1695, 7 William 3, c. 10; 1699, 10 and 11 William 3, c. 21; 1704, 3 and 4 Anne, c. 5; 1709, 8 Anne, c. 13; 1713, 12 Anne, c. 8.) She restrained all imports and exports to and

from America to British ports and British ships — (12 Car. 2, c. 12, §§ 1, 2, 3, 4, 19; 7 and 8 Wm. 3, c. 22, § 13; 8 Anne, c. 13, § 23; The Recovery, 6 Robinson, 346; Wilson *v.* Marriatt, 8 T. R. 31; 1 Bos. & Pull. 432; 2 Evans's British Statutes, 51; 15 Car. 2, c. 7; 2 Evans's Stats. 58, 62; Grant *v.* Lloyd, 4 Taunt. 136.) She regulated the import of prize goods into and from America, — (1711, 10 Anne, c. 22; 1742, 15 George 2, c. 31; and 1744, 17 George 2, c. 34.) She encouraged and controlled all the trade to her colonies, by statutes — (1695, 7 William 3, c. 22; 1707, 6 Anne, c. 37; 1710, 8 Anne, c. 27; 1733, 6 George 2, c. 13; 1740, 13 George 2, c. 31.) She forbade exports from her colonies to certain foreign countries — (1731, 4 George 2, c. 15; 1732, 5 George 2, c. 22; 1757, 30 George 2, c. 9.) She regulated the import of coffee, tea, and other goods into these colonies; appointed commissioners of the revenue, and provided penalties for the violations of such laws — (1763, 4 George 3, c. 15; 1765, 5 George 3, c. 45; 1766, 6 George 3, c. 49 and 52; 1767, 7 George 3, c. 41, 46, 56; 1768, 8 George 3, c. 22; 1772, 12 George 3, c. 7 and 60; 1773, 13 George 3, c. 44.) And following up her legislation in regard to these colonies, Great Britain in 1772, (12 George 3, c. 60,) allowed a drawback on tea, exported to her British North American Colonies; and, until the Revolution, entirely controlled the trade and duties laid in the colonies. Journals of Congress, Vol. 1, pp. 27, 31, 33 to 39, 47, 394 to 396; Gales & Seaton's Debates in Congress, 216.

The oppression of these laws of Great Britain upon her colonies having resulted in the destruction at Boston, on the 31st December, 1773, of teas imported there by the East India Company, on which they had paid duties; in the meeting of the Congress of the Colonies on the 5th of September, 1774, at Philadelphia; in Great Britain's denouncing them out of her protection on the 20th of December, 1775; in the Declaration of Independence of 4th of July, 1776; in the acknowledgment of the independence of the United States by Great Britain, on 30th November, 1782; and in the Treaty of Peace, signed at Paris on the 2d of September, 1783, — the United States became independent and absolute sovereignties.

(c.) From the 2d of September, 1783, until the adoption of the Constitution by the States, respectively, each had, and several of them exercised, the power of regulating its foreign commerce, and laying imposts and tonnage duties. Journals of Congress of the Confederation, Vol. 2, 298, 301; Gales & Seaton's History of Debates in Congress, 111. Georgia laid 1*s.* 8*d.* sterling on tonnage; and South Carolina laid 1*s.* 3*d.* sterling, (id. 300); Pennsylvania laid a tonnage on vessels of nations in treaty;

Maryland laid 1*s.* 8*d.* per ton on vessels in treaty, and 2*s.* 8*d.* on others, except British, which paid 6*s.* 8*d.* and two per cent. on goods therein; Virginia laid a tonnage of 3*s.* 6*d.* on vessels in treaty, and 6*s.* 6*d.* on non-treaty vessels, and two per cent. *ad valorem* on goods therein; and South Carolina laid 2*s.* 9*d.* sterling on British sugars, and 1*s.* 8*d.* on those of other nations. Id. 275.

By the Confederation of 17th November, 1777, the States still reserved to themselves the right to regulate their foreign commerce, and to lay duties. See article 6th, vol. 2, Journals of Congress of the Confederation, 298, 301, 330. There were, however, secured to the citizens of different States certain rights by the Confederation in regard to imports and exports of goods from State to State. Arts. 4, 6, 2 volume Journals of Confederation, 330.

It is true that the Congress of the Confederation, on the 22d September, 1774, (see Journal of Congress, vol. 1, 14,) requested the merchants and others in the colonies to recall all orders for goods from Great Britain, and on the 27th September, 1774, (id. vol. 1, 15,) resolved, that after 1st December, 1774, there should be no importation of goods from Great Britain or Ireland, nor purchase of goods if imported thence; and that on 20th October, 1774, (id. vol. 1, 23 to 26,) the non-importation, non-consumption, and non-exportation agreement was signed by the members of Congress, yet the Congress did not, in fact, execute these resolves; and on 6th April, 1776, (id. vol. 1, 307–8,) a resolve was passed allowing importations and exportations to the citizens of the colonies, and of all nations, except to and from those under the dominion of Great Britain, subject to the duties laid or to be laid by the colonies.

Yet, before the Revolution, a commercial combination regulated the importations between America and Great Britain. If any man was suspected of an infraction of the non-importation agreement, his conduct was strictly watched, and if his guilt was discovered he was published and held up to the world as an enemy to his country. Gales & Seaton's History of Debates in Congress, vol. 1, 320, speech of Mr. White.

The means to defray the expenses of government, under the Confederation, for common defence and general welfare, were obtained by requisitions on the several States, for such sums of money as should be in proportion to the value of the lands and improvements in possession, or in grant to the citizens of the State, (Journals of Congress of Confederation, October 14th, 1777, vol. 2, 288,) to be estimated in such way as Congress should appoint. See Confederation, article 8, vol. 2, Journal of Congress, 330, November 15th, 1777. These quota were fixed

by Congress, from time to time, according to the number of the white inhabitants in each State. Art. 9, Confederation; see vol. 2 of Journals of Confederation, 336, 337; also id. 346, November 23d, 1777, and the Report of the Committee of the Board of Treasury, id. 332.

From these authorities it will appear that the States, individually, regulated their foreign commerce and duties, and were in this respect foreign sovereigns to each other, and they maintained this relation until the adoption of the Constitution of the United States. Thus we find that by the 7th article of the Constitution, the ratification thereof by the conventions of nine of the original thirteen States was to be sufficient for the establishment of the Constitution, and that on 26th July, 1788, eleven of the thirteen had adopted it, and that North Carolina and Rhode Island stood aloof; the first until 2d November, 1789, and the last till 29th May, 1790. See Mr. Hickey's Book, published in 1847, p. 24.

Between the 26th July, 1788, and 29th May, 1790, Rhode Island was therefore in the position of a foreign State, regulating her own commerce, and laying her own duties, and she did not send deputies to the convention at Philadelphia to form a Constitution. See Gales & Seaton's History of Debates in Congress from 1789 to 1791, vol. 1, p. 4 of Introduction. Rhode Island was thus in a position to force British goods into the United States, by Long Island and Connecticut. Id. p. 124, Mr. Boudinot's speech. She did, in fact, enter into the neighboring States linen and barley that had not paid duty to the United States. Id. p. 164.

(d.) The position of North Carolina and of Rhode Island was that of foreign States, as to the United States, and they were so treated by the Congress of the United States, under the Constitution. Thus (Gales & Seaton's History of Debates in Congress from 3d March, 1787, to 3d March, 1791, vol. 1, pp. 1011, 1012,) a bill passed the Senate to prevent goods from being brought from Rhode Island into the United States; and (History of Congress from March 4, 1789, to March 31, 1793, by Carey, Lea & Blanchard, p. 609, 2d sess. 1 Cong. Senate Journal, p. 134,) on 28th April, 1790, a committee was appointed to consider what provisions would be proper for Congress to make respecting Rhode Island; and on 11th May, 1790, their report was considered, (same Journal, p. 138, 139,) and a resolution was passed, that all commercial intercourse between the United States and Rhode Island from 1st July next be prohibited; and on 13th May, 1790, the committee reported a bill for that purpose; on 14th May, it was ordered to a third reading, and on the 18th May, it was passed by the Senate, 13 ayes to 7 noes.

In the House, it passed first and second readings; and on 1st June, 1790, the President communicated, by a message to both houses, that Rhode Island had acceded to the Constitution. See House Journal, p. 219, 232; also, Gales & Seaton's History of Debates in Congress, vol. 2, p. 1009, 11th May, 1790. When Rhode Island came into the Union, acts of Congress were passed to extend to this State, the laws of Congress relative to the judiciary, the census, &c. vol. 1 Gales & Seaton's History of Debates in Congress, pp. 1020, 1023, 1026; Id. 1711; also, Id. 1006.

The State of Vermont was admitted by 1 Stat. at L. 191, c. 7, February, 1791, and laws extended over her by c. 12, March, 1791, 1 Stat. at L. 197, 198.

Rhode Island and North Carolina were, therefore, until they adopted the Constitution of the United States, foreign to the United States, and to the laws of Congress, and were outside of all provisions in regard to commerce and duties, unless expressly named in the statutes of Congress. The General Collection Act of 31st July, 1789, c. 5, (1 Stat. at Large, p. 29,) by section 1, establishes collection districts, in each of the eleven States that had adopted the Constitution; and by section 39, 1 L. U. S., 48, recites that North Carolina and Rhode Island had not adopted the Constitution, and "lays duties on goods not the produce of those States, when imported from either of them into the United States." The act of 16th September, 1789, c. 15, (1 Stat. at L. 69,) section 2, gives to vessels of North Carolina and Rhode Island the same privileges, when registered, as to vessels of the United States; section 3 lays on rum, loaf-sugar, and chocolate made in North Carolina and Rhode Island, the same duties as when imported from other foreign countries; neither North Carolina nor Rhode Island were embraced in the acts of 23d September, 1789, c. 18, to compensate the judges of the Supreme Court, (1 Stat. at L. 72,) and of 24th September, 1789, c. 20, establishing the judiciary of the United States, (1 Stat. at L. 73.) North Carolina was brought within the revenue laws by the act 8th February, 1790, § 1, c. 1, (1 Stat. at L. 99); and the Judiciary Act was extended to North Carolina, 4th June, 1790, c. 17, (1 Stat. at L 126.) And the second section of act of 16th September, 1789, was revived against Rhode Island by the first section of the act of 8th of February, 1790, (1 Stat. at L. 100.) The Census Act of the 1st March, 1790, c. 2, did not embrace her; 1 Stat. at L. 102. And on the 4th June, 1790, c. 19, (1 Stat. at L. 127,) the revenue acts were extended to Rhode Island, and by reason thereof, the thirty-ninth section of the act 1789, c. 5, ceased to operate, when she came into the Union; and on

23d June, 1790, c. 21, extended the Judiciary Act to Rhode Island; and the law of 5th July, 1790, extended to her the Census Act.

The power lodged in the Congress of the United States by Constitution, Art. 1, § 8, "to regulate commerce with foreign nations," includes all power over navigation. Gibbons *v.* Ogden, 9 Wheat. 191; The North River Steamboat Company *v.* Livingston, 3 Cowen, R. 713; United States *v.* The Brigantine William, 2 Hall's Law Journal, 265; 3 Story's Com. Const. 161; 1 Kent's Com. 405, Lec. 19. The power to regulate it "among the several States" was demanded because, during the confederacy, the States had pursued a local and selfish policy, suicidal in its tendency; and temporily sought to gain advantages over one another in trade, by favors and restrictions. Federalist, No. 42, 1 Tuck. Black Com. App. 247 to 252; President Monroe's Message, 4th May, 1822, pp. 31, 32; 2 Story's Com. Const. § 1062, p. 511. And the power to regulate it "with the Indian tribes" having been prior to the Revolution vested in the British sovereign, and having, at the Revolution, naturally flowed, subject to some restrictions, to the government under the confederacy, (Worcester *v.* State of Georgia, 6 Pet. 515; Johnson *v.* McIntosh, 8 Wheat. 543,) was finally vested, unreservedly in the United States, under the Constitution. 2 Story's Com. Const. § 1094, p. 540, 541.

(e.) The power to admit new States under the Confederation was limited to Canada (Art. 11); no other British colony was to be admitted, except by consent of nine States. The Congress of the Confederation at length induced the States to cede the Western Territory, (3 Story's Com. Const. 1311,) and the ordinance of 13th July, 1787, as to this territory, is the model hitherto used for our territorial governments. 3 Story's Com. § 1312; Webster's Speeches, January, 1830, pp. 360,-4. Missouri came into the Union by force of this ordinance, with a limit of 36° 30′ N. lat. as that, by which all territories ceded by France shall exclude slavery. Act of Congress, 6th March, 1820, 3d L. U. S. 548. See Green *v.* Biddle, 8 Wheat. R. 1, 87, 88, as to the compact between Virginia and Kentucky. Now, under the Constitution, (§ 3, art. 4, 3 Story's Com. Const. § 1308, p. 184,) the United States have power to admit new States, and their power can only be exercised by the Congress.

The power of Congress to admit new States does not include, as its incident, any power to acquire new territory by treaty, purchase, or otherwise, (the power to admit new States had reference only to the territory then belonging to the United States, 3 Story's Com. Const. § 1280,) was designed for the admission of the States, which, under the ordinance of 1787, were to be formed within its old boundaries. The purchase of Louisiana

cannot be justified as incident to the power of Congress as to common defence and general welfare. This purchase from France, by treaty of 1803, by which the United States were to pay eleven millions of dollars and to admit the inhabitants into the Union as soon as possible, was justified by President Jefferson, on the ground of the necessity to protect the commerce of the West and have the passage of the Gulf, (President's Message, pp. 105, 106, &c., 17th October, 1803,) and the power to make this purchase depends solely on its being an incident of the national sovereign power of the United States, to make war and conclude treaties, (4 Elliott's Debates, 257 to 260; American Insurance Company *v.* Canter, 1 Pet. S. C. R. 511, 542, 5173; Story's Com. Const. § 1281,) and the United States have incidentally the power to create corporations and territorial governments. McCulloch *v.* Maryland, 4 Wheat. 409, 422, 3 Story's Com. Const. 132.

The power, then, of the United States to acquire new territory does not depend upon any specific grant in the Constitution to do so, but flows from its sovereignty over foreign commerce, war, treaties, and imposts. 3 Story's Com. Const. § 1281; 4 Elliott's Debates, 257–260; American Insurance Company *v.* Canter, 1 Pet. 511–542, 517. The power of the United States over conquered and ceded territory is sovereign, and exclusive of State control or power, (3 Story's Com. Const. § 1251, p. 124; Hamilton's Works, vol. 1, p. 115; 4 Wheat. 420; 9 Wheat. 36, 5, 7; 3 Story's Com. Const. § 1322; except so far as the treaty, or the ordinance of 1787 may limit it. Rawle on Const. c. 27, p. 237; 1 Kent's Com. § 12, p. 243; id. § 17, pp. 359–360. By § 3, Art. 4 Constitution, "The Congress is empowered to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

Territory acquired by the United States, by conquest or by treaty, does not, by force of our Constitution, become entitled to self-government, nor can it be subject to the jurisdiction of any State. 3 Story's Com. Const. 1318. It would be without any government at all, if it were not under the dominion and jurisdiction of the United States. American Insurance Company *v.* Canter, 1 Pet. S. C. R. 511, 542; id. 516. During military occupation, it is governed by military law; but when ceded by treaty, it is under the civil government of the United States; and the terms of the treaty, or statutes of the United States, are the only law that can bind it. The rights and relations of persons *inter se* remain, but the allegiance is transferred, although the

people do not share in the powers of general government, until they become a State, and are admitted as such. American Insurance Company *v.* Canter, 4 Pet. S. C. R. 511–543. With the transfer of the domain, the inhabitants cease to be inhabitants of the State or country that cedes the lands in question. People *v.* Godfrey, 17 Johns. R. 225; Commonwealth *v.* Young, 1 Hall's Jour. of Jurisprudence, 47. The power of the United States lodged in the Congress is supreme over all cessions, even from the several States — and no State can limit, defeat, or modify the action of the United States over such cessions, (Cohens *v.* Virginia, 6 Wheat. 264, 424–8; Loughborough *v.* Blake, 5 Wheat. R. 322–4,) both as to the property and as to the inhabitants; and the domain and sovereignty are distinct, and may be one or both exercised or not; hence Congress may lay a direct tax on lands in its ceded territories. 5 Wheat. 317. Congress may omit to extend a direct tax to the territories or districts owned by her, whenever a direct tax is laid on the States. 5 Wheat. 317; 3 Story's Com. Const. § 996, p. 463. The words of Art. 1 § 9, Constitution United States, do not require that such tax shall extend to the territories. 2 Story's Com. Const. § 1005, § 2, Art. 1, Const. regulates how a direct tax shall be apportioned among the States, but this does not require the territories to be taxed, although no State could be exempted.

(f.) These authorities show clearly that the domain and the sovereignty of the United States always must be distinct; and may or may not be both in full exercise at once, as is ever the case with all nations. The sovereignty of the United States is operative in foreign countries — both in war and peace her domain is local. In war, we taxed the goods brought into Tampico, in Mexico, while in our military occupancy; and also laid imposts on goods brought thence into the collection districts of the United States. Fleming *v.* Page, 9 Howard, S. C. R. 615–619. See Benner *v.* Porter, id. 235. In war, Great Britain, by force of arms, occupied Castine, a port within a collection district of the United States, and foreign goods were there imported during such hostile occupancy: hence, upon the abandonment of that port by the foe, the United States had no right to lay imposts on said goods, then and there found; because her sovereignty was, as to that port, in her domain, suspended by the hostile occupancy. United States *v.* Rice, 4 Wheat. 246; United States *v.* Hayward, 2 Gallison's R. 501; Grotius de Jure, B. & P. 2, c. 6, § 5; id. lib. 3, c. 6, § 4; id. c. 9, §§ 9, 14; Puffendorf lib. 7, § 5, n. 4; lib. 8, c. 11, § 8; Bynkershoek Quest. Jur. Pub. lib. 1, c. 6; 30 hhds. Sugar *v.* United States, 9 Cranch, 195; The Fama, 5 Robinson, 114, 117; Reeves's Law of Shipping, 103; Hall *v.* Campbell, Cowp. 204; see Journal H. Rep.

15th Cong. 1st Sess. p. 165; Report, dated 23d March, 1815; also Journal 15th Cong. 2d Sess. p. 61; 16th Cong. 2d Sess.; Journal, p. 140, 197; Act Cong. 19th May, 1824, 19th Cong. 1st Sess.; Report Com. of Senate, No. 23, January 23, 1826.

The sovereignty may be in full force; but the actual possession of the domain may not be enjoyed in such way as to put the power of collecting imports, &c., in force, — thus Louisiana was acquired by cession, under treaty with France of 30th April, 1803, and until the act of Congress of 24th February, 1804, took effect, no duties were taken on foreign goods imported into Louisiana. Ch. 13, 2 L. U. S. 251.

So Florida was ceded to the United States by treaty of 22d February, 1819; and on 3d March, 1821, (16th Cong. 2d Sess. c. 39, sec. 2, 3 Stat. at L. 639,) the revenue laws were extended over Florida; and in the interval no duties accrued to the United States on foreign goods imported into Florida. See the Fama, 5 Robinson, 97; 2 Robinson, 361; Jacobsen's Sea Laws, 455; 5 Robinson, 349; Opinion of Attorney-General, 359, 365, 395, case of the Olive Branch.

Under the Louisiana cession the United States claimed to 54° 40′ north latitude, embracing Oregon, and it was not until August 14th, 1848, when the revenue laws were extended to Oregon, and a port of entry established therein. See 9 Stat. at L. c. 177, p. 331, 1st Session, 30th Congress.

The territory of Washington was created, out of the same cession, a territory by act of 32d Cong. 2d Sess. c. 90, (Session Laws, 1852–3, 173,) but the revenue laws do not yet extend to it.

The inland and lake districts were created by acts of 1799, c. 22, 1 Stat. at L. 637, and 2 Stat. at L. 181.

The District of Minnesota, by act of 1850, c. 79, § 89, Stat. at L. 510.

Texas collected her own duties until the act of 31st December, 1845, took effect, and created collection districts therein. See 9 L. U. S. p. 2, c. 2, p. 128; id. 108; Calkin *v.* Cocke, 14 Howard, 235, 236.

The taxes laid by Great Britain on her colonies, without representation or consent, formed part of the injuries and wrongs which led to our independence. Declaration of Independence, 1 Stat. at L. 2.

Finally, duties have never been held to accrue to the United States in her newly acquired territories, until provision was made by an act of Congress for their collection; and the revenue acts always have been held to speak only as to the United States, and her territories, existing at the time when the several

acts were passed; and the decisions of the courts and acts of the executive have conformed to these views. See Letter of Gen. Jones from R. B. Mason, 19th Aug. 1848; see Walker's Circular, 7th October, 1848; President's Annual Message, Dec. 1848; Fleming & Marshall *v.* Page, 9 Howard, 603; Ripley *v.* Gelston, 9 Johnson R. 202.

And the right to exclusive power of taxation through the Congress formed one of the strongest inducements to the adoption of the Constitution of the United States. See Madison Papers, 171, 217, 224, 475, 481, 493, 540; id. 146, 297; id. 109, 218, 488; id. 403; id. 730. See, also, Elliott's Debates in Convention on Adoption of Federal Constitution, vol. 1, pp. 72, 76, 82, 83, 86 to 88, 95 to 106; id. 298, 304, 320; vol. 2, pp. 189, 461, 441, 133 to 150, 118 to 125; 2 Story's Com. Const. § 977.

And, as if more fully to evince the intention of the Congress to confine its revenue laws to the States and Territories, at the times when the respective laws are passed, and not to seem, by prospective legislation, in regard to territories not yet acquired, to hold forth the character of a conqueror, the United States have passed two acts regulating the entering of merchandise into the United States from foreign adjacent territories. See act 1821, c. 14, 3 Stat. at L. 616; and act 3d March, 1823, c. 58, 3 Stat. at L. 781.

(The argument upon the other points is omitted for want of room.)

The brief of *Mr. Cushing*, (Attorney-General,) occupied thirty printed pages. From it there will be extracted so much as relates to the first instruction asked for by the plaintiffs below.

III. — *First and second Instructions.* The bill of exceptions begins on page 8, and ends on page 138, (as before stated,) and includes the instructions moved by the plaintiffs and refused by the court, and the charge to the jury as given, pp. 136–137.

1. *As to both Instructions.* The first instruction, moved by the plaintiffs and refused, comprises the period from the 3d of February, 1848, the day on which the treaty of peace and cession to the United States of California was signed, to the 3d of March, 1849, the day on which the act of Congress was approved for making California a collection district and San Francisco a port of entry.

The second instruction, moved by the plaintiffs and refused by the court, comprehends the period from the 3d of March, 1849, when the act of Congress passed for making California a

collection district, to the 13th of November, 1849, when the collector, Collier, appointed under that act, arrived at San Francisco and entered upon the duties of his office.

These two instructions may be considered together; they assert, in substance, that the collections of duties by the defendant, Harrison, were illegal exactions, for which the defendant is responsible to the plaintiffs in this action; for that, during the first period, "no duties accrued to the United States on merchandise not the production of the United States, nor on vessels not of the United States, which arrived within the limits of California; and during the second period, that nobody but Collier was authorized to collect duties in California until "Collector Collier entered upon his duties as collector of the customs at the port of San Francisco."

The instructions must be considered as having been asked of the court in reference to the evidence given, and must be pertinent to that evidence, and must be the deductions of law properly arising out of the facts which the evidence conduces to prove; if not so, the court ought to refuse to give the instructions.

The court is not bound to entertain abstract propositions, nor should the judge bewilder the jury with instructions couched in language to lead them astray.

The plaintiffs' own evidence (for the defendant adduced none) proved —

1. That the foreign merchandise, and foreign vessels laden with the merchandise in question, were not only imported into California with the intent to be there unladen, but were actually unladen and landed at the port of San Francisco.

2. That the plaintiffs were warned that if the merchandise was unladen at San Francisco without the payment of duties, they would be liable to seizure and forfeiture; were left at liberty to carry the goods, wares, and merchandise to some other port in the United States, and there make entry and payment of the duties, or to pay the proper duties at San Francisco, and save the expense of going elsewhere and the forfeiture; that the plaintiffs elected to pay the duties, and did pay them voluntarily, without compulsion, without force, and for no other cause than the warning and election so given them.

3. That no other or higher duties were paid by plaintiffs and received by the defendant than were imposed by the laws of the United States.

4. That the defendant was lawfully appointed and acting under the government of California, instituted during the war between the United States and Mexico, and continued in being, operation, and effect, after the treaty of peace and cession of

the conquered territory of California to the United States, and so continued, and solely existing in fact, and in operation, during the whole period of time comprised in the instructions asked by the plaintiffs.

5. That the defendant received the duties to the use of the United states, and had "disbursed and paid out to and for the use of the United States" all the moneys received from the plaintiffs except the sums repaid to the plaintiffs for drawbacks on goods reëxported.

Upon such proof as to the mild alternative given, and the election thereupon made by the plaintiffs, and the voluntary payments of duties according to their election, no cause of action can arise to the plaintiffs unless the defendant falsely affirmed to the plaintiffs that their goods would be liable to seizure and forfeiture if landed in California without permit, and without having paid the duties accruing to the United States.

2. *As to the first Instruction separately.* The first instruction asked by plaintiffs, therefore, asserts, "that during the period from the 2d day of February, 1848, the date of the treaty of peace and limits with the Republic of Mexico, and the 3d of March, 1849, the date of the act of Congress which erected the State of California into a collection district of the United States, no duties accrued to the United States on merchandise not the production of the United States, which arrived within the limits of California ceded by said treaty," and applying that instruction to the facts that the goods, and vessels wherein they were laden, were imported into California with intent to be unladen, and were actually there landed, it asserts that the said goods, and the vessels from which they were so unladen, were not liable to seizure and forfeiture if the duties were unpaid.

The error of those propositions of the plaintiffs is proved by inspection of the following statutes:

Act of July 30, 1846, 9 Statutes at Large, 42, c. 74; Act of July 20, 1790, 1 Statutes at Large, 135, c. 30, for imposing duties of tonnage on ships and vessels; and of January 14, 1817; 3 Ib. 345, c. 3, supplementary to an act to regulate the collection of duties on imports and tonnage. Act of March 2, 1799: "An act to regulate the collection of duties on imports and tonnage." 1 Statutes at Large, 639, c. 22 §§ 18, 93.

The first act above mentioned, of July 30, 1846, enacts, "That from and after the first day of December next, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, and on such as may be now exempt from duty, there shall be levied and collected and paid on the goods, wares, and

merchandise herein enumerated and provided for, imported from foreign countries, the following rates of duty — that is to say," &c.

This is the tariff of duties by which the plaintiffs paid the moneys to the defendant.

The second and third acts before cited, imposing duties of tonnage on ships and vessels, need not be recited.

The 18th section of the act of March 2d, 1799 — to regulate the collection on imports and tonnage, before cited, (vol. 1, 639) — enacts, "That it shall not be lawful to make entry of any ship or vessel which shall arrive from any foreign port or place within the United States, or of the cargo on board such ship or vessel, elsewhere than at one of the ports of entry, . . . nor to unlade the said cargo or any part thereof elsewhere than at one of the ports of delivery" established by law: "Provided, always, that every port of entry shall be also a port of delivery."

Section 62 prohibits any permit for the landing of goods to be granted until the duties thereon are paid or secured to be paid.

Section 63 prohibits any permit to be granted for unlading a vessel until the tonnage duty thereon is paid.

"Section 92. That except into the districts herein before described on the northern, northwestern, and western boundaries of the United States, adjoining to the dominions of Great Britain in Upper and Lower Canada, and the districts on the rivers Ohio and Mississippi, no goods, wares, or merchandise of foreign growth or manufacture, subject to the payment of duties, shall be brought into the United States from any foreign port or place in any other manner than by sea, nor in any ship or vessel of less than thirty tons burden, agreeably to the admeasurement hereby directed for ascertaining the tonnage of ships or vessels; nor shall be landed or unladen at any other port than is directed by this act, under the penalty of seizure and forfeiture of all such ships or vessels, and of the goods, wares, or merchandise imported therein, landed or unladen in any other manner. And no drawback of any duties on goods, wares, or merchandise, of foreign growth or manufacture shall be allowed on the exportation thereof from any district of the United States, otherwise than by sea and in vessels not less than thirty tons burden."

This act of 1799, in its various sections, and particularly in sections 18, 62, 63, and 92, taken together, protect the revenue from being evaded or defrauded by importing and landing goods in the United States at ports or places where the United States have not established a port of entry or delivery,

and likewise from the landing of goods even at a port of entry or of delivery without a permit, which permit cannot be granted until the duties on imports and tonnage have been paid or secured to be paid.

The defendant therefore truly informed the plaintiffs that their goods, if landed at San Francisco without permit and payment of duties, would be liable to seizure and forfeiture, and the vessel also from which such unlawful unlading was effected. The first instruction asked is totally erroneous in supposing that no duties would accrue to the United States upon foreign goods nor upon foreign vessels arriving in California, and there unlading their cargoes between February 2, 1848, and March 3, 1849. It is a most egregious blunder to assert, that after the United States had acquired California by treaty, and before they had provided by after law for a collection district, and a collector in that country, the citizens of the United States and foreigners might lawfully inundate the country with foreign goods, wares, and merchandise, without incurring any liabilities for duties on imports and tonnage; that the former laws and government ceased *eo instante* upon the treaty of peace and cession; and that there was no law, no government, no order there until the Congress of the United States had legislated, and the executive department had acted in pursuance of such new legislation upon the new state of things growing out of the war and the ensuing peace.

In so far as the revenue from duties on imports and tonnage was concerned, in the acquisition of Upper California, the act of 1799 had effectually provided against the importation of foreign dutiable goods into that country, and landing them there free of duty. And the existing government and its laws and officers provided the means of causing these revenue laws to be respected and obeyed until the Congress of the United States had provided the proper officers of the customs adapted to the new state of things.

Before the treaty, and under the government instituted and existing in fact in Upper California, duties of import and tonnage were levied and collected, and a system for the collection of those duties was in full, actual, effective operation, sanctioned by the President of the United States, the civil and military governor of the territory, supported by the naval force of the United States in the Pacific Ocean, and by the army of the United States then in California. The defendant Harrison was the collector of customs appointed by the then existing government, and acted in obedience to the laws and instructions of that government.

Upon the cession of California to the United States, "the

laws, whether in writing or evidenced by the usage and customs of the ceded country," continued in force until altered by the new sovereign. Strother *v.* Lucas, 12 Peters, 436; Mitchell *v.* United States, 9 Peters, 749.

Such is the law of nations. Vattel, edition 1853, 358. So it is by the common law.

Lord Mansfield lays it down as the doctrine of the common law, that conquered (and, of course, also ceded) States retain their old laws until the conqueror thinks fit to alter them. Rex *v.* Vaughan, 4 Burr. 2500. See also Calvin's case, 7 Coke, 176; Blankard *v.* Galdy, 2 Salk. 411; S. C. 2 Mod. 222; Attorney-General *v.* Stewart, 2 Meriv. 154; Hall *v.* Campbell, Cowp. 209; Gardiner *v.* Fell, 1 Jac. & W. 27; Anon. 2 P. Williams, 76; Spragge *v.* Stone, cited, Doug. 38; Ex parte Prosser, 2 Br. C. C. 325; Ex parte Anderson, 5 Ves. 240; Evelyn *v.* Forster, 8 Ves. 96; Sheddon *v.* Goodrich, 8 Ves. 482; Elphinstone *v.* Bedreechund, Knapp's P. C. R. 338; Mostyn *v.* Fabrigas, Cowp. 165; 4 Com. Dig. Ley. (C.)

The first instruction, so moved by the plaintiffs, was an improper deduction of law from the facts proved by the plaintiffs' own evidence, oral and documentary, conducing, if given, to confuse and mislead the jury, and was therefore properly overruled.

Mr. Justice WAYNE delivered the opinion of the court.

This case comes up, by writ of error, from the Circuit Court of the United States for the Southern District of New York.

It was an action brought by Cross, Hobson and Company against Harrison, for the return of duties alleged to be illegally exacted by Harrison whilst he was acting as collector of the customs at the port of San Francisco, in California. The claim covered various amounts of money which were paid at intervals between the 3d day of February, 1848, and the 13th of November, 1849. The first of these dates was that of the treaty of peace between the United States and Mexico, and the latter when Mr. Collier, a person who had been regularly appointed collector at that port, entered upon the performance of the duties of his office. During the whole of this period it was alleged by the plaintiffs that there existed no legal authority to receive or collect any duty whatever accruing upon goods imported from foreign countries.

The period of time above mentioned was subdivided by the plaintiffs in the prayers which they made to the court below, into two portions, to each of which they supposed that different rules of law attached. The three periods may be stated as follows:

3d of February, 1848, the date of the treaty of peace between the United States and Mexico. 9 Stat. at Large, 922 to 943.

3d of March, 1849, when the act of Congress was passed, including San Francisco within one of the collection districts of the United States. And

13th of November, 1849, when Collector Collier entered upon the duties of his office.

In order to show what was the state of things on the 3d of February, 1848, it is necessary to refer to some of the public documents which were offered in evidence by the plaintiffs, being Senate Document No. 18 of the first session of the thirty-first Congress.

On the 19th of August, 1847, H. W. Halleck, signing himself "Lieutenant of Engineers and Secretary of State for the Territory of California," issued a circular to certain persons who had been appointed collectors of the customs, in which he recited that the commander-in-chief of the naval forces had been authorized by the President of the United States to establish port regulations, to prescribe the conditions under which American and foreign vessels might be admitted into the ports of California, and also to regulate the import duties. The circular then prescribed certain rules which were to be observed.

On the 15th of September, 1847, Commodore Shubrick prescribed certain rates, or scales of duties, which were confirmed on the 14th of the ensuing October, by R. B. Mason, who signed himself Colonel of the 1st dragoons and Governor of California.

On the 20th of October, 1847, Colonel Mason, still styling himself Governor of California, issued an order saying, that "recent instructions from the President of the United States made the officers of the army and navy the collectors of the customs in California." The arrangement was made accordingly.

This was the state of things up to the 3d of February, 1848, the first epoch mentioned by the plaintiffs in their prayers to the court. The war tariff was collected by officers of the army and navy.

On the 3d of February, 1848, a treaty of peace was signed between the United States and Mexico, the ratifications of which were exchanged on the 30th of May ensuing. Some alterations were made in the mode of collecting the revenue during this second period of time, namely, between the 3d of February, 1848, and 3d of March, 1849, which it is necessary to notice.

On the 26th of July, 1848, Colonel Mason, still calling himself Governor of California, issued a number of regulations for

the government of the custom-house, amongst which the following two may be mentioned:

"7. If any master of a vessel shall be detected in landing, or attempting to land, anywhere in California, any goods or merchandise, without permit from a collector, he shall be fined for every such offence in the sum of five hundred dollars, and the goods or merchandise so landed, or attempted to be landed, and the boat or boats through which such landing is effected or attempted, shall be seized, forfeited, and sold by the nearest collector.

"8. If any person or persons other than the master of a vessel shall be detected in landing, or attempting to land, anywhere in California, any goods or merchandise, without permit from a collector, he or they shall be fined in the sum of one hundred dollars, and the goods or merchandise so landed, or attempted to be landed, and the boat or boats through which such landing is effected or attempted, shall be seized, forfeited, and sold by the nearest collector."

On the 7th of August, 1848, a proclamation was issued to the people of California, by R. B. Mason, the governor, announcing the ratification of the treaty of peace, by which Upper California was ceded to the United States.

On the 9th of August, H. W. Halleck, lieutenant of engineers and Secretary of State, wrote to Captain Folsom, the collector of the customs at San Francisco, directing him to perform the duties until further orders, but announcing that he would be relieved as soon as some suitable citizen could be found to be appointed his successor. In the mean time he was told "the tariff of duties for the collection of military contributions will immediately cease, and the revenue laws and tariff of the United States will be substituted in its place."

In order to illustrate the view which Colonel Mason took of his position, it may be proper to insert the following extract from a letter written by him to the War Department on the 14th of August, 1848:

"In like manner, if all customs were withdrawn, and the ports thrown open free to the world, San Francisco would be made the depôt of all the foreign goods in the north Pacific, to the injury of our revenue and the interests of our own merchants. To prevent this great influx of foreign goods into the country duty free, I feel it my duty to attempt the collection of duties according to the United States Tariff of 1846. This will render it necessary for me to appoint temporary collectors, &c., in the several ports of entry, for the military force is too much reduced to attend to those duties.

"I am fully aware that, in taking these steps, I have no fur-

ther authority than that the existing government must necessarily continue until some other is organized to take its place, for I have been left without any definite instructions in reference to the existing state of affairs. But the calamities and disorders which would surely follow the absolute withdrawal of even a show of authority, impose on me, in my opinion, the imperative duty to pursue the course I have indicated, until the arrival of despatches from Washington (which I hope are already on their way) relative to the organization of a regular civil government. In the mean time, however, should the people refuse to obey the existing authorities, or the merchants refuse to pay any duties, my force is inadequate to compel obedience."

On the 3d of September, 1848, Governor Mason appointed Edward H. Harrison temporary collector of the port of San Francisco, with a salary of two thousand dollars per annum, provided that so much was collected over and above the expenses of the custom-house.

In order further to illustrate the view which was taken by the Executive branch of the government, of the existing condition of things in California, it is proper to insert an extract from a despatch written by Mr. Buchanan, Secretary of State, to Mr. Voorhees, on the 7th of October, 1848. It is as follows:

"The President, in his annual message, at the commencement of the next session, will recommend all these great measures to Congress in the strongest terms, and will use every effort, consistent with his duty, to insure their accomplishment.

"In the mean time, the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the Treaty of Peace, the military government which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. But is there, for this reason, no government in California? Are life, liberty, and property under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government, a government *de facto*, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate

an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.

"This government *de facto* will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles the growth, produce, or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the territory of the United States. I shall not enlarge upon this subject, however, as the Secretary of the Treasury will perform that duty"

At the same time, despatches were issued by the War and Treasury Departments to their respective officers, of similar import to the above. Mr. Walker, the Secretary of the Treasury, after providing for the reciprocal admission of goods which were the growth, &c., of California and the United States, free of duty, into the ports of each, thus provided for the case under consideration, so as to protect the revenue: "Third. Although the Constitution of the United States extends to California, and Congress have recognized it by law as a part of the Union, and legislated for it as such, yet it is not brought by law within the limits of any collection district, nor has Congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that territory. Under these circumstances, although this department may be unable to collect the duties accruing on importations from foreign countries into California, yet, if foreign dutiable goods should be introduced there, and shipped thence to any port or place of the United States, they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without the payment of duties. R. J. WALKER,

Secretary of the Treasury."

When these papers reached California, some doubt was entertained whether or not the revenue laws would be enforced, and application was made to Commodore Jones, then commanding the naval forces in the Pacific, to know whether he would use the forces under his command to aid the collector in seizing and confiscating goods, &c.; to which the commodore replied that he would so employ the force under his command.

On the 23d of February, 1849, Cross, Hobson, and Company

protested against the payment of $105.62, duties which accrued upon an importation by the French bark Staonele, and also protested against the payment of duties upon all other importations, past, present, or to come.

In order still further to explain the views of those who administered the government in California, it may be proper to introduce another extract from instructions which were issued on the 2d of February, 1849, by H. W. Halleck, Secretary of State, to Mr. Harrison, the collector, namely:

"This view of the subject presents a ready reply to the questions proposed in your letter. No vessel can demand as a right to enter any foreign dutiable goods here, and you will not be liable to prosecution for refusing such entry; and by a voluntary payment of her duties here, in preference to going to a regularly established port of entry, such vessel binds herself to abide by the revenue laws of the United States, in the absence of all instructions to the contrary."

On the 3d of March, 1849, (another of the periods of time mentioned in the prayers to the court,) Congress passed an act (9 Stat. at Large, 400,) making the port of San Francisco a collection district.

On the 13th of November, 1849, Collector Collier, who had been regularly appointed, entered upon the execution of his duty at San Francisco. This was the third period referred to in the prayers to the court.

In April, 1851, Cross, Hobson, and Company brought an action of trespass on the case in the Circuit Court of the United States for the Southern District of New York, against Edward H. Harrison, to recover sundry sums of money paid, under the above protest, for duties upon goods imported into San Francisco, during the period between the 3d of February, 1848, and the 12th of November, 1849.

Upon the trial, the jury, under the instructions of the court found a verdict for the defendant.

The bill of exceptions contained the deposition of sundry persons as to the payment and other facts in the case, and also the whole of the Senate Document above mentioned.

The counsel for the plaintiffs then rested; and the counsel for the plaintiffs thereupon prayed the court to charge and instruct the jury, as matter of law, as follows:

1. That during the period from the 3d day of February, 1848, the date of the treaty of peace and limits with the republic of Mexico, and the 3d of March, 1849, the date of the act of Congress which erected the State of California into a collection district of the United States, no duties accrue to the United States on merchandise not the production of the United States, nor of

vessels not of the United States which arrived within the limits of California, ceded by said treaty to the United States, and that the exaction by the defendant of such alleged duties on such goods imported into California by the plaintiffs within said period was not authorized by any law of the United States, and was therefore illegal.

2. That during the period from the 3d of March, 1849, when the act of Congress erected the State of California into a collection district, and the 13th of November, 1849, when Collector Collier entered upon his duties as collector of customs at the port of San Francisco, in said district, the exaction of alleged duties to the United States, by the defendant, was not authorized by any law of the United States, and was therefore illegal, unless the jury shall find that the defendant was legally appointed and qualified to act as collector of the customs at San Francisco.

3. That if the jury shall find that on the 23d February, 1849, the plaintiffs made their written protest against all exactions that then were or thereafter should be made by said defendant, as unauthorized by any act of Congress and illegal, and that moneys then and thenceforward were demanded as alleged duties to the United States by said defendant, and were paid under coercion of military power and duress, and not in pursuance of any law of the United States, that then such exactions were unauthorized and illegal, and the jury must find for the plaintiffs.

4. That if the jury shall find from the evidence that alleged duties were exacted by the defendant from the plaintiffs between the 3d February, 1848, and the 12th November, 1849, by coercion and duress, and against their remonstrance and protest, that then the plaintiffs are entitled to the customary interest of California upon such exactions.

Whereupon the court, *pro forma*, then and there charged and instructed the jury in conformity with the following prayers, in conformity with which the defendant's counsel insisted and prayed the court to instruct the jury as matters of law:

1. That between the 3d February, 1848, and the 3d March, 1849, duties did accrue to the United States, on foreign merchandise, not the production of the United States, and on foreign vessels not of the United States, which were imported into and arrived within the limits of California, as ceded to the United States by the treaty of peace and limits with the Republic of Mexico, signed at Guadaloupe Hidalgo.

2. That after the act of 3d March, 1849, erecting the State of California into a collection district of the United States, took effect, duties accrued to the United States, both on foreign mer-

chandise, not the production of the United States, and on foreign vessels not of the United States, imported and brought within the limits of such collection district.

3. That if, from the evidence in the cause, the jury shall find that between the 3d February, 1848, and 12th November, 1849, the plaintiffs were allowed by the defendant to enter their said foreign goods and vessels at another port of the United States within a collection district, and thereafter to land the same at San Francisco without further exaction of duties, and that the plaintiffs neglected so to do, and elected to enter and land the same at San Francisco, and pay duties thereon, and that the duties were paid by defendant to the use of the United States, that then the said payment of duties was voluntary and not coercive, and the jury must find for the defendant.

4. That if the jury shall find that the plaintiffs paid duties to the defendant on foreign merchandise, and on foreign vessels, not of the United States, between the 3d February, 1848, and 12th November, 1849, and that such payments were illegal but voluntary, and made through mistake of law, then the plaintiffs are not entitled to interest upon such exactions, and that upon the whole evidence the payments aforesaid were voluntary and not coercive.

And the court further, *pro forma*, refused to instruct and charge the jury in conformity with the points insisted upon by the plaintiffs' counsel, and in conformity with which he had prayed the court to charge and instruct the jury as aforesaid.

Upon this exception, the case came up to this court.

This statement presents the case of the plaintiffs as strongly as it can be made from the record, and that contains every fact and document having any connection with the subject. The cause has been argued here with much research. Every argument has been brought to bear upon it by counsel on both sides, which can enter into its consideration. It seems, from the institution of the suit, until now, to have been conducted with the wish upon the part of the United States to give to the plaintiffs every opportunity to establish their claim judicially, if that could be done; and with a desire upon its part to obtain from this court a decision as to what are the rights of the United States in respect to tonnage and impost duties, in such a conjuncture as that was, when California was ceded by treaty to the United States, before Congress had authorized such duties to be collected there by a special act. We have received much assistance from the argument, and make the acknowledgment the more readily because it has enabled us to come to conclusions which we believe will be satisfactory, though adverse from the claim of the plaintiffs.

The purpose of the suit is to recover from the defendant certain tonnage duties and imposts which were paid to him by the plaintiffs upon ships which had arrived in San Francisco, and upon foreign merchandise landed there from them, between the 3d February, 1848, and the 13th November, 1849. Harrison had been appointed collector for the port of San Francisco by Colonel Mason, military governor of California. He told the plaintiffs, officially, that he would not permit them to land their goods without the payment of duties; stating if they attempted to do so, without having made an entry of them, that they would be seized and forfeited. He placed an inspector of the customs on board of the vessels of the plaintiffs, to prevent any merchandise from being landed from them without permits and entries, and when they complained that the duties which they were required to pay were illegal exactions, which they protested against, the collector refused to receive the duties under protest, and told the plaintiffs that they might enter their ships at some other port in the United States, and then discharge their goods at San Francisco. That he considered San Francisco a port in the United States at which foreign goods could not be landed without the payment of duties. It is as well to remark here, though the same fact appears in our statement of the case already given, that the duties for which the plaintiffs sue were paid by them between the 3d February, 1848, and the 12th November, 1849. They were paid, however, until some time in the fall of 1848, at the rate of the war tariff; which had been established early in the year before by the direction of the President of the United States.

The authority for that purpose given to the commander-in-chief of our naval force on that station, was, to establish port regulations, to prescribe the conditions upon which American and foreign vessels were to be admitted into the ports of California, and to regulate import duties. That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States. This last was done with the assent of the Executive of the United States, or without any interference to prevent it. Indeed, from the letter of the then Secretary of State, and from that of the Secretary of the Treasury, we cannot doubt that the action of the military governor of California was recognized as allowable and lawful by Mr. Polk and his cabinet. We think it was a rightful and correct recog-

nition under all the circumstances, and when we say rightful, we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California.

California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward the United States had military possession of all of Upper California. Early in 1847 the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. We will add, by way of note to this opinion, references to all of the correspondence of the government upon this subject; now only referring to the letter of the Secretary at War to General Kearney, of the 10th of May, 1847, which was accompanied with a tariff of duties on imports and tonnage, which had been prepared by the Secretary of the Treasury, with forms of entry and permits for landing goods, all of which was reported by the Secretary to the President on the 30th of March, 1847. Senate Doc. No. 1, 1st session, 30th Congress, 1847, pp. 567, 583. No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself. Nothing is stipulated in that treaty to be binding upon the parties to it, or from the date of the signature of the treaty, but that commissioners should be appointed by the general-in-chief of the forces of the United States, with such as might be appointed by the Mexican government, to make a provisional suspension of hostilities, that, in the places occupied by our arms, constitutional order might be reëstablished as regards the political, administrative, and judicial branches in those places, so far as that might be permitted by the circumstances of military occupation. All else was contingent until the ratifications of the treaty were exchanged, which was done on the 30th of May, 1848, at Queretaro; and there is in the 3d article of the treaty a full recognition by Mexico of the belligerent rights exercised by the United States during the war in its ports which had been conquered. In that article, besides other things provided for, it was stipulated that

the United States, upon the ratifications of the treaty by the two republics, should despatch orders to all persons in charge of the custom houses at all ports occupied by the forces of the United States, to deliver possession of the same to persons authorized by Mexico to receive them, together with all bonds and evidences of debts for duties on importations and exportations not yet fallen due, and that an exact account should be made out, showing the entire amount of all duties on imports and exports collected at such custom houses or elsewhere in Mexico by the authority of the United States after the ratification of the treaty by Mexico, with the cost of collection, all of which was to be paid to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications, subject to a deduction of what had been the cost of collection.

The plaintiffs therefore can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded, in fact, to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them.

But after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory. Our inquiry here is to be, whether or not the cession gave any right to the plaintiffs to have the duties restored to them, which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our government to the military governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation from the President that the civil and military government, which had been instituted during the war, was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington.

It will certainly not be denied that those instructions were binding upon those who administered the civil government in California, until they had notice from their own government that a peace had been finally concluded. Or that those who were locally within its jurisdiction, or who had property there, were not bound to comply with those regulations of the government, which its functionaries were ordered to execute. Or that any one could claim a right to introduce into the territory of that government foreign merchandise, without the payment of duties which had been originally imposed under belligerent

rights, because the territory had been ceded by the original possessor and enemy to the conqueror. Or that the mere fact of a territory having been ceded by one sovereignty to another, opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations, and the attempt to introduce it in this instance is resisted by all of those considerations which have made foreign commerce between nations conventional. "The treaty that gives the right of commerce, is the measure and rule of that right." Vattel, c. 8, § 93. The plaintiffs in this case could claim no privilege for the introduction of their goods into San Francisco between the ratifications of the treaty with Mexico and the official annunciation of it to the civil government in California, other than such as that government permitted under the instructions of the government of the United States.

We must consider them as having paid the duties upon their importations voluntarily, notwithstanding that they protested against the right of the collector to exact them. Their protest was made from a misconception of the principles applicable to the circumstances under which those duties were claimed, and from their misapprehension of what were the commercial consequences resulting from the treaty of peace with Mexico and the cession of California to the United States. That treaty gave them no right to carry foreign goods there upon which duties had not been paid in one of our ports of entry. The best test of the correctness of what has just been said is this: that if such goods had been landed there duty free, they could not have been shipped to any other port in the United States without being liable to pay duty.

Having considered and denied the claim of the plaintiffs to a restoration of the duties paid by them from the date of the treaty up to the time when official notice of its ratification and exchange were received in California, we pass on to the examination of their claim from that time until the revenue system in respect to tonnage and import duties had been put into practical operation in California, under the act of Congress passed for that purpose. The ratification of the treaty of peace was proclaimed in California, by Colonel Mason, on the 7th of August, 1848. Up to this time it must be remembered that Captain Folsom, of the quartermaster's department of the army, had been the collector of duties under the war tariff. On the 9th of August, he was informed by Lieutenant Halleck, of the engineer corps, who was the Secretary of State of the civil government of California, that he would be relieved as soon as

a suitable citizen could be found for his successor. He was also told that "the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariff of the United States will be substituted in its place." The view taken by Governor Mason, of his position, has been given in our statement. The result was to continue the existing government, as he had not received from Washington definite instructions in reference to the existing state of things in California.

His position was unlike any thing that had preceded it in the history of our country. The view taken of it by himself has been given in the statement in the beginning of this opinion. It was not without its difficulties, both as regards the principle upon which he should act, and the actual state of affairs in California. He knew that the Mexican inhabitants of it had been remitted by the treaty of peace to those municipal laws and usages which prevailed among them before the territory had been ceded to the United States, but that a state of things and population had grown up during the war, and after the treaty of peace, which made some other authority necessary to maintain the rights of the ceded inhabitants and of immigrants, from misrule and violence. He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly, and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption

of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a State government, which was subsequently recognized by Congress under its power to admit new States into the Union.

In confirmation of what has been said in respect to the power of Congress over this territory, and the continuance of the civil government established as a war right, until Congress acted upon the subject, we refer to two of the decisions of this court, in one of which it is said in respect to the treaty by which Florida was ceded to the United States: "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independently of stipulations. They do not however participate in political power — they do not share in the government until Florida shall become a State. In the mean time Florida continues to be a territory of the United States, guarded by virtue of that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the natural consequences of the right to acquire territory." American Insurance Co. *v.* Canter, 1 Peters, 542, 543.

The court, afterwards, in the case of the United States *v.* Gratiot, 14 Peters, 526, repeats what it said in the case of Canter in respect to that clause of the Constitution giving to Congress the power to make all needful rules and regulations respecting the territory or other property of the United States.

Colonel Mason was fortunate in having his determination to continue the existing government sustained by the President of the United States and the Secretaries of his cabinet. And nothing but an almost willing misunderstanding of the circular of the Secretary of the Treasury, Mr. Walker, could have caused a doubt as to the liability of the importers of foreign goods into California to pay duties upon them. That part of the Secretary's circular relating to duties is in our statement of the case. It will show that the Secretary says no more than this: that as Congress had not brought California by law within the limits

of any collection district, or authorized the appointment of officers to collect the revenue accruing upon the importation of foreign dutiable goods into that territory, that his department may be unable to collect them. Revenue accruing upon the importation into California of foreign dutiable goods, means that the goods were liable to pay the duty. There is nothing uncertain in the Secretary's circular. It does not warrant in any way the declaration that it was his opinion that the goods were not dutiable, or that they might not be legally collected, though that could not be done by the instrumentality of officers of a collection district. Our conclusion, from what has been said, is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason.

But it was assumed in the argument, and not without force and ingenuity, and with some appearance of authority, that duties did not accrue to the United States upon foreign goods brought into California between the 3d of February, 1848, and the 3d of March, 1849, and from the last date until the 12th of November, 1849; and that the exaction of them was illegal. The two first dates mentioned, comprehend the time between the date of the treaty and the date of the act of Congress which included California within one of the collection districts of the United States, and the other date comprehends the time from the date of the act of Congress until Mr. Collier, the collector, entered upon the duties of his office. It was also said by counsel, that as there was no treaty or law enjoining or permitting the collection of the duties, that the exaction of them by the defendant was illegal. It was said, that the duties were illegally exacted, because the laws of a ceded country, including those of trade, remained unchanged until the new sovereignty of it changed them, and that this Congress had not done. That the practice of the United States had been, not to collect duties upon importations upon goods brought into a ceded territory, until Congress passed an act for it to be done. Louisiana and Florida were the instances cited; and the ratification by North Carolina and Rhode Island of the Constitution of the United States, were also mentioned as having been the subjects of special legislation to bring them within the operation of the revenue laws which had been passed by Congress.

And it was said, that as Congress has the constitutional power to regulate commerce, and had not done so specifically in respect to tonnage and import duties in California, that none of the existing acts of Congress, for such purposes, could be applied there until Congress had passed an act giving to them operation, and had legislated California into a collection district, with denominated ports of entry.

This last being the most important of the objections which were made, we will examine it first, and afterwards notice those which precede it. The objection assumes, that, under the laws then in force, duties could not be collected in California after the war with Mexico had been concluded by a treaty of peace; and that the President had no legal authority to order the collection of duties there upon foreign goods, or power to enforce any revenue regulations, or to prevent the landing of goods prior to the passage of the act, by which our revenue laws were extended to California, and before proper officers had been appointed to execute those laws. It has already been shown, that for seven months of the time the duties received were paid under the war tariff, and that the treaty, though signed in 1848, did not become operative until the ratifications and exchanges of it. And further, that it could not have any effect upon the existing government of California, until official information of those ratifications had been received there. The belligerent right of the United States to make a civil government in California when it was done, and to authorize it to collect tonnage and impost duties whilst the war continued, is admitted.

It was urged, that our revenue laws covered only so much of the territory of the United States as had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied, that collection districts and ports of entry are no more than designated localities within and at which Congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district, must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations, that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere, within its jurisdiction, is a violation of its sovereignty. It is not necessary that such should be declared in terms, or by any decree or enactment, the expressed allowances being the limit of the liberty given to foreigners to trade with such nation.

Upon this principle, the plaintiffs had no right of trade with California with foreign goods, excepting from the permission given by the United States under the civil government and war tariff which had been established there. And when the country was ceded as a conquest, by a treaty of peace, no larger liberty to trade resulted. By the ratifications of the treaty, California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage. It was bound by the eighteenth section of the act of 2d of March, 1799. The fair interpretation of the second member of the first sentence of that section is, that ships coming from foreign ports into the United States were not to be permitted to land any part of their cargoes in any other than in a port of delivery, confined then to the ports mentioned in the act; afterward applicable to all other places which might be made ports of entry and delivery, and excluding all right to unlade in any part of the United States which had not been made a collection district with ports of entry or delivery. The ninety-second section of that act had four objects in view. First, to exclude foreign goods subject to the payment of duties from being brought into the United States, except in the localities stated, otherwise than by sea. Next, that they were not to be brought by sea in vessels of less than thirty tons burden. And third, to subject to forfeiture any foreign goods which might be landed at any other port or place in the United States than such as were designated by law. Fourth, to exclude the allowances of drawback of any duties on foreign goods exported from any district in the United States otherwise than by sea, and in vessels less than thirty tons burden. The sixty-third section also of that act, directing when tonnage duties were to be paid, became as operative in California after its cession to the United States, as it was in any collection district.

The acts of the 20th July, 1790, (1 Stat. at Large, 130, c. 30,) and that of 2d March, 1799, (1 Stat. at Large, 627, c. 22,) were also of force in California without other special legislation declaring them to be so. It cannot very well be contended that the words "entered in the United States," give an exemption from them on account of the word entered, because a ship has been brought into a port in the United States where an entry cannot be made, as it may be done in a collection district. The goods must be entered before a permit for delivery can be given. Shall one then be permitted to land goods in any part of the United States not in a collection district, because he has voluntarily gone there with his vessel where an entry of his

goods cannot be made; or to say, I know that my goods cannot be entered where I am, and therefore claim the right to land them for sale and consumption free of duty?

It has been sufficiently shown that the plaintiffs had no right to land their foreign goods in California at the times when their ships arrived with them, except by a compliance with the regulations which the civil government were authorized to enforce —first, under a war tariff, and afterward under the existing Tariff Act of the United States. By the last, foreign goods, as they are enumerated, are made dutiable — they are not so because they are brought into a collection district, but because they are imported into the United States. The Tariff Act of 1846 prescribes what that duty shall be. Can any reason be given for the exemption of foreign goods from duty because they have not been entered and collected at a port of delivery? The last become a part of the consumption of the country, as well as the others. They may be carried from the point of landing into collection districts within which duties have been paid upon the same kinds of goods; thus entering, by the retail sale of them, into competition with such goods, and with our own manufactures, and the products of our own farmers and planters. The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there was nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States. As to the denial of the authority of the President to prevent the landing of foreign goods in the United States out of a collection district, it can only be necessary to say, if he did not do so, it would be a neglect of his constitutional obligation "to take care that the laws be faithfully executed."

We will here briefly notice those objections which preceded that which has been discussed. The first of them, rather an assertion than an argument — that there was neither treaty nor law permitting the collection of duties — has been answered, it having been shown that the ratifications of the treaty made California a part of the United States, and that as soon as it became so, the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right.

The second objection states a proposition larger than the case

admits, and more so than the principle is, which secures to the inhabitants of a ceded conquest the enjoyment of what had been their laws before, until they have been changed by the new sovereignty to which it has been transferred. In this case, foreign trade had been changed in virtue of a belligerent right before the territory was ceded as a conquest, and after that had been done by a treaty of peace, the inhabitants were not remitted to those regulations of trade under which it was carried on whilst they were under Mexican rule; because they had passed from that sovereignty to another, whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed. We have said in a previous part of this opinion, that the sovereignty of a nation regulated trade with foreign nations, and that none could be carried on except as the sovereignty permits it to be done. In our situation, that sovereignty is the constitutional delegation to Congress of the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In respect to the suggestion that it has not been the practice of the United States to collect duties upon importations of foreign goods into a ceded territory until Congress had passed an act for that purpose, counsel cited the cases of Louisiana and Florida. The reply is, that the facts in respect to both have not been recollected. There was no forbearance in either instance, in respect to duties upon imports, until Congress had acted. Louisiana was ceded by a treaty bearing the date of the 30th of April, 1803, but the possession of it by the United States depended upon the terms of final ratifications by the parties to it, and upon the delivery of it by a commissioner to be appointed by the French government to receive the transfer from Spain to France, and by him to be immediately transferred to the United States. Articles 1, 2, 4, 5.

The surrender from Spain to France was formally made on 30th of November, 1803, and that to the United States was done on the 20th of December, 1803. It was known in Washington, by a letter from the commissioner appointed to receive it, early in January. It is said, that from that time until the act of the 24th of February, or, as was provided for in the act, until thirty days after, Louisiana was not considered, in a fiscal sense, as a part of the United States; and that duties were not only not collected by the United States on importations into Louisiana, but that duties were charged on goods brought from Louisiana into the United States. It seems to have been forgotten that our commercial intercourse with Louisiana had been the subject of legislation by Congress in several

particulars from the year 1800; and that before the revenue system could be applied, it was necessary to repeal that special legislation. Mr. Gallatin, in his report of the 25th of October, 1803, (American State Papers, Finance, vol. 2, 48,) suggested that it should be done. Congress, however, did not do so until the act of the 24th of February, 1804, was passed, by the third section of which the repeal was effected. The postponement of the operation of the act for thirty days longer, was with the view to prevent any conflict of rights or interests between what would be the new regulations of commerce under the act, and those which had preceded them.

It is only necessary to say as to Florida, that the treaty of the 22d February, 1819, was not ratified by the United States until the 19th February, 1821. In a few days afterward the act was passed extending our revenue system to it, subject to the stipulation in the 15th article of the treaty in favor of Spanish vessels and their cargoes. There was, then, no interval in either instance where duties were not collected upon foreign importations, because Congress had not legislated for it to be done.

The application of the revenue acts to North Carolina and Rhode Island, when those States had ratified the Constitution of the United States, though that was not done until the Constitution had been ratified by eleven of the States, does not support the position taken by the counsel of the plaintiff in error. Those States had been parties to the Confederation, and North Carolina was represented in the convention which formed the Constitution. It was to become the government of the Union when ratified by nine States. It had been ratified by eleven States, and Congress declared that it should go into operation on the 4th day of March, 1789. The subsequent ratifications by North Carolina and Rhode Island made them parties in the government. It brought them in, without new forms or legislation, and their senators and representatives were admitted into Congress upon the presentation of their ratifications. Special acts were passed to apply to them the previous legislation of Congress, and that of the revenue acts, as a matter of course, because, previously to the ratification, those States had not been attached to any collection district. But it was not supposed by any one that after those States had ratified the Constitution, that foreign goods could have been imported into them without being subject to duty, or that it was necessary to make them collection districts to make such importations dutiable.

But we do not hesitate to say, if the reasons given for our conclusions in this case were not sound, that other considera-

tions would bring us to the same results. The plaintiffs carried these goods voluntarily into California, knowing the state of things there. They knew that there was an existing civil government instituted by the authority of the President, as commander-in-chief of the army and naval forces of the United States, by the right of conquest; that it had not ceased when these first importations were made; that it was afterwards continued, and rightfully, as we have said, until California became a State; that they were not coerced to land their goods, however they may have been to pay duties upon them; that such duties were demanded by those who claimed the right to represent the United States — who did so, in fact, with most commendable integrity and intelligence; that the money collected has been faithfully accounted for, and the unspent residue of it received into the treasury of the United States; and that the Congress has by two acts adopted and ratified all the acts of the government established in California upon the conquest of that territory, relative to the collection of imposts and tonnage from the commencement of the late war with Mexico to the 12th November, 1849, expressly including in such adoption the moneys raised and expended during that period for the support of the actual government of California after the ratification of the treaty of peace with Mexico. This adoption sanctions what the defendant did. It does more — it affirms that he had legal authority for his acts. It coincides with the views which we have expressed in respect to the legal liability of the plaintiffs for the duties paid by them, and the authority of the defendant to receive them as collector of the port of San Francisco.

From these circumstances the law will not imply an assumpsit upon the part of the defendant to repay the money received by him from them for duties; the plaintiffs knew, when they paid him, that the defendant received them for the United States. The plaintiffs have no claim for damages against the defendant in justice or equity. They paid duties to which the United States had a rightful claim, and no more than the law required. The plaintiffs have paid no excess. The moneys were paid under no deceit, no mistake; the defendant has honestly paid them over to the United States, has been recognized as their agent when he acted as collector, and is not responsible to the plaintiffs *in foro conscientiæ*. The moneys were paid from a portion of the funds in the treasury of the United States, subject to the constitutional restriction that no money shall be drawn from the treasury but in consequence of appropriations made by law for such purposes as the Constitution permits. Our conclusion is, that the rulings made in this case in

the Circuit Court are correct. We shall direct 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 Southern 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 affirmed, with costs.

NOTE.

The following are the documents referred to in the above opinion:

1847, October 13. Mr. Marcy to Colonel Mason.
1848, July 26. Colonel Mason's Custom House Regulations.
1848, August 7. Colonel Mason's Proclamation, announcing the ratification of the Treaty of Peace.
1848, October 7. Mr. Buchanan to W. B. Voorhees.
1848, October 7. Mr. Walker's Circular.
1848, October 9. Mr. Marcy to Colonel Mason.
1849, March 15. Persifor F. Smith to Adjutant-General Jones.
1849, April 1. Persifor F. Smith's Circular to Consuls.
1849, April 3. Mr. Clayton to Thomas Butler King.
1849, April 3. Mr. Meredith to James Collier, Collector.
1849, April 5. Persifor F. Smith to Adjutant-General Jones.
1849, June 20. Persifor F. Smith to Mr. Crawford, Secretary of War.
1849, June 30. General Riley to Adjutant-General Jones.
1849, August 30. General Riley to Adjutant-General Jones.
1849, October 1. General Riley to Adjutant-General Jones.
1849, October 20. Carr, Acting Deputy-Collector, to Mr. Meredith.
1849, October 31. General Riley to Adjutant-General Jones.
1849, November 13. Mr. Collier, Collector, to Mr. Meredith.

HENRY CHOUTEAU, PLAINTIFF IN ERROR, *v.* PATRICK MOLONY.

On the 22d of September, 1788, the tribe of Indians called the Foxes, situated on the west bank of the Mississipi, sold to Julien Dubuque a permit to work at the mine as long as he should please; and also sold and abandoned to him all the coast and the contents of the mine discovered by the wife of Peosta, so that no white man or Indian should make any pretension to it without the consent of Dubuque.

On the 22d of October, 1796, Dubuque presented a petition to the Baron de Carondelet for a grant of the land, which he alleged that he had bought from the Fox Indians, who had subsequently assented to the erection of certain monuments for the purpose of designating the boundaries of the land.

The governor referred the petition to Andrew Todd, an Indian trader, who had received a license for the monopoly of the Indian trade, who reported that as to the land nothing occurred to him why the governor should not grant it, if he deemed it advisable to do so, provided Dubuque should be prohibited from trading with the Indians, unless with Todd's consent, in writing.

Upon this report the governor made an order, granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd.

This grant was not a complete title, making the land private property, and therefore excepting it from what was conveyed to the United States by the treaty of Paris of April 30, 1803.

The words of the grant from the Indians do not show any intention to sell more than a mining privilege; and even if the words were ambiguous, there are no extrinsic circumstances in the case to justify the belief that they intended to sell the land.

The governor, in his subsequent grant, intended only to confirm such rights as Dubuque had previously received from the Indians. The usual mode of granting land was not pursued. Dubuque obtained no order for a survey from Carondelet, nor could he have obtained one from his successor, Gayoso.

By the laws of Spain, the Indians had a right of occupancy; but they could not part with this right except in the mode pointed out by Spanish laws, and these laws and usages did not sanction such a grant as this from Carondelet to Dubuque.

Moreover, the grant included a large Indian village, which it is unreasonable to suppose that the Indians intended to sell.

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

It was an action brought by petition, in the nature of an ejectment, by Chouteau, a citizen of Missouri, to recover seven undivided eighteenth parts of a large body of land, containing nearly one hundred and fifty thousand arpents; and including the whole city of Dubuque. Molony claimed under a patent from the United States. The documents upon which Chouteau's claim was founded are set forth *in extenso* in the opinion of the court; and as that opinion refers to Mr. Gallatin's report, it may be proper to give a history of the claim so that his report may be introduced. A large portion of the argument, in behalf of the plaintiff in error, consisted of reasons to show that Mr. Gallatin was mistaken. The following is the history of the case, as given by Mr. Cormick.

History of the Claim. In a case so free from doubt, the question arises, why did Congress assume that Dubuque's title was worthless, and sell the land?

The answer to this question is, Mr. Gallatin, while Secretary of the Treasury, became prejudiced against the land titles of Upper Louisiana, and so much prejudiced against this particular title, that he construed it with reference, not to the grant itself, but to his preëxisting prejudices; that he made a report adverse to the claim, and utterly misdescribed the document upon which that claim is based; that congressmen, when the question came up before them, referred, as was natural, to Mr. Gallatin's report, to see what it said about the title, and finding it there described as the grant of a mere personal permission of occupancy, revocable at will, they naturally concluded it was a fraudulent effort to obtain property, which the claimants knew they had no right to.

On the 3d of November, 1804, a treaty was made by General William Henry Harrison, Governor of the Indiana Territory, (of which the present States of Missouri and Iowa were then a part,) with the Sac and Fox Indians. An additional article was inserted to prevent the land granted to Dubuque from being considered as receded by the treaty. The Indians then acknowledged the validity of the grant. See p. 22 of Senate Doc. 350 of 1st Sess. 28th Cong.

On the 17th of May, 1805, Julien Dubuque and Auguste Chouteau, as his assignee of a portion of the land, jointly filed their claim.

On the 20th of September, 1806, a majority of the Board of Commissioners, John B. C. Lucas, dissenting, pronounced the claim to be a complete Spanish grant, made and completed prior to the first day of October, 1800.

In 3 Green's Public Lands, 588, will be found the translation of the title, which seems to have been the translation relied on by the Board, as well as by Mr. Gallatin. It is in the following words, namely:

(These documents are inserted, in the opinion of court, with some change of phraseology. There was much controversy, during the argument, as to the proper translation.)

On the 11th of April, 1810, the United States agent laid before the Board of Commissioners, in pursuance of section 6 of act of 2d March, 1805, (2 Statutes at Large, 328,) a list of documents, which list embraces this claim, pertaining to lead mines and salt springs in the Territory of Louisiana. 3 Green's P. L. 603.

In 1810, Mr. Gallatin, instead of reporting to Congress the action of the board relative to the claim, himself made an *ex parte* official report against it. 1 Clark's Land Laws, 958.

On the 19th of December, 1811, the following entry was made on the minutes of the Board of Commissioners, namely:

"December 19th, 1811. Present, a full board. On a ques-

tion being put by John B. C. Lucas, commissioner, Clement B. Penrose and Frederick Bates, commissioners, declined giving an opinion. It is the opinion of John B. C. Lucas, commissioner, that the claim ought not to be confirmed." 2 Green's P. L. 552.

The claimants were not parties to this last proceeding. It seems to have originated between the dissenting commissioner and the Secretary of the Treasury, who were under the impression that the sixth section of act of 2d March, 1805, which required the government agent "to examine into and investigate the titles and claims, if any there be, to the lead mines within the said district, to collect all the evidence within his power, with respect to the claims and value of the said mines, and to lay the same before the commissioners, who shall make a special report thereof, with their opinions thereon, to the Secretary of the Treasury, to be by him laid before Congress," &c., thereby authorized the Board, by an *ex parte* proceeding, to reverse their own decision made more than five years before.

Dubuque continued in possession of the land till his death, in 1810. During his life, he had exercised great influence over the neighboring Indians. But that influence had been much enhanced by the liberal presents he had made them. He died insolvent. That portion of the tract which he had not sold to Auguste Chouteau, was sold after his death, by order of court, to pay his debts. In the meanwhile the last war with England was approaching, and English emissaries were on the frontiers, inciting the savages to hostilities against our people. Our government was not then, as it now is, sufficiently strong to protect the frontiers.

In the latter part of 1832, the claimants thought the time had come when they might safely attempt the enjoyment of their rights, as the assignees of Dubuque, to the profits which might be realized from the lead mineral contained in the land. They accordingly employed an agent to lease to miners the right to dig on the land for lead. On the 5th of January, 1833, the following order was issued by the Major-General of the United States army:

(This was an order to remove the settlers by force.) See p. 28, Sen. Doc. 350, 1st Sess. 28th Cong.

In pursuance of this order, a military detachment was sent from Fort Crawford, and the claimants' tenants were driven off at the point of the bayonet, and their dwellings burnt.

The claimants at that time all lived in the State of Missouri, mostly at St. Louis. One of them, on his own behalf, and as agent for the others, went to Galena, in Illinois, to institute legal proceedings. He could not sue for the land, because after

Missouri had come into the Union, as a State, there was no court which had jurisdiction of a suit brought for the recovery of the land. The federal government had in the meanwhile leased much of the land to lead diggers, and a considerable portion of the mineral dug on the land was taken to smelting furnaces at Galena, to be converted into lead. But much of the mineral then smelted at Galena was from land not embraced in this grant. The agent for the claimants, in order to test the question of title, brought suit for a lot of mineral, which had been brought to Galena. But he was not at the trial able to identify it, and a nonsuit was taken. The agent then came to Washington, and petitioned for redress during many successive sessions of Congress. Certain citizens of Kentucky had in the meanwhile, by intermarriage and by inheritance, become interested in the claim, and on their own account presented a memorial in January, 1837. Several memorials were also presented to the executive. Various bills were reported for the relief of the claimants, some of which passed in one house, and were never reached in the other, and others were voted down in the house in which they originated.

An act of Congress was passed the 2d of July, 1836, for the laying off the towns of Fort Madison and Burlington, in the county of Des Moines, and the towns of Belleview, Dubuque, and Peru, in the county of Dubuque, Territory of Wisconsin, and for other purposes. The towns of Dubuque and Peru, the lots of which were required by this act to be sold, are situated on the land embraced by the grant on which this suit is based. What is now the State of Iowa, constituted, on the 2d of July, 1836, a part of the Territory of Wisconsin.

On the 3d of March, 1837, an act, amendatory of the foregoing, was passed. The manner in which the town lots are to be sold is somewhat varied from the manner specified in act of 2d of July, 1836, 5 Stat. at Large, 178, 179.

(Then followed an enumeration of the reports of committees in each branch of Congress, and the acts passed, under one of which Malony claimed title.)

Mr. Gallatin's report was a succinct statement of the facts in the case, upon which he made the following remarks:

I. Governor Harrison's treaty adds no sanction to the claim; it is only a saving clause in favor of a claim, without deciding on its merits, a question which indeed he had no authority to decide.

II. The form of the concession, if it shall be so called, is not that of a patent, or final grant; and that it was not considered as such, the commissioners knew, as they had previously received a list procured from the records at New Orleans, and

transmitted by the Secretary of the Treasury, of all the patents issued under the French and Spanish governments, in which this was not included, and which also showed the distinction between concession and patent, or complete title.

III. The form of the concession is not even that used when it was intended ultimately to grant the land; for it is then uniformly accompanied with an order to the proper officer to survey the land, on which survey being returned the patent issues.

IV. The governor only grants as is asked; and nothing is asked but the peaceful possession of a tract of land on which the Indians had given a personal permission to work the lead mines as long as he should remain.

Upon the whole, this appears to have been a mere permission to work certain distant mines without any alienation of, or intention to alienate the domain. Such permission might be revoked at will; and how it came to be considered as transferring the fee-simple, or even as an incipient and incomplete title to the fee-simple, cannot be understood.

It seems, also, that the commissioners ought not to have given to any person certificates of their proceeding, tending to give a color of title to claimants. They were by law directed to transmit to the treasury a transcript of their decisions, in order that the same might be laid before Congress for approbation or rejection.

On the trial of the cause in the District Court, the plaintiff admitted that the defendant was a purchaser under the government of the United States, and that patents had been regularly issued to him for the land in question.

The defendant demurred, and specified the three following causes of demurrer, namely:

1. That, admitting all the facts stated in the petition to be true, the plaintiff is not entitled to recover.

2. That, as appears by the exhibits to said petition, the plaintiff claims under an unconfirmed Spanish title.

3. That it appears, from the plaintiff's own showing, that he rests his title on an incomplete Spanish grant, and that defendant is in possession under a complete title from the United States.

A judgment final was rendered by the court below, in favor of the defendant on this demurrer. The assignments of error were

1. The said District Court erred in deciding that the said petition of the said Henry Chouteau, and the matters therein contained, were not sufficient in law to maintain the said action of the said Henry Chouteau.

2. The said District Court erred in rendering judgment in favor of the said Patrick Molony against the said Henry Chouteau.

Upon these points of demurrer the case came up to this court, and was argued by *Mr. Cornick* and *Mr. Johnson*, for the plaintiff in error, and by *Mr. Platt Smith*, *Mr. T. S. Wilson*, and *Mr. Cushing*, (Attorney-General,) for the defendant in error.

The points which were made on behalf of the plaintiff in error are thus stated by *Mr. Cornick*.

The record presents but one question, namely: Was the grant which the Baron de Carondelet made to Julien Dubuque on the 10th of November, 1796, a complete title?

If it constituted a complete title, the judgment of the court below is erroneous; if it did not constitute a complete title, there is no error in the record.

The decisions of this court which established the doctrine that a grant of land of specific locality, by the Spanish land-granting officer, vested in the grantee a complete title, are so numerous and so uniform that it would be considered unnecessary to cite authorities to sustain this grant, but for the fact that the United States government has, by selling the land, assumed it to be a part of the public domain. For this reason many authorities will be cited in support of propositions of law, which would otherwise be regarded as self-evident. And an explanation will be submitted of the causes which probably induced Congress to disregard a grant, the validity of which is wholly free from doubt the moment it is viewed from the proper point of view.

I. The Baron de Carondelet had power to make the grant. That interest which the Governor-General intended to grant, whether fee-simple or a tenancy at will, whether limited or unlimited in the duration of the estate, was the interest which, by virtue of the grant, vested in Dubuque. See United States *v.* Arredondo, 6 Pet. 691; Percheman *v.* United States, 7 Pet. 51; Delassus *v.* United States, 9 Pet. 134.

In the United States *v.* Moore, 12 How. 217, this court recognized Carondelet's power as extending from January 1, 1792, to the beginning of 1797. It was within this period that this grant was made.

In Delassus *v.* United States, 9 Pet. 117, the court say: "The regulations of Governor O'Reilly were intended for the general government of subordinate officers, and not to control and limit the power of the person from whose will they emanated. The Baron de Carondelet must be supposed to have had all the powers which had been vested in Don O'Reilly." In Smith

v. United States, 4 Pet. 511, the same principle is established. See the printed record.

In United States *v.* Arredondo, 6 Pet. 728, it is said that the actual exercise of the power of granting land, by a colonial governor, without any evidence of disavowal, revocation, or denial by the king, and his consequent acquiescence and presumed ratification are sufficient proof — in the absence of any to the contrary — (subsequent to the grant) of the royal assent to the exercise of his prerogative by his local governors.

According to the principle here established, the King of Spain must be considered as having acquiesced in, and assented to the grant by the Baron de Carondelet to Dubuque, unless his dissent be proved by the defendant.

In United States *v.* Arredondo, 6 Pet. 729, the court say: "It is an universal principle, that when power or jurisdiction is delegated to any public officer or tribunal, over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public or any one denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made, or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

This court, in Strother *v.* Lucas, 12 Pet. 410, say: "Where the act of an officer, to pass the title to land, according to Spanish law, is done contrary to the written order of the king produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motive set out therein, and according to some order known to the king and his officers, though not to his subjects; and courts ought to require very full proof that he had transcended his powers, before they so determine it."

II. The description of the land by Dubuque, in his petition, completely fixed its locality, and dispensed with the necessity of a survey.

(The argument upon this point is omitted.)

III. The assent of the Baron de Carondelet to the petition establishes the truth of its statements, and the moment he assented, the sale by the Indians, to Dubuque, thereby ceased to be a link in the chain of title.

IV. Our government cannot grant or sell land which does not belong to it.

But the principal part of the argument of the counsel for the plaintiff in error was directed to show that Mr. Gallatin had erred in the report which he made and the four conclusions to which he came, which have been already stated in this report. These errors were said to be the following:

Mr. Gallatin's first error. The language near the close of the report — "Upon the whole, this appears to have been a mere permission to work certain distant mines, without any alienation of, or intention to alienate the domain. Such permission might be revoked at will; and how it came to be considered as transferring the fee-simple, or even as an incipient and incomplete title to the fee-simple, cannot be understood."

Following what the secretary had already said about Todd's report — ("The governor refers the application for information to A. Todd, who had the monopoly of the Indian trade on the Mississippi. A. Todd reports that no objection occurs to him, if the governor thinks it convenient to grant the application, provided that Dubuque shall not trade with the Indians without his permission,") — necessarily impressed congressmen, who relied on Mr. Gallatin's report for their views of the grant, with the belief, not only that the claim set up by Dubuque and Chouteau, before the commissioners, was a fraudulent pretence to what they knew they had no right to, but also that A. Todd recommended the granting to Dubuque of a mere personal permission of occupancy. Mr. Gallatin professes to describe the grant; yet no one from his description could even suspect that Todd had in his report used the language — "As to the land for which he asks, nothing occurs to me why it should not be granted, if you deem it advisable to do so; with the condition nevertheless that the grantee shall," &c.

Here we find a most material variance between the grant itself and Mr. Gallatin's description of it. Congress did really cause the land, covered by the grant, to be sold; but we here see very clearly that Congress passed no judgment against the validity of the title on which this suit is based, but that it only decided against the title which Mr. Gallatin's violently excited prejudices fancied to exist. If a man had been indicted for the larceny of this document, and it was as much misdescribed in the bill of indictment as it is in this report of Mr. Gallatin, surely no court would hesitate to decide, on objection properly made, that the grant to Dubuque, represented by any one of the translations ever made of it, could not be given in evidence in support of the indictment.

Mr. Gallatin's second error. In the first sentence of his re-

port he speaks of the claim as containing upwards of one hundred and forty thousand acres of land.

Whatever may have been Mr. Gallatin's opinion of his knowledge of the law of Spanish grants, it is now very certain that neither he, nor any other American citizen, understood the subject at that time. But we must suppose that so able a Secretary of the Treasury understood arithmetic. Yet he so exaggerated the amount embraced by this claim as to demonstrate, that if he knew how to calculate quantities, he was so prejudiced against the claim that he was unable, in this particular case, to make such calculation. Even if the distance from the little Makoketa to the Mesquabysnenque, which Dubuque states to be about seven leagues along the bank, were a straight line, so as to give a front of exactly seven leagues, so as to make the claim embrace exactly twenty-one leagues of superficies, there would only be one hundred and twenty-five thousand and sixty acres. But as in fact the river bank curves there, as it does everywhere else, and curves very much — and as what Dubuque calls about seven leagues along the bank, is really less than seven, though upwards of six — the real quantity embraced by the claim is a little over ninety-seven thousand acres. Mr. Gallatin committed an error of about forty-seven thousand acres, in fact. But, when he made his report, he did not have the data by which accurately to calculate the number of acres. Yet he then had data enough to show that he was exaggerating, at least to the extent of fourteen thousand nine hundred and sixty acres.

Mr. Gallatin's third error. He contradicts himself in describing the sale by the Indians to Dubuque. In the commencement of his report, he describes it as a purchase "from the Indians, of an extent of seven leagues front on the Mississippi, by three leagues in depth, containing upwards of one hundred and forty thousand acres." He afterwards speaks of it as a sale of the "hill and contents of the land (or mine) found by Peosta's wife." He afterwards speaks of the right acquired by Dubuque as a "personal permission to work the lead mines as long as he should remain."

Mr. Gallatin's fourth error. Remark No. 2 of the report involves the proposition, that concession and patent are two things entirely distinct. And, at the same time, he uses such language as shows he considered that patent and final grant were synonymous, and that a grant was not final unless it was evidenced by a patent.

(The argument upon this head, and also that under the head of the eighth error, are omitted for want of room, as they were both very elaborate.)

Mr. Gallatin's fifth error. In his remark No. 3, he considers a survey an essential prerequisite to a complete grant. But we have seen that many decisions of this court have established that a description which fixes the boundaries, dispenses with the necessity of a survey.

He seems to have had a confused idea that this grant to Dubuque was vicious, because it was not made in accordance with the regulations of O'Reilly, Gayoso, or Morales. But a very slight examination of those regulations would have shown him the impossibility of surveying the land in the manner there required; as in the wilderness country where Dubuque made his settlement, there was no neighbor, no syndic, no officer of any description. He would then have seen that to make an actual survey, a prerequisite would amount to denying the power to the Baron de Carondelet to grant the land.

Mr. Gallatin's sixth error. In remark No. 3, he advances the proposition that, after the grant of an inchoate title, the execution of the order of survey was the only prerequisite to the issuance of a patent. He advances this as a universal proposition. But in the great majority of cases this is untrue. Observe, for example, the order of the governor-general in the inchoate grant to Owen Sullivant. This error of the secretary is material; for it shows he was extremely ignorant of the laws he usurped the power to pass judgment on.

Mr. Gallatin's seventh error. He adopted as a fundamental principle of Spanish law, to guide his decision, the erroneous hypothesis that all grants, whether in the wild Indian country or not, must completely correspond with the forms usually observed when the land granted was situated in the settled parts of the province, and that the governor-general had no power to grant by any other form.

Mr. Gallatin's eighth error. In remark No. 4, he considers peaceable possession as synonymous with personal permission of occupancy, revocable at will.

We have seen that the four translations of the grant heretofore made, differed, in some respects materially, one from another. The translation averred in the record, differs from the preceding four. Those four all agree in rendering the word "possession" into the English word "possession," and three of them render "paisible" into "peaceable," while the remaining one renders it into "peaceful." The main difference between those four translations and the translation averred in the record is, that the latter represents the words "*paysibles possessions*" by English words, which indicate ownership enjoyed free from adverse claim.

This new version was made for the following reasons: The

French phrase, "*paisible possession*," is an idiomatic expression, and it would, as used in this petition, raise directly in the mind of a Frenchman the idea of ownership and quiet enjoyment free from adverse claim, without any reasoning whatever on the subject. It was attempted, in shaping this new translation, not only to raise in the mind of the reader the same ideas which were raised in the mind of the Baron de Carondelet, when he read the original, but to raise them in the same direct manner.

The most usual signification of the French word "*possession*" is enjoyment of a thing in the character of its owner. In the same way "*possesseur*" most usually signifies a person enjoying a thing as its owner. In the French language "*le possesseur*" is the person who has *la possession;* just as in English "possessor" is the person who has the possession.

On the part of the defendant in error, the points were thus stated by *Mr. Wilson*, which were sustained also by *Mr. Smith.*

The land in controversy is in what was called the Louisiana territory acquired by the treaty of 1803.

The United States extinguished the Indian title to it by the treaty of 1832, made by General Scott and Governor Reynolds. See Indian Treaties, 7 Stat. at Large, 374.

The sale by the United States, to the defendant, was under the act of Congress, 9 Stat. at Large, 37.

The plaintiff admits that defendant holds the land by patent from the United States.

This is the defendant's title.

It is manifest from the plaintiff's petition and exhibits that he has no title, and

1st. From the permit from the Indians. They did not and could not sell the land, and they did not profess to do so. It was but a permit to mine.

2dly. From the permit or license from Carondelet. This permit or license is improperly translated in plaintiff's petition. The words "*paysibles possessions*" and "*paysibles possessures*" in the original, which should be translated "peaceable possession," are rendered in the plaintiff's petition "full proprietorship."

The petition of Dubuque is again improperly translated in the plaintiff's petition, namely, what should be rendered "from the coast above the little river Maquoquetais to the coast of the Mesquibenanques," has been rendered "from the margin of the waters of the Maquotais," &c.

The permit from Carondelet was a mere license to work the mines, and was not intended by him as any thing more. See the permit and also the construction put upon it by Albert Gal-

latin, in his report on this claim in Senate Document No. 20, vol. 2, 28th Cong. 2d Sess.

The United States government took possession of this land immediately after the Rock Island Treaty. See the letter of General Macomb in the same document, p. 28.

That the permit from Carondelet was a mere license to work the mines, is evident from the fact that the petition of Dubuque is in the precise words required by the ordinances of Spain in reference to petitions for working the mines. See Rockwell on Mines, p. 173, §§ 2, 4. "No mines shall be worked without permission from the crown." If it had been intended as a grant, the *proces verbal* and order of survey would have been issued.

3dly. Carondelet had no legal authority to make such a grant, or to divest the crown of the title in this summary manner, because —

(a.) It was in violation of the regulations of O'Reilly. See the 1st, 2d, 3d, and 12th articles, in 2 White's Compilation, 228, *et seq.*

(b.) There was no compliance with the regulations of Morales. See those regulations, 2 White's Compilation, 472, 477, 235.

4thly. If Carondelet even had the power to make a grant of this land, and if the paper is more than a license, it was only an inchoate and imperfect title, and not such a title as will avail any thing in a court of law. This is manifest from the numerous decisions of this court on the subject of Spanish claims. In these decisions four great principles or landmarks are well settled, namely:

First. That there must be a compliance with the ordinances and regulations of Spain, to sever the land from the public domain. 2 Howard, 372.

Antoine Soulard was, at the time, and both before and after, Surveyor-General of Upper Louisiana. See Amer. St. Papers, vol. 5, p. 700. Why was no order of survey issued to him?

Second. In order to constitute a valid claim, there must be clear words of grant. United States *v.* Perchman, 7 Peters, 81; New Orleans *v.* The United States, 10 Peters, 727; United States *v.* Arredondo, 6 Peters, 691; United States *v.* King, 3 Howard, 773. There are no words of grant in this case, and no compliance with the usual and necessary forms.

Third. There must be a definite description of the land granted. United States *v.* Boisdoré, 11 Howard, 92; Choteau *v.* Eckhard, 2 Howart, 372. The description in this case is indefinite and uncertain.

Conclusion. If it should be decided that the papers exhibited by the plaintiff exhibit a full and perfect title, without any act

of Congress confirming this grant, or authorizing another tribunal to confirm it, it would be a reversal of all principles established by the previous decisions of this court on this subject.

Mr. Cushing, (Attorney-General,) after referring to the action of the executive and legislative departments of the government upon this subject, laid down the two following propositions, namely:

I. That the political power of the government, to which this court conforms its judgment in such matters, has decided against the validity of the pretended title in Dubuque.

II. That the decision of the political power of the government was a rightful one, as well on the true tenor of the alleged grant, as upon the collateral facts set forth in the printed record.

(The discussion under the first head and also the arguments under many subdivisions of the second head, must be omitted for want of room.)

II. The action of the executive and legislative departments of the government, in refusing to recognize this claim, and in disposing of the land as public domain, was right; because the documents produced by the plaintiff do not show a perfect and complete title, nor a full property and ownership in Julien Dubuque.

1. The cession by the Indians, the petition to the Baron de Carondelet, and the Baron's concession thereupon, must all be taken together as one instrument, because they are all connected by reference in the writings themselves; and so they serve to explain each other. United States *v.* King, 7 Howard, 833.

The cession by the Foxes to Dubuque appears on the face of the instrument to be a mere personal permission to occupy and work at the mine discovered by the woman Peosta, "and in case he shall find nothing within he shall be free to search wherever it shall seem good to him." That which is sold is the contents of the mine found by the woman Peosta, with the privilege of searching elsewhere.

There is no quantity, no boundary, no estate of inheritance, no location of land except the mine found. It is impossible to make of this any conveyance of land. It is a personal privilege to work the mine found, and if that should prove unproductive, to search at pleasure for another mine.

Independently of the question as to what is the nature of the Indian document, it could of course, according to the general rules established by all European governments in America, not convey any title of itself. United States *v.* Clarke, 9 Peters 168.

2. The petition to Carondelet alludes to the Indian cession and Dubuque's working of the mines, and asks only to be confirmed in the peaceable possession of that which he was in possession of under the permission of the Foxes, which is appended to the petition. No quality or duration of estate other than that contained in the Indian permission, is asked for. Sensible of this, the petitioner in this case has endeavored to eke out the petition by interpolation, and to supply defects by parol testimony, as before remarked.

3. In Carondelet's indorsement of the petition there is no order of survey, none of the usual words of a patent or complete title, no reference to the authority of the king, no grant in his royal name. It is unlike the complete titles usually granted. United States *v.* King, 7 Howard, 852.

To a complete title, to a full property in fee under the Spanish law, a survey, a formal investiture of possession by the proper officer, and a title thereupon in form, were indispensable. Until then the title was but incipient, inchoate, equitable only, not full and complete.

An example of a complete Spanish grant is given in the case of Menard's Heirs *v.* Massey, 8 Howard, 293, 314.

The difference between an incomplete, and a full comple title is well known. To the former a survey is not a prerequisite; a description reasonable to a common intent, which may be thereafter perfected by a survey, is sufficient. To the latter a survey and a formal title thereupon, duly made and duly recorded, are indispensable. O'Hara *v.* United States, 15 Peters, 282, 283; United States *v.* Forbes, 15 Peters, 173, 185; Buyck *v.* United States, 15 Peters, 215; United States *v.* Miranda, 16 Peters, 159, 160; United States *v.* Powers' Heirs, 11 Howard, 577; Heirs of Vilemont *v.* United States, 13 Howard, 266; 2 White's Recopilacion, 238, art. 15, 16.

The question here is not whether Dubuque acquired an incipient property, an equitable title, which might have been perfected into a complete title, by a survey and title in form thereupon, but whether the instrument, produced by the plaintiff, is of itself such a complete Spanish grant of a perfect title as severed an identical tract from the public domain, and conveyed it to Dubuque, so that nothing passed to the United States.

Such a complete conveyance, such a perfect title, the plaintiff has alleged, and must prove; such only can sustain his action: an incipient interest, a mere equity will not do.

To divest the sovereign of his public domain and convey it to a subject, certainty, identity, precise locality is essential. If something yet remains to be done, if a survey be yet necessary to ascertain and fix the identity of the land, the severance is not

complete, the conveyance is not perfect, the prince is not denuded of his domain, the subject is not completely invested with a private right; the prince yet holds, and the subject must look to the prince to do, by his officers, the farther acts to complete the severance, and perfect the inchoate private right into a complete title.

As in our own system land titles are progressive from an incipient, inchoate right, to a perfect title by patent, as when the purchaser at public sale has paid the price and obtained the certificate thereof of the receiver and register, or when the pre-emptioner has proved his settlement, cultivation, building, and habitation, paid the price, and received the certificate of the register and receiver, he is yet invested only with an inchoate title, and must obtain thereon an affirmance of his right and a patent in due form from the General Land Office, — so also under the Spanish dominion of Louisiana, land titles were progressive from an incipient, inchoate right, from a petition admitted or conceded, an order of survey to fix the identity of the tract of land, the formal delivery of possession thereof, the return of the procès verbal and figurative plat, up to the approval thereof by the governor, or the intendent-general, and the issue of the title in form thereupon.

Upon Dubuque's petition to Carondelet there was no order of survey, no survey, no severance of a precise quantity by defined limits from the public domain. Being only a permission to work the mines which he had opened, and not intended as a grant of the land in fee, the preliminary steps necessary to obtain such a title were not ordered nor taken.

The king, the government, the prince, cannot be disseized. Therefore a formal delivery of possession by a competent officer was required by the law of Spain.

Until a subject has acquired a legal private right to the land, his occupancy is not a disseisin of the prince; the occupant is tenant at will, his occupancy is not adverse but in subordination to the public title of the prince.

7. But the words "granted as asked" (*concedido come se solicita*) are relied upon.

The name of an instrument does not change the body and effect of the writing, no more than the title of a statute can change the purview and body of the enactment. See United States *v.* King, 7 Howard, 833.

The word "granted," is not of itself sufficient to make a complete title an ownership in fee. It may include a mere privilege to work the mines, or a tenancy at will, or an estate for a term of years, or for life, or an estate in fee, just as the words with which it is connected will authorize according to the

requirements of law. "Granted," or "grant," has no such technical meaning and effect as to convey an absolute complete title in fee. It may apply to a personal favor, a mere privilege, to any thing which is solicited.

The verbal argument, so much elaborated by plaintiff's counsel, has no force.

The petition prays of Carondelet "*accorder.*" This French word is not a word of title. It means to grant, to allow, to accord, to give, to concede, as "*accorder une grâce,*" "*accorder sa fille en mariage.*" Fleming and Tibbits, *sub voc.*

The indorsement of Carondelet is, "*concedido;*" but "*concedido*" has no force as a word of title. It is to give, grant, bestow, a loan or gift, or to grant or admit a proposition. Salvá, Dic. Castel. *sub voc.*

Even in English the word "granted," has not of itself any intrinsic efficiency to make a complete title, an ownership in fee. It may include a mere privilege to work the mines; or a tenancy at will, or an estate for a term of years, or for life, or an estate in fee, just as the words with which it is connected will authorize, according to the requirements of law. "Granted" or "grant," has no such technical or all sufficient meaning and effect as to convey an absolute, complete title in fee. It may apply to a personal favor, a mere privilege, to any thing which is solicited.

In the seventh section of the act of the 3d of March, 1807, (2 Stat. at Large, by Little & B. 441,) we have the words — "That the tracts of land thus granted by the commissioners." Here "granted" is applied to the certificates of the commissioners. But such granting by the commissioners did not invest the party to whom such a grant was made with a complete title, but the land was to be surveyed and a patent would issue thereupon in due form from the General Land Office.

So when Carondelet indorsed the petition of Dubuque, even if it had contained the interpolated words — "and to grant him the full proprietorship thereof," the petition and indorsement, "granted as asked," would have amounted to no more than an incipient, imperfect right, which could have been perfected only by a survey officially made and returned, and a title in form issued thereon in the name of the king.

8. The great question in the case is, whether the document, on which the plaintiff relies, is a complete legal title on which an action of ejectment can be sustained. This is a question, first of Spanish law, and secondly of that of the United States.

O'Reilly, under whom the Spanish power in Louisiana, after the cession by France to her was secured and established, made regulations respecting the grant of lands by virtue of the powers

given to him by the king. These regulations are dated at New Orleans, the 18th of February, 1770.

The 12th article states "that all grants shall be made in the name of the king by the governor-general of the province." 2 White, 230.

By a communication of the Marquis de Grimaldi to Unzaga, the successor of O'Reilly, of the 24th of August, 1770, (2 White, 460,) in which he states that O'Reilly had recommended that the governor alone should be authorized by his Majesty to make grants, and that orders should be given in conformity with the instructions drawn up and printed in the distribution of the royal lands, he says: "The king having examined these dispositions and propositions of the said lieutenant-general, approves them, and also that it should be you and your successors in that government only who are to have the right to distribute (*repartir*) the royal lands, conforming in all points as long as his Majesty does not otherwise dispose, to the said instruction, the date of which is February 18th, of this present year." This, be it observed, is the date of O'Reilly's regulations.

The formula observed by the Spanish governors, in making complete grants, always stated that they were made in the name of the king, and in virtue of the authority vested in them by the king.

The regulations of O'Reilly were, it is to be observed, to be the land law of Louisiana until the king should otherwise dispose. The laws of the Indies had nothing to do with the subject.

The Council of the Indies approved of the regulations of O'Reilly. 2 White, 463–4. Unzaga succeeded O'Reilly; Galvez succeeded him, 1779; Miro succeeded him, 1786; Carondelet, him, 1791; Gayoso, him, 1796, who made new regulations in 1797. 2 White, 231.

It was during Gayoso's administration that the granting of lands was taken away from the governor and vested in the intendant, at the instigation of Morales, who became vested with power, and issued his regulations in 1799.

The regulations of O'Reilly, approved as they were by the king, were the regulations in force at the time of the alleged grant by Carondelet to Dubuque.

The regulations of Hita, made long afterwards, and in Florida, have nothing to with the case.

But the court has already decided that an order or instrument, like that in the present case, "granted," &c., is an incomplete title, and not a perfect grant.

The act of 1824, with respect to land-titles in Missouri, it will be remembered, applies, and gives the court jurisdiction only in the cases of incomplete titles.

Under this act a petition was filed by John Smith, T., claiming a tract of land under a petition to Carondelet, at the bottom of which were these words: "New Orleans, 10 February, 1796, Granted. The Baron de Carondelet."

The court acted on this as an incomplete title and confirmed it. Smith *v.* United States, 10 Pet. 328.

So it was held in the case of the Florida Land Cases. By the act of 1828, (4 Stat. at Large, 285) these claims were to be adjudicated according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, for claimants in the State of Missouri, by the act of 26th May, 1824. The Florida courts had, therefore, only jurisdiction in the cases of incomplete titles. In the case of the United States *v.* Wiggins, the alleged grant by Governor Estrado, was, — "The tract which the interested party solicits, is granted to her, without prejudice to a third party, &c." The court took jurisdiction of this as an incomplete grant, but dismissed the petition on the merits. 14 Pet. 345.

These cases show that the word "Granted" does not make a complete title, and is not used exclusively in relation to complete titles to land.

The title is complete or incomplete according to the body of the writings, whether the word "Granted" be or be not used.

The document relied upon by the plaintiff bears no resemblance to a Spanish complete title, made in pursuance of the regulations of O'Reilly, approved and ordained by the king as irrevocable, except by his own order. See the letter of the Marquis of Grimaldi to Unzaga, of 24th August, 1770; 2 White's Recopilacion, p. 460.

It was only a permit to Dubuque to work the mines, that he might avoid a violation of the law of Spain, which ordained that no mine shall be worked without permission from the crown. Rockwell on Spanish Mines, p. 170, 173, c. 5.

Being but a concession to Julien Dubuque to work the mines, it was revocable at will, and died with him if not previously revoked.

Had Carondelet intended to grant a title in fee to such a body of land and the mines, he would not have neglected his duty so far as not even to have preserved the evidence thereof in the public archives. Neither would Dubuque have neglected the matter so important to the security of such an estate. But viewing the instrument as a personal permit to work the mines, the conduct of Carondelet and Dubuque is consistent with the law.

Mr. Justice WAYNE delivered the opinion of the court.

It is necessary to make a statement of the facts of the case

from the pleadings, in order that the opinion which we shall give may be fully understood.

It is a suit for the recovery of land, but not according to the form of the proceedings in ejectment. It is a petition according to the course of pleading allowed in the courts of Iowa, (which has been adopted by the District Court of the United States,) setting forth in detail the facts upon which the petitioner claims the ownership of the land.

The petitioner, Henry Chouteau, states that he is the owner of several tracts of land, and that they are wrongfully withheld from him by the defendant, Patrick Molony. It is admitted that Molony purchased the lands from the United States, and that he has a patent for them. But the validity of the patent is denied, upon the ground that the land had been granted to Julien Dubuque by the authorities of Spain, before Louisiana had been transferred by France to the United States.

Dubuque's claim is said, by the petitioner, to be a purchase from the Fox Indians of a large tract of land situated in what is now the Dubuque Land District.

It is described as bordering on the Mississippi River, extending from the Little Makoketa River to the mouth of the Musquabinenque Creek, now called Tete des Morts. The purchase, it is said, was made at Prairie du Chien, from the chiefs of the Fox Indians, on the 22d September, 1788. In proof of it, an instrument in writing, in French, is produced, with a translation into English.

It is further stated that Dubuque paid the Indians for the land in goods when the writing was executed. The petitioner then states, that the chiefs of the Fox Indians, a few days afterwards, assented to the erection of monuments, and that they were erected at the mouths of the rivers just mentioned, as evidence of the upper and lower boundaries of the tract of land.

It is also said that Dubuque occupied the land from the time it was sold to him; that he made improvements on it, cleared an extensive farm, constructed upon it houses and a horse-mill; that he cultivated the farm and dug lead ore from the land, which he smelted in a furnace constructed for that purpose. This land was in the Spanish province of Louisiana; Dubuque resided on this land from 1788 to his death in 1810. Upon his first settlement there, he employed ten white men as laborers, who removed from Prairie du Chien to enter his service; that the white inhabitants who resided on the land were almost entirely persons who had been inhabitants of Prairie du Chien before Dubuque made his settlement, and that other persons from that town entered into his service in the interval between the date of his contract with the Indians and the time when he ap-

plied to the Governor of Louisiana, the Baron de Carondelet, for the confirmation of the sale of the Indians to him. It also appears that Dubuque, from the time he made his settlement until the province of Louisiana was transferred to the United States, did not permit any one to carry on business on the land without having first obtained his consent, and that he drove forcibly from it a person named Guêrien, who came there with goods to trade.

It seems, too, that Dubuque was a man of enterprise; that, during his residence upon this land, he exercised great influence over the Indians on both sides of the Mississippi River; and that the Winnebagoes on the east of it, and the Foxes on the west of it, were in the habit of consulting with him upon their more important concerns.

It will be remembered that Dubuque's settlement on the land began with the date of his bargain with the Fox Indians, which was the 22d of September, 1788. Eight years afterwards, or to be precise, on the 22d of October, 1796, Dubuque presented to the Baron de Carondelet, at the city of New Orleans, his petition for a grant to him of the land which he alleges he bought from the Fox Indians, by his contract with them of the 22d of September, 1788, and their subsequent assent to the erection of the monuments upon the Makoketa and Tête des Morts, as designations of the boundary of the land on the Mississippi River. The governor referred his petition to Andrew Todd, an Indian trader, who had received a license for the monopoly of that trade, for Todd to give to him information of the nature of Dubuque's demand. Todd replied, that he had acted upon the reference of the memorial, saying, that as to the land for which he asked, nothing occurred to him why it should not be granted, if you deem it advisable to do so; with the condition, nevertheless, that Dubuque should observe his Majesty's provisions relating to the trade with the Indians, and that he should be absolutely prohibited from doing so unless he shall have Todd's consent in writing.

Upon this answer of Todd, Governor Carondelet makes this order: Granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd.

The contract with the Indians, Dubuque's petition to the governor, the reference of it to Todd, Todd's return of it with his written opinion, and the governor's final order, are here annexed.

The exhibit referred to in the petition, and filed therewith, and marked A, is in the words and figures following, to wit:

Exhibit A. — Conveyance from Foxes to Dubuque.

Copie de conseil tenu par Messrs. les Renards, c'est à dire, le

chef et le brave de cinque villages avec l'approbation du reste de leur gens, expliqué par Mr. Quinantotaye, deputé par eux, en leur presence et en la notre, nous soussignés, sçavior, que les Renards permette à Julien Dubuc, appelé par eux la petite nuit, de travailler à la mine jusqu'à qui lui plaira, des s'en retirer sans lui specifier aucun terme; de plus, qu'il lui vende et abandonne toute la côté et contenu de la mine trouve par le femme Peosta, que sans qu'aucuns blancs ni sauvages, ni puissent pretendre sans le consentment du Sr. Julien Dubuc; et si en cas ne trouve rien dedans, il sera mêtre de cherche où bon lui semblera, et de travailler tranquillement, sans qu'aux qu'un ne puisse le nuire, ni portez aucune prejudice dans ses travaux; ainsi nous, chef et brave, par la voie de tous nos villages, nous sommes convenu avec Julien Dubuque, lui vendant et livrant de ce jour d'hui comme il est mentionnés ci-dessus, en presence de François qui nous attende, qui sont les temoins de cette piêce, à la Prairie du Chien, en plein conseil le 22 7br., 1788.

BLONDEAU,
ALA sa x marque. AUSTIN,
AUTAQUE.

BAZIL sa x marque. TEREN, temoin,
BLONDEAU marque x DE QUIRNEAU, tobague.
JOSEPH FONTIGNY, temoin.

The exhibit referred to in the petition, and filed therewith, and marked B, is in the words and figures following, to wit:

Exhibit B.— A Translation of A.

Copy of the council held by the Foxes, that is to say, of the branch of five villages, with the approbation of the rest of their people, explained by Mr. Quinantotaye, deputed by them in their presence, and in the presence of us, the undersigned, that is to say, the Foxes, permit Mr. Julien Dubuque, called by them the Little Cloud, to work at the mine as long as he shall please, and to withdraw from it, without specifying any term to him; moreover, that they sell and abandon to him all the coast and the contents of the mine discovered by the wife of Peosta, so that no white man or Indian shall make any pretension to it without the consent of Mr. Julien Dubuque; and in case he shall find nothing within, he shall be free to search wherever he may think proper to do so, and to work peaceably without any one hurting him, or doing him any prejudice in his labors.

Thus we, chief and braves, by the voice of all our villages, have agreed with Julien Dubuque, selling and delivering to him this day, as above mentioned, in presence of the Frenchmen who attend us, who are witnesses to this writing.

At the Prairie due Chien, in full council, the 22d of September, 1788.

BLONDEAU,
ALA AUSTIN, his x mark,
AUTAQUE.

BAZIL TEREN, his x mark,
marque
BLONDEAU DE x QUIRNEAU, } Witnesses.
tobague.
JOSEPH FONTIGNY.

The exhibit referred to in the petition, and filed therewith, and marked H H, is in the words and figures following, to wit:

Exhibit H H.—Petition of Dubuc to Carondelet, &c.

A son excellence le BARON DE CARONDELAIS:

Le tres humble suplyent de votres excellence, nommé Julien Dubuque, aiant faites une abbitation sur les frontier de votres gouvernements, au millieux des peuples sauvages, qu'il sont les âbiteurs du pays a achetée une partye de terre de ces indients avect les mines qu'il quontient, et par sa parsaverances a surmonter tous les optacles tous contenzes que densgerenzes est parvenue approi bien des travences à être paysibles possesseures d'unes partye de terre sur la rives occidentalle du Mississypi, à quil il a donnee le nom des mines d'Espagnes, en mêmoir du gouvernements aqui il appartenais. Comme le lieux de l'abitation n'est qu'un point, et les diferentes mines qu'il travailles sont et parts et à plus de trois lieux de distences les unes des autres, le très humbles supplyant prit votres excellences de vouilloir bient lui accorder la paysibles possessions des mines et des terres, qui ai à dire, depuis les cautes d'eau aux de la petites rivier Maquanquitois jusque au quantes de Mesquabysnanques, ce qu'il formes environt sept lieux sur la rives occidentalle du Mississippye, sur trois lieux de profondeure, que le très humbles supliant *anzes* esperer que vos bontée vousdrats bien lui accorder sa demandes et prit settes même bonti qu'il fait le bonneur de tous de sugaits, de me pardonner mon stille, et de vousloir bient aprouver la pure smplicitée de mon cœur au defaux de mon elloquences. Je prie de ciel de tous mon pouvoir possibles qu'il vous conserves et qu'il vous combless de tous ses bientfait; et je sui et serez toutes ma vie, de votres excellences le très humbles et très auxbeissents, et très soumis servitteur.

J. DUBUQUE.

Order to Todd.

NUEVA ORLEANS, 22 *de October de* 1796.

Informe el comerciante Dn. Andres Todd, sobre la naturaleza de esta demanda. EL BARON DE CARONDELET.

Information of Todd.

S'OR GOB'OR: Compliendo con el superior decreto de V. S. en que me manda informar sobre la solicitud del individuo interesado en el antecendente memorial, debo decir, que en quanto á la tierra que pide, nada se me ofrece, en que V. S. se la conceda, si lo halla por conveniente, con la condicion sin embargo de observara el concesionario lo prevenido por S. M. acerca de la treta con los Indios, y que esta se le prohibira absolutamente á menos que notenga mi consentimiento por escrito.

Na. Orleans, 29 de Octubre de 1796. ANDREW TODD.

Order of Carondelet to Dubuc.

NUEVA ORLEANS, *de Noviembre de* 1796.

Concedido como se solicita baxo las restricciones que el comerciante Dn. Andres Todd expresa en su informe.

EL BARON DE CARONDELET.

Certificate that H H is a true copy of the original paper withdrawn by plaintiff, by leave of court.

The foregoing two pages have been prepared by me in pursuance of an order of court to that effect, and is a true copy of Dubuque's petition, the interlocutory orders of the Baron de Carondelet and Andrew Todd, and the final order of the Baron de Carondelet.

Witness my hand, this 9th January, 1852.

T. S. PARVIN, *Clerk.*

The exhibit referred to in the petition, and filed therewith, and marked C, is in the figures and words following, to wit:

Translation of H H.

To his excellency, the BARON DE CARONDELET:

Your excellency's very humble petitioner, named Julien Dubuque, having made a settlement on the frontiers of your government, in the midst of the Indian nations, who are the inhabitants of the country, has bought a tract of land from these Indians, with the mines it contains, and by his perseverance has surmounted all the obstacles, as expensive as they were dangerous, and, after many voyages, has come to be the peaceable possessor of a tract of land on the western bank of the Mississippi, to which [tract] he has given the name of the

"Mines of Spain," in memory of the government to which he belonged. As the place of settlement is but a point, and the different mines which he works are apart, and at a distance of more than three leagues from each other, the very humble petitioner prays your Excellency to have the goodness to assure him the quiet enjoyment of the mines and lands, that is to say, from the margin of the waters of the little river Maquanquitois to the margin of the Mesquabysnonques, which forms about seven leagues on the west bank of the Mississippi, by three leagues in depth, and to grant him the full proprietorship * thereof, which the very humble petitioner ventures to hope that your goodness will be pleased to grant him his request. I beseech that same goodness which makes the happiness of so many subjects, to pardon me my style, and be pleased to accept the pure simplicity of my heart in default of my eloquence. I pray Heaven, with all my power, that it preserve you, and that it load you with all its benefits; and I am, and shall be all my life, your Excellency's very humble, and very obedient, and very submissive servant.

J. DUBUQUE.

NEW ORLEANS, *October*, 22, 1796.

Let information be given by the merchant, Don Andrew Todd, on the nature of this demand.

THE BARON DE CARONDELET.

SENOR GOVERNOR: In compliance with your superior order, in which you command me to give information on the solicitation of the individual interested in the foregoing memorial, I have to say that, as to the land for which he asks, nothing occurs to me why it should not be granted, if you deem it advisable to do so; with the condition, nevertheless, that the grantee shall observe the provisions of his Majesty relating to the trade with the Indians; and that this be absolutely prohibited to him, unless he shall have my consent in writing.

New Orleans, October 29, 1796. ANDREW TODD.

NEW ORLEANS, *November* 10, 1796.

Granted as asked, under the restrictions expressed in the information given by the merchant, Don Andrew Todd.

THE BARON DE CARONDELET.

The defendant in this suit demurred, and for causes of demurrer says:

1. Admitting all the facts of the petition to be true, the plaintiff is not entitled to recover.

* "Peaceable possession" is the proper translation of the original.

2. As it appears by the exhibits to the petition that the plaintiff claims under an unconfirmed Spanish title, he has no standing in a court of law.

3. That it appears, from the plaintiff's own showing, that he rests his title upon an incomplete Spanish grant, and that the defendant is in possession under a complete title from the United States.

It appears, then, that the petitioner claims under the Indian instrument of writing, termed by him a sale, and in virtue of a confirmation of it into a grant by the Governor of Louisiana, the Baron de Carondelet, dated the 10th November, 1796. We shall consider the case, as it was argued by all of the counsel, as presenting but one question.

Was the grant which the Baron de Carondelet made to Julien Dubuque, a complete title, making the land private property, and therefore excepted from what was conveyed to the United States by the Treaty of Paris of the 30th April, 1803?

Our inquiry begins with the examination of that paper introduced by the petitioner as the Indian contract of sale to Dubuque.

After reciting that the paper is a copy of the council held by the Foxes and the braves of the five villages, with the approbation of the rest of their people, these words are found in that paper: "The Foxes permit Mr. Julien Dubuque, called by them the Little Cloud, to work at the mine as long as he shall please, and to withdraw from it without specifying any time to him; moreover, that they sell and abandon to him all of the coast or hills and contents of the mine discovered by the wife of Peosta, so that no white man or Indian shall make any pretension to it without the consent of Mr. Julien Dubuque; and in case he shall find nothing within, he shall be free to search wherever he may think proper to do so, and to work peaceably, without any one hurting him or doing him any prejudice in his labors." From these terms it is plain that Dubuque was treating with the Indian council for a mine, the mine of Peosta, with all the coast or hill, and the contents of that mine, with the privilege to open other mines, protected in doing so from all interferences in the event that he should not find ore in the Peosta mine. The words, that they sell and abandon to him all the coast and the contents of the mine discovered by the wife of Peosta, are the only words from which it can be implied that they were selling land. Admitting that they do so, the words "all the coast" of the mine Peosta cannot be enlarged to mean more than the land which covered its ramifications and the land contiguous to them, which was necessary for the operations of the miners and for their support. We say so because such were

the allowances under the mining ordinances of Spain. We shall see hereafter how that was determined by the Spanish ordinances regulating the mines. But to make it more certain that the Indians meant to sell a mine, and that Dubuque was bargaining for a mine, the contract of sale conveying it to him, with the extended privilege to open other mines if that bought should turn out to be deficient in ore, the council conclude their paper thus: "We, the chiefs and braves, by the voice of all of our villages, have agreed with Julien Dubuque, selling and delivering to him this day, as above mentioned, in the presence of the Frenchmen who attend us, who are witnesses of this writing." There are no words in this paper, except the words "all the coast" of the mine of Peosta, conveying any other land, either as to locality, quantity, or boundary. When it is remembered, too, that this paper or contract was written by Frenchmen, and that one of them explained to the Indians what it meant or what the paper contained, and that it was witnessed by other Frenchmen, some of whom could read and write, it is hard for us to suppose that they meant by it to convey to Dubuque the large tract of land which he afterwards claimed, or that they did not honestly, fairly, and fully write only that which the Indians meant to do. At all events, if the words of the paper are doubtful as to what the Indians meant to sell, as the copy of the council is written in a language which they could neither read nor fully understand, it will be but right to hold it as an uncertainty, and not to permit their bargainee, Dubuque, or his alienees, to give it a fixed meaning in their own favor.

But let it be admitted that the words of the copy of this Indian council are obscure and ambiguous, so as to express its meaning imperfectly, and that a resort may be made to exterior circumstances connected with the transaction to ascertain its intention. There are no such proofs in the case — nothing of the kind to guide us to a different conclusion than that which the paper expresses. Dubuque, the interested party, is made to say, in the plaintiff's petition, that a few days after the Indian sale was executed, the chief, in the presence of Dubuque, assented to the erection of monuments at the mouth of the Little Makoketa, and at the mouth of the Tête des Morts, as evidence that the former was the upper and the latter the lower end of the Mississippi River boundary line of the large tract, and that the monuments were actually erected. With the exception of the erected monuments, the same is repeated in Dubuque's memorial to Governor Carondelet for a grant; but with this remarkable addition for the first time, that the tract from the points mentioned on the river was to a depth of three leagues. depth is not in the copy of the Indian council. It was not

stipulated for by Dubuque, nor in any way mentioned by or to the chiefs when they assented to the erection of monuments. It will be seen at once that it was necessary for him to give depth to the tract when he applied to the governor for a grant, in order to give certainty to his previous declaration that he had bought the land from the Indians. Without having a given depth, the tract could not have been surveyed as to quantity or boundaries. On that account it would, under the Spanish law, as well as our own, have been void for its uncertainty. Indeed, we cannot think otherwise than that the statement in the petition in this case is contradictory to Dubuque's petition for a grant of the land, and that the first must be taken as the fullest extent, of any arrangement between Dubuque and the Indians subsequently to their sale to him of the Peosta mine, with a privilege to search elsewhere if that mine should fail. The erection of monuments within certain distances upon the river was consistent with the privilege to search for other mines. In the absence of all words from which it can be inferred that a sale of land was meant, the monuments, as points mentioned on the river, can have no other reference than to the privilege to search for mines. This, in our view, is the sound interpretation of the Indian contract, and the statement made of it in the petition in this suit.

It would certainly be a novelty, even in the looseness with which grants of land were made in Louisiana, if a grantee or one claiming under him was permitted by his own declaration to amend and enlarge a specification defective in the particulars of quantity and boundaries.

Our interpretation of the paper, given by the Fox Indians to Dubuque, will be much strengthened, if it needs it, by a brief statement of what were the rights of the Indians in those lands and to the mines.

Spain, at all times, or from a very early date, acknowledged the Indians' right of occupancy in these lands, but at no time were they permitted to sell them without the consent of the king. That was given either directly under the king's sign-manual, or by confirmation of the governors representing him. As to the mines, whether they were on public or private lands, and whether they were of the precious or baser ores, they formed a part of what was termed the royal patrimony. They were regulated and worked by ordinances from the king. These ordinances were very many, differing, and contradictory. It is very difficult, though aided by the best commentaries upon them, to determine in all instances how far the older ordinances were repealed by those subsequently made, or how much of both of them remained in force. As to the rights of the crown, however,

there can be no uncertainty. By the law of the Partida, law 5, title 15, Partida 2, Rockwell, 126, the property of the mines was so vested in the king that they were held not to pass in a grant of the land, although not excepted out of the grant; and though included in it, the grant was valid as to them only during the life of the king who made it, and required confirmation by his successors.

The law 11, title 28, Partida 3:

"The returns from the port, salt-works, fisheries, and iron-works, and from the other metals, belong to the emperors and kings, and all these things were granted to them that they might have wherewith an honorable establishment to defend their lands and kingdoms, and to carry on war against the enemies of the faith, and that they might have no need to load their people with great or grievous burdens." Rockwell, 126. Rockwell also says, by the law 8, title 1, book 6, of the Ordenamiento Real, (we have not seen the original,) copied in law 2, title 13, book 6, Collection of Castile, that all mines of gold, silver, or any other metal whatsoever, and the produce of the same, were declared to be the property of the crown, and no one was to presume to work them except under some especial license or grant previously obtained, or unless authorized by immemorial prescription. This rule was afterwards moderated by law 1, title 13, book 6, Collection of Castile, so far as to permit any person to dig or work mines in his own land or inheritance, or with the permission of the proprietor in that of any other individual; the miner retaining for himself, after deducting expenses, one third of the produce, rendering the other two thirds to the king. Rockwell, 126. Subsequently the profitless return of the mines in the Spanish dominions induced Philip 2d, acting with the council and chief accountants of the mines, to reserve all grants which had been made of them, whether they were in private or in public ground. The object of this proceeding was to throw open to all of his subjects the right to search for mines both in public and private grounds, giving to the owner of the latter a compensation for damages and a third part of the produce. Law 4, title 13, book 6, Collection of Castile, Rockwell, 126. By a second ordinance of Philip, all persons, natives and foreigners, were permitted to search for mines. It was declared that the finders of them should have a right of possession and property to them, with a right to dispose of them as of any thing of their own, provided they complied with the rules of the ordinance, and paid to the crown the seignorage required. These privileges were afterwards extended to the Indians by name, as may be seen by law 1, title 19, book Collection of the Indies. Rockwell, 128-387. Such were

the regulations of Spain in respect to the rights of the Indians in lands and mines before Louisiana became a part of her dominions, from the cession of it by France in 1763.

What were the regulations of France in respect to mines in her colonies, we need not inquire into, as the transaction we have before us happened after France had parted with the province, and after Spain had legislated new ordinances upon the subject of mines, which were applicable to all of her dominions, as well those in North as in South America. We mean the ordinances entered in the General Land Office of the Indies, at Madrid, the 25th of May, 1783. In chapter 5 of these ordinances, the king declares that mines are the property of his royal crown; that without separating them from his royal patrimony, he grants them to his subjects in property and possession, in such manner that they may sell, exchange, pass by will, either in the way of inheritance or legacy, or in any other manner to dispose of all their property in them, upon the terms they themselves possess them, to persons legally capable of acquiring. The grant depended upon two conditions: that the proportions of metal reserved were paid into the royal treasury, and that the mines were worked subject to the ordinances. To all the subjects of the king's dominions, "both in Spain and the Indies, of whatever condition or rank they may be," were granted the mines of every species of metals, but foreigners were not permitted to acquire or work mines as their own property, unless they were naturalized, or did so expressly under a license. The right of the Indians to work the mines, upon their own account, was at one time questioned. It was determined that they could do so. Law 14, title 19, book 4, Collection of the Indies, Rock. 137. And the mines discovered by Indians were declared to be, in respect to boundaries, on the same footing, without any distinction, as those worked or discovered by Spaniards. Besides the other privileges secured by this ordinance to the owners of mines upon the public lands, they had the right to use the woods on mountains in the neighborhood of them, to get timber for their machines, and wood and charcoal for the reduction of the ores. Rockwell, 82, § 12, c. 13. Besides the privileges just stated, they were exempted from a strict compliance with the ordinance in respect to the registry of their mines. Indeed, every indulgence was given to them. Much care was taken to preserve for them their property in mines, and to give them the means of working them. With these rights and privileges it is much more natural to construe the contract of the Foxes with Dubuque into a sale and a purchase of mines, than into a transfer of lands.

We will now consider Dubuque's petition to Governor Ca-

rondelet the reference of it to Todd for information on the nature of the demand; Todd's reply, and the governor's final order. — Dubuque makes his purchase from the Indians the foundation of his prayer for a grant, and the inducement for the governor to give it. He asks the governor to accord to him the peaceable possession of the mines and lands, which is to say, from the hills above the little river Maquanquitois as far as the hills of Musquabinenque, which forms seven leagues on the western bank of the Mississippi, by three leagues in depth. We do not doubt that Dubuque meant to ask for lands as well as mines, and that his object was to get a grant for this large body of land. But the true point here is not what he meant to ask for, but what he had a right to ask for under his contract with the Indians, and what the governor meant to grant, and could grant under that contract. Mining was the motive which induced Dubuque to make his settlement among the Indians. It had been his pursuit and occupation for eight years before he petitioned the governor; the governor referred the petition to Andrew Todd for information on the nature of the demand. Todd replies, "I have to say that, as to the land for which he asks, nothing occurs to me why it should not be granted by your lordship, if you find it convenient, with the condition, nevertheless, that the *concessionario* shall observe the provisions of his majesty as to the trade with the Indians, and that this be absolutely prohibited to him, unless he have my consent in writing." The governor's order is granted as asked, or conceded as petitioned for, under the restrictions which the merchant, Mr. Andrew Todd, expresses in his report.

We have here, then, three things to note. First, land is described out of the contract of the Indians with Dubuque; next, that it is to be granted upon a condition; and third, that it is conceded as asked, under the restrictions expressed in the report of Todd. "Granted as asked," is the governor's order. It cannot be said that this is referable alone to the quantity of land asked for by Dubuque, and not to his statement that he had bought that quantity from the Indians, and that its boundaries were coincident with his description of them. There is no such description in the Indian sale to Dubuque. It is a misstatement of a fact. Admitting that the chiefs of the Fox Indians assented to the erection of monuments at the mouth of the Little Makoketa and at the mouth of the Tête des Morts, and that it was done to mark a boundary; when it is found that nothing was said by them or by Dubuque at that time descriptively of a tract of land which could be surveyed, the inference is that the monuments were marks within which and from which Dubuque was permitted to search for mines, and to

work them in the event that the mine of Peosta did not yield ore.

It cannot be presumed that the governor had not read the petition before he gave his order upon Todd's information; or that when giving, it was not his intention to confer upon Dubuque the benefit of his purchase from the Indians. He referred the petition to Todd for information. It was a reference out of the usual course of proceeding when applications were made for grants of land. Todd had neither agency nor office, or knowledge in such matters. The officials of the land office were not called upon. In every other grant made by the Baron Carondelet, the applications for them were so referred. Notwithstanding the very large grants which were made by him, under all the circumstances of each case, whether pressing or otherwise, gratuitous or for a consideration, he scrupulously adhered to all the forms and the essentials which custom, usage, and the law had imposed upon the granting of lands. The cause for his reference of Dubuque's petition to Todd is obvious. We find it in the petition in this suit. Dubuque had undertaken to interfere with others who attempted to trade with the Indians. It is said that he had not permitted any one to carry on that trade on the land from the time he had made his purchase from the Indians, and that he had driven from it forcibly a person who had, without his consent, landed goods upon it with an intention to sell them to the Indians. This, it appears from Todd's report, he had no right to do. The Indian trade was regulated by ordinances from the king. Todd had obtained the privilege to carry it on, and to exclude others from doing so without his consent. From his report it may be inferred that Dubuque had done so, its language being "that this (trade) be absolutely prohibited to him, unless he shall have my consent in writing." The governor recognizes Todd's right to give that consent. His order is, granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd. This is a very novel condition to be annexed to a grant of land in full proprietorship, if the governor meant to give such a grant. Does it not rather imply that the governor meant to permit him to continue in the quiet enjoyment of the mines, and to work them, with the use of the lands, as the Indians had permitted him to do for eight years, notwithstanding what had been Dubuque's irregular interference and appropriation of the trade with the Indians. With such a condition it was revocable by the governor upon any imputation that he had violated it. It would not have been right to recall the order without proof of the transgression of it; but if that could be a subject of inquiry at all, it shows that though Dubuque asked for lands and

mines, that the governor had not made an unconditional grant of lands.

It is scarcely possible that such a reference of Dubuque's petition would have been made; that the subject of Indian trade should have been introduced into the affair by Todd; and that the governor should have recognized it as a cause for qualifying the terms in which grants of land were made; and that every official agency in making grants of land should have been disregarded, if it had been the intention of the governor to make to Dubuque a grant of the land as property, without any reference to his declaration that he had bought it from the Indians, and to the fact stated in the petition, that he was then working the mines "three leagues apart from each other."

The law for granting lands was, that the grants were to be made with formality, in the name of the king, by the governor-general of the province; that when the order to grant was given, that a surveyor should be appointed to fix the boundaries, and that the order itself should be registered in the land office, with the memorials and other papers, whatsoever they might be, which had induced the governor to make the grant. The practice of the governors, including the Baron de Carondelet, corresponded with all of the requirements just mentioned. Nothing of the kind was done in this case. The whole proceeding was kept from the proper office in New Orleans, where, by law and usage, an entry of it should have been made. Dubuque did not ask for a survey; he took with him the papers. The first notice given of the existence of them came from Dubuque himself, after the transfer of Louisiana to the United States, when the richness of the lead mines on the upper part of the Mississippi had attracted the attention of the public and of Congress. Rumors had reached the government at Washington that Dubuque claimed the richest of them, and that speculators were trying to get from him an interest in them. At that time it became necessary to explore the upper Mississippi and its sources, with the view of obtaining general information for military and legislative purposes, and more definite knowledge of what were the boundaries of Louisiana. Lieutenant, afterwards our distinguished General Pike, was detailed, with a sufficient exploring force, for that purpose. Among other things he was charged, when he arrived at what were called the Dubuque mines, to make particular inquiries about them, and into Dubuque's claim. He had an interview with Dubuque at his residence, some six or seven miles from the mines, but did not make an inspection of them, as Dubuque could not furnish him with transportation to their locality, and he then had been attacked with fever. He proposed however, to Dubuque, seve-

ral questions in writing, and we have the paper, with the answers, signed by both of them. They are curious and reserved upon the part of Dubuque, and may find a place here without interfering with the part of the argument which we are now upon: "What is the date of your grant of the mines from the savages? Answer. The copy of the grant is in Mr. Soulard's office at St. Louis. What is the date of the confirmation by the Spaniards? The same answer as to query first. What is the extent of your grant? The copy of the grant is at Mr. Soulard's office at St. Louis. What is the extent of the mines? Twenty-eight or twenty-seven leagues long, and from one to three broad. Lead made per annum? From 20 to 40,000 pounds. The answers to the other questions are equally indefinite, and all were so excepting as to the place where the grant could be found." 1 Appendix to Pike's Expedition, 5. These answers, however, were communicated to Mr. Gallatin before the commissioners for adjusting land claims had made their report, and they serve to show that when he made his report to the President upon the Dubuque claim, that he had done so with his usual care and caution. Whatever was then in Mr. Soulard's office at St. Louis, connected with it, he had obtained. His report is not liable to the censure which was cast upon it in the argument; for if it be defective in clerical particulars, his conclusion is sustained both by knowledge and principle.

We return to the point which we left to give the extract from Pike. It was, that there were not upon Dubuque's petition any of the customary forms, or required proceedings, which had always been observed by the Spanish governors in making grants of lands. They were not only omitted by the governor, but were not asked for by Dubuque; or if he did ask, there was not a compliance with the request. The papers were kept by him without any action upon them until after the United States had acquired Louisiana.

This conduct varies so much from the ordinary action of persons under like circumstances, that it may very properly be mentioned with the other incidents of this case, which have led us to the conclusion that the governor's order was not meant to concede to him more than the quiet enjoyment and peaceable possession of the mines, and such lands as the mining ordinances permitted to be used for working them. The objection with us is not that Dubuque had not caused a survey to be made, but that he had not obtained, that the governor had not given, an order for such purpose. We think it could not have been done by Soulard or any other official Spanish surveyor. No one of them would have ventured to stretch a chain upon the land with a view of separating it from the

public domain, without special authority to do so from the governor. Such an order was the uniform accompaniment of a grant, and without it a concession was incomplete: though, when given, if circumstances such as were mentioned in the argument of this case interfered with its execution, it did not lessen the completeness of the title, if the description of the land was such that it could be carried into a survey. There ought not to have been in this case, any apprehension of Indian interference with a survey, after Dubuque's residence of more than eight years among them, if their understanding had been for all of that time that they had sold to him the land. His relations with them are represented to have been friendly and influential in their more important concerns; and if, as is stated, he kept all intruders from the land in its whole extent, claiming it as his property, and not permitting any one to come upon it to trade with the Indians, and keeping that trade for himself — all of this with the acquiescence of the Indians — it is not probable that fears of their opposition to it prevented him from getting an order of survey, or from having run from the monuments the three lines which would have comprehended his description of the land. It is certain that he had no order for a survey. It is equally certain, as it had not been given by Governor Carondelet, that he could not have obtained it from his successor, Gayoso de Lemos. It will not do in such cases to indulge conjecturally, as to the motives of Dubuque for such conduct, but sometimes historical facts clear up difficulties which cannot be explained in any other way. Governor Carondelet's commission had been recalled, and his successor, Gayoso, appointed, before the former had given his order upon Dubuque's petition. He was then only holding over until the arrival of his successor from Natchez. Gayoso lost no time; perhaps urged to it by very recent larger grants which his predecessor had made, and which were complained of, in announcing that in respect to the quantity to be granted, he would enforce the regulations of O'Reilly, not only in Opelousas, Attacapa, and Nachitoches, but throughout the province. From that moment, Dubuque's claim was, at all events, if he had any rightful claim for land from his Indian contract, reduced to a league square, unless it could be shown that it had been already confirmed by Governor Carondelet; and this course was preferred in the assertion of title to it before the tribunals of the United States.

In our construction of the muniments of title of this case, we have considered them, as he does, as one instrument, and so they were treated in the argument — that each might aid to explain the other, and that the truth might be obtained from

the whole of them in regard to this transaction. Our conclusion is, Dubuque's contract with the Fox Indians was a sale to him of the Peosta mine, with its allowed mining appendages, with the privilege to search for other mines in the event that ore was not found in that mine; and that the order of Governor Carondelet, upon his petition, was not meant to secure to him the ownership of the lands described in his petition.

The real importance of this case, the interests involved, and the notoriety which has been given to the Dubuque claim for more than forty years, in Congress and out of it, do not permit us to stop this opinion with the conclusion just announced. Hitherto the case has been considered in connection with the documents upon which the plaintiff relies, and as if Governor Carondelet had official authority to make a grant of the land upon the petition of Dubuque. We will now present another view of it. Dubuque prays for a concession of what was then Indian land, which had been in the occupancy of the Indians during the whole time of the dominion of Spain in Louisiana, and which was not yielded by them until it was bought from them by treaties with the United States. It is a fact in the case, that the Indian title to the country had not been extinguished by Spain, and that Spain had not the right of occupancy. The Indians had the right to continue it as long as they pleased, or to sell out parts of it — the sale being made conformably to the laws of Spain, and being afterwards confirmed by the king or his representative, the Governor of Louisiana. Without such conformity and confirmation no one could, lawfully, take possession of lands under an Indian sale. We know it was frequently done, but always with the expectation that the sale would be confirmed, and that until it was, the purchaser would have the benefit of the forbearance of the government. We are now speaking of Indian lands, such as these were, and not of those portions of land which were assigned to the Christian Indians for villages and residences, where the Indian occupancy had been abandoned by them, or where it had been yielded to the king by treaty. Such sales did not need ratification by the governor, if they were passed before the proper Spanish officer, and put upon record.

The Indians within the Spanish dominions, whether christainized or not, were considered in a state of tutelage. In the Recopilacion de las Leges de las Indias, a part of the official oath of the Spanish governors was, that they would look to the welfare, augmentation, and preservation of the Indians. Book 5, c. 2. Again: Indians, although of age, continue to enjoy the rights of minors, to avoid contracts or other sales of their property — particularly real — made without authority of the judi-

ciary or the intervention of their legal protectors. Solerzanos Politica Indiana, 1, 209, §§ 24, 42. Indians are considered as persons under legal disability, and their protectors stand in the light of guardians. 46, 51. The fiscal in the audiencia were their protectors, but in some cases they had special protectors. When Indians dispose of their landed property or other thing of value, the sale is void unless made by the intervention of the authorities, or of the protector-general, or person designated for the purpose. C. 29, 42. Many other citations of a like kind might be given from the king's ordinances for the protection of the Indians. They were protected very much by similar laws when Louisiana was a French province, excepting in this: that the power to confirm an Indian sale of land, as to the whole or a part of it, or to reject it altogether, was exercised by the French governors of the province.

Nor were these laws of protection disregarded. They were brought into operation very soon after General O'Reilly took possession of the province, in 1769. He acted not only upon Indian sales of land made after the cession of the province by France, but upon such as had been made before. Considering himself as representing the king, when called upon to relinquish the title of the crown in favor of such purchasers, he rejected them altogether when not made in compliance with the laws for the protection of the Indians, and diminished the quantities of such sales when the purchasers could show from any cause whatever that they had an equitable claim upon the Indians for remuneration. The first sale of the kind to which his attention was called was one from Rimeno, the chief of the Attacapas village, as early as 1760, to Fuselien de la Clare, afterwards claimed by Morgan & Clark. O'Reilly did not think that the sale had been completed so as to pass the title to it under the French law, though it had been executed before the governor. De la Clare then petitioned for a grant of one league to front upon the Teche, by a league in depth, making the sale to him from the Indians, of two leagues in front, from north to south, limited on the west by the River Vermilion, and on the east by the River Teche, the foundation of the equity of his claim for a grant. Governor O'Reilly received the application and granted a league in front by a league in depth. In the same manner all other larger purchases from the Indians were afterwards reduced to one league square. It became the common understanding that no larger confirmation of an Indian sale of land would be made, and no one of them was ever confirmed for more, by either of the Spanish governors of Louisiana, including Salcedo, the last of them. This of Dubuque is the only case in which it is claimed to have been done. In Florida, larger Indian sales

of land were confirmed, upon the ground that the governors of that province acted in such a matter upon a different authority from the king. But both in Florida and Louisiana it was so well understood that an Indian sale of land, before it could take effect at all, needed the ratification of the governor, that it was frequently inserted in the act of sale. See claims of purchasers of Indian lands by Stephen Lynch, Joseph and John Lyon. Such had been the law of Louisiana, or rather the administration of it by the governors, for more than eighteen years, when Dubuque alleges that he bought the land from the Fox Indians. Such it had been for twenty-six years when he presented his petition to the Baron Carondelet. It is true that the governors had the same powers to grant the public lands of the crown, to which a title and instant possession could be given to the grantee; but it is also true, in their action upon the sales of Indian lands still in their occupancy, that they were bound by the same laws, usages, and customs, and by those laws especially which had been made for the protection of the Indians, and by the oath which they took to look to the welfare, augmentation, and preservation of the Indians.

Such are our views of the law relating to the powers of the governor in respect to sales of land by the Indians. If we thought then, as we do not, that the order of Governor Carondelet upon the petition of Dubuque was a grant of the ownership of the land, we should be obliged to decide that it was an unaccountable and capricious exercise of official power, contrary to the uniform usage of his predecessors in respect to the sales of Indian lands, and that it could give no property to the grantee. It is not meant, by what has just been said, that the Spanish governors, could not relinquish the interest or title of the Crown in Indian lands and for more than a mile square; but when that was done, the grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it.

It has been intimated that the action of the governors of Louisiana upon the sales of Indian lands, especially in the reduction of them to a league square, was the consequence of O'Reilly's regulation, limiting grants of land in particular districts to a league square. This may have been so as regards quantity, but the principle upon which they acted upon Indian sales of land is to be found in those laws of Spain which made them officially the protectors of the Indians.

But it will be said at this point of the case, as it was said in the argument, if the governor's order was not a grant for lands, that

it gives to Dubuque nothing, as he had already the occupancy under the Indian purchase. The error in the statement is, the assertion that he had the right to occupancy, and in the supposition that the opposers of the grant contend that the governor meant to give him that right. Not so. The last, we have just said, the governor could not give, and that the Indian sale could not give it to a purchaser until the sale had been ratified. But the privilege to work the mines in lands still in the occupancy of the Indians, he could give, because the mines were a part of the royal patrimony of the crown, and the king had directed that they might be searched for and worked in all of his dominions by his subjects, both Spaniards and Indians. When, then, Dubuque represented to him that he had bought mines and lands from the Fox Indians, and asked for the enjoyment and peaceable possession of them, and the governor wrote "granted as asked for," he meant no more than this: as you say that you have bought the mines, with the permission of the Indians to work them, you shall also have mine.

The view taken of this case relieves us from the consideration of several points which were made in the argument of it; particularly from that of the effect of the words "peaceable possession," found in the petition of Dubuque to Governor Carondelet, to which it was contended his final order had a direct reference. We admit, with pleasure, that it was shown by a learned and discriminating appreciation of those words in grants for land, that they were more frequently than otherwise a grant of ownership; but they cannot do so in a case where the order or grant is given with direct reference to a fact in the petition for it which does not exist, or where a grant is given upon an Indian sale of land contrary to what we think the laws of Spain permitted to be done. The order given upon the petition of Dubuque, had it been intended to be a grant of ownership, would not have been binding upon the conscience of the king of Spain, and only such as are so are conclusive against the United States under the treaty transferring Louisiana.

Nor is it necessary for us to notice the reference which was made in the argument to the treaty made by General Harrison with the Fox Indians, further than to state that it is no more than a declaration that the Indians, in selling to the United States their land, did not mean to sell parts of it which they had sold before to others. It may have had a reference to this claim of Dubuque, but not having been so expressed, it cannot be inferred.

We cannot leave this case without a reflection occurring from our investigation of it, and which is not favorable to the statement made by Dubuque that he had bought the land from the Fox Indians.

Dubuque's mines, as they were called, are on the west bank of the Mississippi, a little more or less than seventy miles below Prairie du Chien, where he made his contract with the Indians. They are so near to the city of Dubuque that they may be said to be contiguous. In the year 1780 the wife of Peosta, a warrior of the Kettle chief's village, discovered a lead mine on these lands, and other mines were found soon afterwards. The principal mines are situated upon a tract of one league square, immediately at the Fox village of the Kettle chief, extending westward. This was the seat of the mining operations of Dubuque. The Kettle chief's village was on the bank of the Mississippi River, below the little river Makoketa, and was at the time when Dubuque settled there, a village of many lodges. Schoolcraft.

If it was not the largest of the Fox or Outagami Indians, it was not inferior to any other village than that of the Foxes and Sacs on the bank of the Mississippi River, near Rock Island. It had been for a long time an Indian village when Dubuque settled there. It continued as such all the time that Dubuque resided there until his death; that is, from 1788 to 1810; and its chief survived Dubuque for ten years. Can it be presumed that, under the contract with Dubuque, the Indians meant to sell him that village, and all the lands for miles above and below it, with all of the mines upon the land directly adjoining it? And yet such must be the result if that were so; for, carry Dubuque's description of his purchase into a survey, and it takes in the Kettle chief's village. We cannot believe that the Indians did make such a sale, or that they were so ignorant of their topography as not to know that a line extended from the monuments on the Makoketa and the Tete des Morts for three leagues west, with a base equal to the Mississippi boundary, would not have included their village. We make no other commentary than this — that time, if it does not obliterate the offences and weaknesses of men, disposes us to recollect them in connection with their merits; and if we speak of them at all, to do so forbearingly.

We will now close the case with an additional remark. This claim was presented to Congress in the year 1812. It had been before the commissioners for adjusting land claims in the Territory of Louisiana, as early as 1806. It has been repeatedly before both houses of Congress, but with such differing opinions concerning it, that no confirmation of it could be obtained, although the commissioners had returned it as a valid claim. It was before the Senate again in 1845. It was then reported upon, and again in 1846. Doc. March 30, 1846. That is an able paper; but b sides conclusions drawn from the decisions

of this court which we do not think applicable, and others which were made without reference to the laws of Spain, which prevailed in Louisiana, we think it remarkable that the report, though containing frequent allusions to Dubuque's contract with the Indians, and extracts from it, does not set it out entire as one of the papers upon which the claim was rested. The petition of Dubuque to the governor, his reference of it to Todd, Todd's reply, and the governor's order, are the papers upon which the report was made. The same documents were placed before the commissioners in 1806, without the Indian contract. See Public Lands, American State Papers, vol. 3, p. 580. It does not surprise us that a correct view was not taken of it then, or that the committee of public land claims in the Senate should have viewed it differently in 1846 from that now taken by this court. The petitioner in this suit has the merit of having put his case upon every thing in any way connected with the claim of Dubuque fairly, fully, and openly. Still if success does not follow his expectation, he cannot complain of it, for the purchase from Dubuque was an adventure to buy the half of the land, with a full knowledge of all of the papers and the circumstances under which Dubuque claimed.

The judgment of the District Court is affirmed.

Order.

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

AUGUSTINE ANNE LOUISE DENISE, HYACINTH ADDA MAYNEAUD DE PAUCEMONT, COUNTESS DE TOURNON, SERAPHINE CARPENTIER, WIDOW OF OLIVIER LOUIS MARTIN, CHARLES ALEXANDER MARTIN, JANE MARARIE SERAPHINA MARTIN, AND JAQUES FRANCOIS, JUSTINIAN FRANCOIS, AND ANTIONE JOSEPH SERVAIS, PLAINTIFFS IN ERROR, *v.* BENJAMIN RUGGLES.

Where a grant issued in 1722, by the French authorities of Louisiana, cannot be located by metes and bounds, it cannot serve as a title in an action of ejectment; and it was proper for the Circuit Court to instruct the jury to this effect.

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

The case depended on the construction of an old French grant, which is stated in the opinion of the court. It would not be possible to explain the nature of the dispute to the reader, without the introduction of maps; and as the decision in this case cannot possibly serve to illustrate any that may hereafter occur, it is not deemed expedient to increase the size of this volume by their introduction, or the arguments of counsel to show that the grant could or could not be located.

It was argued by *Mr. Garland* and *Mr. Johnson* for the plaintiffs in error, and by *Mr. Bibb* and *Mr. Cushing*, (Attorney-General,) for the defendant in error.

Mr. Justice CATRON delivered the opinion of the court.

This suit was brought in 1844, in the Circuit Court for the Missouri District, to recover sections nine and ten, and the half of sections numbers fifteen and sixteen, adjoining to nine and ten, in township thirty-eight north, range two east of the principal meridian; making 1920 acres, of which it is alleged the defendant Ruggles was in possession. The cause was tried before a jury in 1851, and a verdict rendered for the defendant.

The object of the suit is to establish a claim of Renault's heirs to a tract of land containing upwards of fifty thousand acres. The claim depends on a grant, a translation of which, from the French, was given in evidence in the Circuit Court, and is as follows:

"In the year one thousand seven hundred and twenty-three, and on the fourteenth of June, granted to Mr. Renault, in freehold, for the purpose of forming his establishment on the mines.

"One league and a half of ground fronting on the Little Maramecq on the River Maramecq, at the place of the first arm, (branch, or fork) which leads to the collection of cabins called the Cabanage de la Renaudiere, by six leagues (eighteen miles) in depth; the river forming the middle of the point of compass, and the streamlet being perpendicular, as far as where Mr. Renault has his furnace; and thence straight to the place called the Great Mine."

A copy of the original, in French, being in the record also, it is here insisted for the plaintiffs, that the foregoing translation is erroneous and does not truly describe the boundaries of the land granted; that it should be one and a half leagues fronting on the Little Maramecq in the River Maramecq, at the place of the first branch which leads to the collection of cabins, called the Cabanage de la Renaudiere, by six leagues in depth, "the

river forming the middle of the Rhumb line, and the lead stream, as far as where Mr. Renault has his furnace, and thence a direct line to the spot named the "Great Mine."

The fork of Little Maramecq called for, and the old furnace on it, were proved to exist on the trial, by Mr. Cozzens, who was sent to survey the grant, by order of court, at the instance of the plaintiffs. He says, the Grand Mine is marked on the map; that is, on a copy of the map of public surveys of the United States, obtained from the land office at St. Louis. He furnished no plot, because, as he reported and deposed, he could not make a survey of the land claimed; the description in the grant being too vague and unmeaning for him to lay down the land corresponding to the objects called for on the ground. He further deposed, that he understood the French, and was governed by both the English and French copies. On the question whether the tract of land claimed could be ascertained, and the true boundaries identified by survey, the jury was instructed as follows:

"The court is of opinion that the grant to Renault, unaided by a survey under the French or Spanish government, did not separate the land from the public domain: That it cannot now, from its uncertainty, be located; it is not therefore a grant for any specific lands, and does not entitle the plaintiffs to the *locus in quo*."

Thus the Circuit Court held, that notwithstanding the Little Maramecq River, the lead stream, the smelting furnace, and the Grand Mine, existed as indicated on the public surveys, and as claimed to exist by the plaintiffs, still the grant was void for uncertainty, and the impossibility of locating the same.

As the first instruction took the case from the jury, and put an end to the suit on legal grounds, we will proceed to examine this instruction.

The land is to front on the river. When the point of beginning is established on the river, then it is to be meandered up or down, until a straight line will reach a league and a half from the first to the second corner.

It is insisted that the mouth of the streamlet is to be the place of beginning, and that the first line is to run up the river; and that the north-western side line is to meander the streamlet to the old furnace, called for in the grant.

Why the beginning point should be at the mouth of the lead stream, it is difficult to comprehend. The grant was intended to cover Renault's mining establishment; but if surveyed, as contended for, the second line would run through the centre of his smelting furnace, and also through the centre of the mine where the ore was obtained. By such construction the main

object of the grant, when it was made, would have been defeated. We suppose the following would be a more plausible construction: Take the streamlet, from its mouth to the furnace, to be the perpendicular of the front line on the river; then draw a straight line from its mouth to the furnace to give the course of the side lines; they being drawn parallel on each side of the foregoing middle line and a league and a half apart. By such survey the smelting furnace would have been included. But where these side lines were to begin or end, (treating each as a unit,) no one could tell; nor was it possible to reach the Grand Mine, or include it, by this mode of survey, and therefore this construction could not be relied on.

The jury was bound to find the lines of the grant from its calls, and the objects proved to exist on the ground corresponding to the calls. Nor could this be done by conjecture; lines and corners must be established by the finding, so as to close the survey.

If, after admitting all the verbal evidence to be true, as to objects on the ground, to the extent insisted on for the plaintiffs, and disregarding the defendant's evidence, it was still plainly impossible to locate the grant by its words of description; then, the instruction given by the Circuit Court, was proper.

The argument assumes that the second corner is four and a half miles above the mouth of the lead stream on the Maramecq, and the beginning corner at the mouth of the streamlet; that this is the front; that the north-western side line meanders the lead stream to the furnace; and then runs straight through the Great Mine, extending to a point beyond eighteen miles in depth from the mouth of the streamlet; that, from this last point, a line must be drawn four and a half miles long, and corresponding in its course to the front line on the river; and, from the termination of this line, one must be drawn to close on the upper corner on the river. This, is the theory of a survey predicated of the translation relied on in this court. No mode of survey is here claimed, as being indicated by the translation furnished to the Circuit Court, and on which the instruction is founded.

As the court below was influenced, in its construction of the grant, by the objects claimed by the plaintiffs, and admitted to exist on the ground, so this court must look to the same source of information for aid, in coming to a practical result. Renault's furnace is not found on the map presented to us, but the Great Mine is. We must assume, however, for the purposes of this action, that the furnace lies so high upon the Mineral Fork as that a straight line run from it to the Great Mine, would include

the land sued for. A survey, made on this assumption, would require a line so acute to the Mineral Fork, as to strike the Little Maramecq River not far above the upper corner on the river, and give the grant the form of a triangle. Place the furnace on any part of the Mineral Fork where probable conjecture can locate it, and still the second line, as here claimed, (running through the furnace, and the Great Mine,) would have an acute angle in it, so that no depth could be obtained by this mode of survey. Nor could a corresponding line to the front on the river be obtained; nor a line be laid down corresponding to the north-western side line; as this hypothetical line would vary so much in its courses as not to afford space for the two other lines. We can say, with entire confidence, that no such theory of survey can be carried out, taking the objects called for and found as the governing rule; and it is equally certain, in our opinion, that no specific boundaries were contemplated as having been given to Renault's grant when it was made, but that the lines were to be afterwards established by survey, as in cases of Spanish concessions covering improvements where the exterior boundaries were left to the discretion of the surveyor.

We are therefore of opinion, that the Circuit Court properly held that the grant did not separate any specific tract of land from the public domain, and that the jury could not locate it.

The court having held that the plaintiffs had no title to support their action, it was useless to give any further instructions: nor does it matter whether those given in addition to the first one were right or wrong.

We therefore order that the judgment be affirmed.

Order.

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

CORNELIUS D. THORP, PLAINTIFF IN ERROR, v. ARDEL B. RAYMOND.

The statute of limitations of New York allows ten years within which an action must be brought by the heirs of a person under disability, after that disability is removed.

But the right of entry would be barred if an adverse possession, including those ten years, had then continued twenty years; and the right of title would be barred, if the adverse possession had continued twenty-five years, including those ten years.

Cumulative disabilities are not allowed in the one case or in the other.

Therefore, where a right of entry accrued to a person who was in a state of insanity, the limitation did not begin to run until the death of that person; but began to run then, although the heir was under coverture.

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

The circumstances of the case are fully stated in the opinion of the court.

It was argued by *Mr. Lawrence*, for the plaintiff in error, and by *Mr. Shell*, for the defendant.

The points made for the plaintiff in error were the following:

First. The plaintiff having shown a valid legal title in his ancestor, Nicholas Brouwer, and having proved that the said Nicholas Brouwer died seized and possessed of the premises in question, the inheritance therein passed, on his death, to his granddaughter and sole heir at law, Hannah Brouwer, the plaintiff's grandmother.

Second. There is no evidence that Pine held adversely to the heir at law of Nicholas Brouwer, and therefore it must be presumed that he held in subordination to the Brouwer title. 2 R. S. 392, § 8.

Third. The adverse possession commenced with Oliver DeLancey, in 1801, at which time the owner, Hannah Turner, was under the disability of coverture as well as of insanity. These disabilities continued till her death, in 1822, and were continued in her heir at law, Jemima, by reason of her coverture, until 1832.

The statute provides in substance, (N. Y. R. L. of 1801, vol. 1, p. 562,) that action may be brought within twenty-five or twenty years (as the case may be) after descent cast; and that the time during which the disability of coverture or insanity shall continue, shall form no part of the period of limitation.

In this case, the disability existed when the adverse possession commenced, (Hannah Turner having the title, and being under disability from 1749 to 1822, while the adverse possession commenced in 1801,) and it continued uninterruptedly to exist, in the persons of her and her daughter, Jemima Thorpe, until the

death of the husband of the latter, in 1832. The statute of limitations, therefore, did not commence to run against the original and lawful title until the last named year, and consequently the right of action continued unimpaired until 1852.

The judgment should therefore be set aside, and a new trial ordered.

Defendant's points. I. The adverse possession by the defendant, and those under whom he claimed from the 1st of May, 1801, to the time of the commencement of this suit, in 1850, was perfect, and barred and extinguished the title and right of the plaintiff. 24 Wend. 603, 604, 614; 16 Peters, 455; 2 R. L. N. Y. c. 185, p. 183; 2 R. S. N. Y. p. 222, § 11.

II. Hannah Turner, being under the disability of mental incapacity from the time the adverse possession commenced, to wit, 1st of May, 1801, until her death, in 1822, her heirs at law had ten years after her death within which to bring their action. 2 R. L. N. Y. c. 185, p. 183, §§ 2, 3.

III. Hannah Turner having died in 1822, Jemima Thorpe, her heir at law, and the mother of the plaintiff, should have brought her action within ten years after her death; as the ten years, with the time which elapsed after the adverse possession commenced exceeded twenty years, which would bar ejectment, and exceeded twenty-five years, which would bar a writ of right. Smith *v.* Burtis, 9 Johns. 174; Demarest and wife *v.* Wynkoop, 3 Johns. Ch. R. 129, 135; Jackson, ex dem. *v.* Johnson, 5 Cow. 74. As to the rule in England, under Statute 21 James, c. 16, Doe, ex dem. *v.* Jesson, 6 East, R. 80. Also in Pennsylvania, under Statute 26th March, 1785, Wendle *v.* Robertson, 6 Watts's Rep. 486.

IV. The plaintiff, and those under whom he claims, not having brought their action within the time allowed by law, are barred by the statute from recovering said premises, or any interest therein. 2 R. L. N. Y. c. 185, p. 183.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The plaintiff brought an action of ejectment in the court below against the defendant to recover the one-twentieth part of a mill seat and the erections thereon, together with some eighteen acres of land, situate on the river Bronx in the town and county of Westchester in said State; and, on the trial, gave evidence tending to prove that the premises were owned in fee in 1726 by one Nicholas Brouwer, and that he continued seised of the same as owner down to his death, in 1749; that his heir at law was a grandchild Hannah, then the wife of Ed-

mund Turner; that said Turner died in 1805, leaving his wife surviving, but who had been for some years previously, and then was insane, and so continued till her death, in 1822; that at her death she left, as heirs at law surviving her, several children and grandchildren; that one of her surviving children was Jemima Thorp, the mother of the present plaintiff, who was married to Peter Thorp when nineteen years of age: the said Peter died in 1832, and said Jemima, who survived him, died in 1842, leaving the plaintiff and other children surviving. The plaintiff, also, proved the defendant in possession of the premises and rested.

The defendant then proved that, before the year 1801, the premises in question were in the actual possession of one Oliver De Lancy claiming as owner, who in the same year by indenture of lease demised the same to one James Bathgate, for the term of fourteen years; that the said Bathgate entered into possession, and continued to hold and occupy the premises under this lease till 1804, when one David Lydig entered, claiming to be the owner in fee; that said Bathgate attorneyed to, and held and occupied under him, as tenant, down to 1810, when the defendant succeeded as tenant of the premises under the said Lydig; that David Lydig died in 1840, leaving Philip, his only child and heir at law, surviving; and that from the date of the lease to Bathgate, 1st May 1801, down to the commencement of this suit, the premises had been continually held and possessed by De Lancy and the Lydigs, father and son, by their several tenants, claiming to be the owners in fee, and exclusive of any other right or title: and occupied and enjoyed the same in all respects as such owners.

Both parties having rested, the court charged the jury that Hannah Turner took the title to the premises on the death of her grandfather, Nicholas Brouwer, in 1749, as his heir at law; but, that as she was then a feme covert, the statute of limitations did not begin to run against her till 1805, on the death of Edmund Turner, her husband; and as she was also under the disability of insanity, in 1801, when the adverse possession commenced, the statute did not begin to run against her estate until her death, this latter disability having continued till then; and, that her heirs had ten years after this period to bring the action. But, that the right of entry would be barred if the adverse possession, including these ten years, had continued twenty years; and the right of title would also be barred if the adverse possession had continued twenty-five years, including these ten years. That the ten years having expired in 1832, and the action not having been brought by the plaintiff till 1850, it was barred by the statute of limitations in both respects as

an ejectment, or writ of right; and that, upon the law of the case, the defendant was entitled to their verdict.

We think the ruling of the court below was right, and that the judgment should be affirmed.

It is admitted, that, if this suit should be regarded in the light of an action of ejectment to recover possession of the premises, the right of entry would have been barred by the statute of New York, the twenty years bar having elapsed since the right accrued, before suit brought. 1 R. Laws of 1813, p. 185, § 3.

The right of entry of Hannah Turner accrued in 1801, but at that time she was laboring under the disability of coverture, and also of insanity, which latter survived the former, and continued till her death, in 1822. By the saving clause in the third section of the act, the heirs had ten years from the time of her death within which to bring the ejectment, and no longer, notwithstanding they may have been minors, or were laboring under other disabilities, as it is admitted, successive or cumulative disabilities are not allowable under this section. 6 Cow. 74; 3 Johns. Ch. R. 129, 135. The ten years expired in 1832, which, with the time that had elapsed after the adverse possession commenced, exceeded the twenty years given by the statute. The suit was brought in 1850.

But, it is supposed, that the saving clause in the second section of this act, which prescribes a limitation of twenty-five years as a bar to a writ of right, is different, and allows cumulative disabilities; and as ejectment is a substituted remedy in the court below for the writ of right, it is claimed the defendant is bound to make out an adverse possession of twenty-five years, deducting successive or cumulative disabilities. This, however, is a mistake. The saving clause in this second section, though somewhat different in phraseology, has received the same construction in the courts of New York as that given to the third section. 12 Wend. R. 602, 619, 620, 635, 636, 656, 676.

The judgment of the court below is, therefore, affirmed.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the Southern District of 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 affirmed, with costs.

THIRION MAILLARD, EARNEST CAYLERS, AND HAMILLE C. ROUMAGE, PLAINTIFFS IN ERROR, *v.* CORNELIUS W. LAWRENCE.

By the Tariff Act of 1846, a duty of thirty per cent. *ad valorem* is imposed upon articles included within schedule C; amongst which are "clothing ready made and wearing apparel of every description; of whatever material composed, made up, or manufactured, wholly or in part by the tailor, sempstress, or manufacturer.

By schedule D a duty of twenty-five per cent. only is imposed on manufactures of silk, or of which silk shall be a component material, not otherwise provided for; manufactures of worsted, or of which worsted is a component material not otherwise provided for.

Shawls, whether worsted shawls, worsted and cotton shawls, silk and worsted shawls, barage shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and mouseline de laine shawls, are wearing apparel, and therefore subject to a duty of thirty per cent. under schedule C.

The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions.

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

It was an action brought by the plaintiffs in error against Lawrence, the collecter of the port of New York, for a return of duties alleged to have been improperly exacted upon certain importations of shawls.

The circumstances of the case and the various prayers to the Circuit Court, both on behalf of the plaintiffs and defendant, are fully stated in the opinion of the court.

It was argued by *Mr. Mc Cullok* and *Mr. Cutting*, for the plaintiffs in error, and *Mr. Cushing*, (Attorney-General) for the defendant.

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

1st. The first, second, third, and fourth instructions asked for by the defendant, and granted by the court, are erroneous, each of them —

(a.) Because the terms, "clothing ready-made and wearing apparel of every description, made up or manufactured by the tailor, sempstress, or manufacturer," used in schedule C, of tariff of 1846, do not include by their own force all articles which can be used as personal dress either for the adornment, protection, or comfort of the person; and

(b.) Because, where in said tariff of 1846 the use to which an article may be usually put is intended to govern the rate of duty to be exacted, the statute expressly so declares.

(c.) Because, by all the proofs, said terms, "wearing apparel," as used in trade and commerce in July, 1846, did not embrace such shawls and scarfs.

(d.) Because, the terms "wearing apparel," as used in said act of 1846, are either synonymous with "ready-made clothing," or too indefinite to assess any other article, than ready-made clothing with duty.

(e.) Because the tariff should be construed according to the commercial sense and meaning of the terms employed. The charge is in this respect opposed to the settled law of this court.

2d. The fifth and sixth instructions asked by the defendant, and granted by the court, were erroneous;

(a.) Because the fifth assumes that in commerce the addition of fringes by hand to some of said shawls and scarfs, after they come from the loom, necessarily brings them within the terms, "articles worn by women or children made up, or made wholly, or in part, by hand," which are employed in said schedule C.

(b.) Because the sixth assumes that the making of knots in the fringes, or the twisting of said fringes by hand in some of said shawls, after the shawls came from the loom, necessarily brings the shawls within the clause, "articles worn by women and children, made up or made wholly, or in part, by hand."

The court erred in refusing the plaintiffs' prayers, because—

3d. The shawls and scarfs in question being in trade and commerce known as "manufactures of silk" or "worsted," and not being known in commerce as "clothing ready-made," nor as "articles worn by women and children," the adding of fringes by hand, or the knotting and twisting these fringes by hand, does not take them out of the classes of "manufactures of silk, or of which silk shall be a component material, not otherwise provided," and of "manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for," specified by schedule D.

4th. The proof shows that in trade and commerce the term "made," or "made up," used in schedule C, does not embrace goods to which fringes, borders, knots, or tassels, are added after the fabric is made in the loom; nor force goods with such additions to be rated or known as "articles worn by women, made up, or made wholly, or part by hand."

5th. The use to which goods may be put, in fact, does not exclude them from the commercial class to which they belong.

6th. The goods cannot be classed under schedule C, because the proof shows that in the language of trade and commerce they are not either. (a.) "Articles worn by men, women, or children, made up, or made wholly or in part by hand." (b.) Nor "clothing ready-made, and wearing apparel made up, or manufactured wholly or in part by the tailor, sempstress, or manufacturer. (c.) Nor "manufactures of cotton, linen, silk, wool, or worsted, embroidered, or tambourred, in the loom or otherwise by machinery, or with the needle or other process."

7th. The opinions of the officers of the customs detailed in the proof, and the arguments attempted to be drawn by them from the exemption from duty, under schedule 1, "of wearing apparel in actual use, and other personal effects of persons arriving in the United States," do not establish any fact, nor furnish any guide in construing the tariff of 1846, so as to charge the shawls and scarfs in question with thirty per cent. duty, under schedule C.

8th. To charge the goods in question with thirty per cent. duty, by schedule C, instead of twenty-five per cent. by schedule D, it is essential that they should have been distinctly well known in commerce by the term "clothing ready-made, and wearing apparel," and as the term "clothing ready-made, and wearing apparel," by the testimony does not embrace such shawls and scarfs, the greater rate of thirty per cent. is not to be imposed.

9th. The terms employed in schedule C of the tariff of 1846, by which the exaction of thirty per cent. is claimed, are similar in substance with the terms of the act of 1842, and the practical construction and action of the government, in regard to shawls and scarfs, under that act, should be followed under the tariff of 1846.

10th. The exaction of thirty per cent., under schedule C, is not justified by any treasury instructions which are contrary to the commercial understanding, and to the rules of construction of the statute in regard to duties.

11th. The first, second, third and fourth prayers of the plaintiffs were, and each of them was in accordance with the settled law of this court, and the refusal of the court to instruct the jury upon any of the said propositions as prayed for, was erroneous.

The following is a part of the argument of the *Attorney-General.*

The question raised by the plaintiff in his action is simply this, are "shawls" wearing apparel?

The act of 1846 has not charged duties upon "shawls" by that name. But if it be found that "shawls" are wearing apparel, then the collector has charged the true legal rate of duty, without any excess; and the plaintiff's suit is without foundation in law.

For the signification of the word "shawls," as used in the plaintiff's invoices and entries at the custom-house, and of the words, "wearing apparel," as used in the statute of 1846, we must resort to the established use of that and of correspondent phrases in our own and in cognate languages, and to critical examination of their legal intent and import.

In McCulloch's Dictionary of Commerce we have this definition: "Shawls, (German — Schalen; French — Chales; Italian —Schavali; Spanish — Chevalos); articles of fine wool, silk, or wool and silk, manufactured after the fashion of a large handkerchief, used in female dress. The finest shawls are imported from India, &c. . . . Shawls are made of various forms, sizes, and borders, which are wrought separately with the view of adapting them to the different markets."

In the Dictionary of French and English by Professors Flemming and Tibbits, we have this definition and explanation: "Shawl," (English) "Grand mouchoir de cou," (French) — signifying a great handkerchief for the neck.

In the Dictionary of Commerce, published in Paris, in 1839, under the direction of Guillaman, we have this definition: "Châle," grande piéce d'étoffe, dont les femmes se couvrent les epaules, et qui est ordinairement fabriqué dans le gout des Châles de l'Orient." (Shawl — a large piece of cloth with which the women cover their shoulders, usually manufactured in the fashion of the shawls from the east.)

In Landais' French Dictionary, (which has gone through eleven editions,) we have this definition: "Schall," — longue piece d'étoffe de soie, ou de laine, dont les habitants de l'Egypte s'entourent la tête. Le schall est adopté depuis longtemps par les dames Francaises, qui le portent sur les epaules — ou écrit aussi châle." (Shawl — a long piece of cloth of silk or wool with which the inhabitants of Egypt surround the head. The shawl has been long since adopted by the women of France, who wear it on their shoulders — it is also written "châle."

In the Dictionary of the French Academy, this definition is given: "Châle — longue piéce d'étoffe dont les orientaux s'enveloppent la tête, et qui entre aussi de diverses manières dans leur vétement." (Shawl — a long piece of cloth with which the orientals environ the head, and which, in divers ways, makes a part of their apparel.)

Consulting English lexicons, we find these definitions: "Shawl, a part of modern female dress." — *Worcester.*

"Shawl, a cloth of wool, cotton, silk, or hair, used by females as a loose covering for the neck and shoulders." — *Webster.*

Craig's Dictionary of the English Language (which is considered the best present standard work) gives us this definition:

"Shawl, a kind of large kerchief, originally from India, which forms a part of modern female dress, being worn as a loose covering for the shoulders and back."

These various lexicographers all agree that shawls are wearing apparel.

The plaintiffs, to evade the definitions in commercial diction-

aries and other lexicons, and the descriptive words in the statute, (schedule C,) and the mass of testimony given in this cause, and the invoices and entries at the custom-house by themselves, offer the oaths of men, "that in trade and commerce, articles of this description are not considered wearing apparel;" that shawls of this description "are not known among merchants as wearing apparel;" that, "in a commercial sense, none of these shawls are made up, nor are they known among merchants as wearing apparel; that these shawls 'commercially speaking,' are not wearing apparel."

Declarations of this nature by witnesses avail nothing. Shawls are known in commerce as wearing apparel, these witnesses to the contrary notwithstanding. These witnesses say, in one breath, shawls are not, "in a commercial sense, wearing apparel;" are not, "commercially speaking, made up, nor known among merchants as wearing apparel;" and in the next breath tell us they are worn by women, and come from the manufacturer "in a complete state to be worn," with their fringes tied by hand, with separately woven borders united to them, ready for use; yet they say, "commercially speaking," and "in a commercial sense," they are neither "made up," nor "wearing apparel!"

Such contrariant absurdities the plaintiffs propose to dispose of by the oaths of the two tailors, Raymond and Beaumont, who swear that they have "purchased shawls of this description to make up into gentlemen's garments; into waistcoats and dressing-gowns;" and who think "that shawls are not wearing apparel till they are made up in this way."

According to their mode of thinking, the cashmere, and other fine shawls imported from India, were not known among merchants as wearing apparel, and were not wearing apparel unless they were made up into gentlemen's garments, waistcoats, and dressing-gowns, or such like; that is, "commercially speaking," and "in a commercial sense!"

Such evidence, in favor of the plaintiffs, made "commercially," and "in a commercial sense," cannot outweigh commercial dictionaries and other lexicons; cannot do away long established usages, and make us disbelieve what our eyes see day after day; that is, shawls in actual use, as parts of the wearing apparel of females.

The statute, in schedule C, uses plain language to describe two great general classes of merchandise: the first, "clothing ready-made," the second, "wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer." The witnesses for the plaintiffs confound the two classes, omit

parts of the descriptions of the second class, endeavor to confuse the plain meaning of the statute by introducing a sophistical sense, called by them "a commercial sense;" and even in that they put away the established significations of words, contradict standard writers on commerce, and repudiate common sense and common usage.

Wearing apparel is a general description or genus comprehending many species, and shawls are undoubtedly a species of wearing apparel. Common use, the definitions and explanations of learned writers of commercial dictionaries, and of other lexicons, the daily experience of our own eyesight, all concur to convince our understandings, beyond a doubt, that shawls are a species of apparel worn by females. If shawls are not "made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer," how or by whom are they made? Certain it is they are not a raw material, but are the products of art and labor.

Congress, in legislating the system of duties on imports in the act of 1846, (schedule C,) has given a description for revenue purposes, which clearly comprises these shawls; the words of description employed in the statute must have their known signification as established by standard writers, use, and general acceptation. The sophistications attempted by the witnesses for plaintiffs about a "commercial understanding," and "in a commercial sense," are foreign to the case, and are overruled by this court in De Forest *v.* Lawrence, 13 Howard, 282.

Mr. Justice DANIEL delivered the opinion of the court.

The plaintiffs in error instituted in the court aforesaid against the defendant an action of trespass on the case for the recovery of an alleged excess of duties charged by the defendant as collector of the port of New York, and paid to him under protest by the plaintiffs upon certain goods imported by them from Havre in France, and described by them in the invoices and entries thereof as "worsted shawls, worsted and cotton shawls, silk and worsted shawls, barege shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and mousseline de laine shawls." There appear to have been nineteen different importations by the plaintiffs, comprised within the description just given, but a particular or separate enumeration of them is not necessary, it being admitted that the protest of the plaintiffs embraced the whole of them, and that the correctness or incorrectness of the proceeding in reference to each of them depends upon the construction of the same statute. Upon the articles thus described, the collector charged the duty of thirty per centum *ad valorem* as being wearing apparel within the meaning

of schedule C, in the act of Congress of the 30th of July, 1846. Vid. 9th Stat. at L. c. 74, p. 44. The plaintiffs insist that according to schedule D, in the same statute, they were bound to pay at the rate of twenty-five per centum *ad valorem* only, and for a recovery of the difference between this last rate and that at which they have made payment, their action has been brought.

Upon issue joined on the plea of non-assumpsit and under instructions from the court as to the import of the provisions of the statute of July 30th, 1846, a verdict was found for the defendant, and a judgment entered in accordance therewith. This case is comprehended within narrow limits, and its decision must depend entirely upon the interpretation of those portions of the statute of 1846, designated as schedules C and D, as to the description and enumeration of the articles subjected to duties and the rate of impost prescribed by these schedules.

In schedule C, which imposes a duty of thirty per centum *ad valorem*, are comprised the following articles, in the literal terms of the law, "clothing ready-made, and wearing apparel of every description, of whatever material composed, made up, or manufactured, wholly or in part by the tailor, sempstress, or manufacturer."

By schedule D, of the same act, it is declared that an impost of twenty-five per centum only shall be levied on "manufactures of silk, or of which silk shall be a component material, not otherwise provided for; manufactures of worsted, or of which worsted is a component material, not otherwise provided for."

Several witnesses were examined by the plaintiffs, with the view of showing that in a mercantile sense the term shawls, under which descriptive name the goods of the plaintiffs were entered, did not include "wearing apparel," and *a fortiori* not wearing apparel either made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer, and that therefore under the provision of schedule D they were subject to an impost of twenty-five per centum only as manufactures of silk or worsted, "not otherwise provided for." Countervailing evidence was adduced on the part of the defendant to show that, in a mercantile sense, and by generally received and notorious acceptation, and by the plain and even imperative language of the statute, shawls were established to be wearing apparel; and consequently came within the rates imposed by schedule C, and could not be brought within the description in schedule D, as articles "not otherwise provided for." The character of the evidence, or more properly the points it was designed to bear upon, most plainly appear from the several prayers submitted at the trial, and by the rulings of the court upon those prayers.

The counsel for the plaintiffs moved the court to charge and instruct the jury, 1st. That if the jury shall find from the evidence that the shawls in question were known at the date of the passage of the said act of 30th July, 1846, in trade and commerce as "manufactures of worsted," or of which worsted was a component material, that then they are embraced in schedule D, and are only liable to a duty of twenty-five per centum *ad valorem*, and no more.

Second. That if the jury shall find from the evidence that the shawls in question were not, at the date of the said last-mentioned act, in a commercial sense, and according to the meaning of the term among merchants, either —

1st. Articles worn by men, women, or children "made up," or made wholly or in part by hand. 2d. Nor clothing ready-made, or wearing apparel "made up," or manufactured wholly or in part by the tailor, sempstress, or manufacturer. 3d. Nor manufactures of cotton, linen, silk, wool, or worsted, embroidered or tamboured in the loom, or otherwise by machinery, or with the needle, or other process; then in either of said cases the articles in question are liable only to a duty of twenty-five per centum *ad valorem*.

Third. That if the jury shall find from the evidence that the articles in question were charged, under the act of 1842, with duty as "manufactures of combed wool or worsted," "manufactures of worsted, and manufactures of worsted and silk combined," under section 1, subdivision 1 of said act, and as "manufactures of cotton, or of which cotton shall be a component part under section 2, subdivision 2 of said act, then the articles in question are, under the act of 1846, liable to a duty of twenty-five per cent. *ad valorem*, and no more.

Fourth. That if the jury shall find from the evidence that, at the date of the passage of the said act of the 30th of July, 1846, the shawls in question were commercially known as "manufactures of worsted," or of which worsted was a component material, and that they were not known in trade and commerce as clothing ready-made, or as "wearing apparel" made up, or manufactured wholly or in part by the tailor, sempstress, or manufacturer, nor as articles worn by men, women, and children, made up, or made wholly or in part by hand, then they are chargeable with a duty of twenty-five per cent. *ad valorem*, and no more.

Whereupon his honor, the presiding judge, refused so to instruct the jury in accordance with all or any of the said several prayers, whereby the plaintiffs, by their counsel, had prayed the court to instruct the jury.

And thereupon the counsel for the plaintiffs then and there

excepted to the refusal of the said judge to instruct the jury in conformity with the said several prayers of the said plaintiffs, and also to the charge and instructing the jury by the said judge, in conformity with all, any, and every of the several prayers wherein the defendant's counsel had so prayed the court to instruct the jury as matter of law.

The counsel for the defendant insisted, as matter of law, and prayed the court to charge and instruct the jury as follows:

First. That shawls and scarfs suitable and adapted in the state they are imported, to be worn by women on the person, as an article of dress, and usually so worn by women in the United States, are "wearing apparel," "made up" or manufactured wholly or in part, by the tailor, seamstress, or manufacturer, within the true meaning of schedule C, of the Tariff Act of the 30th of July, 1846, and are properly chargeable with the duty of thirty per centum *ad valorem*, prescribed by said schedule C.

Second. That shawls and scarfs of the description above named are not the less wearing apparel, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, within the true meaning of the said schedule, though sometimes purchased by clothiers and tailors to be made up into vests, dressing-gowns, and other garments, as testified to by the witnesses for the plaintiffs in this case.

Third. That shawls and scarfs of the description above named are wearing apparel, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, within the true mean- of the said schedule C, notwithstanding, at the date of the passage of the said act of July, 1846, they may not have been called or known by commercial men in trade and commerce by the name of wearing apparel.

Fourth. That whatever may have been, at the date of the said act, the definition given by commercial men to the term "wearing apparel," shawls and scarfs of the description above named are nevertheless wearing apparel, made up in whole or in part by the tailor, seamstress, or manufacturer, within the true meaning of the said schedule C.

Fifth. That shawls or scarfs suitable and adapted in their state as imported, to be worn by women and children, of whatever material composed, having fringes added by hand to the body of the shawls after the same has come from the loom, with sticks or needles, or other such implements, although according to commercial usage and understanding that said articles are not thereby charged in their commercial sense or acceptation, are articles worn by women and children made up or made wholly or in part by hand within the true meaning of the said schedule C, and are therefore chargeable with the duty of thirty per centum *ad valorem*, prescribed by said schedule C.

Sixth. That shawls and scarfs of the description above named, in the fringes of which, after the body of the shawls has come from the loom, knots are made by hand as a part of such fringes, or the fringes of which are twisted or otherwise completed by hand, although according to commercial usage and understanding the said articles are not, hereby changed in their commercial sense or acceptation, are, nevertheless, articles worn by women and children, made up or made wholly or in part by hand, within the true meaning of the said schedule C, and are therefore chargeable with the duty of thirty per centum *ad valorem*, prescribed by the said schedule C.

And thereupon his honor, the presiding judge, charged the jury in accordance with the several prayers in conformity with which the defendant's counsel had insisted as matter of law.

And thereupon the counsel for the plaintiffs excepted to said ruling of the court upon each of the said prayers.

In construing the provision of schedule C, we think that its meaning cannot be easily misconceived, if the rule of interpretation be drawn from the ordinary and received acceptation of its language, or from any regard to the sensible and consistent application of its words. It is obvious, that by the phrase "clothing ready-made, and wearing apparel of every description," the legislature did not mean to limit the enumeration to such habiliments as were either by necessity or by a regard to comfort or utility required to be changed from their original shape or fashion, and reshaped and reconstructed in order to adapt them to the human body, or to the purposes of life. Such a construction would render the member of the sentence immediately following and connected with the former by the copulative conjunction, and designing to introduce a new class of subjects, altogether absurd, and wholly inoperative. It must be understood as being the intention of the legislature to add to "clothing ready-made," in the acceptation above given, every article which in its design and completion and received uses, is an article of wearing apparel, and to comprise such article within schedule C of the act of 1846, no matter of what material composed, either in whole or in part, or by whom composed or made up, whether by the tailor, sempstress, or manufacturer. The question to be determined has no relation either to material, or process, or agent, but exclusively to the origin and purposes of the subject of the duty imposed as being in its design and in its finished condition "wearing apparel." Simply, in other words, whether shawls are wearing apparel.

By the several prayers pressed upon the Circuit Court for instructions to the jury, the object to which they are all directed has been the diversion of the jury from this the only legitimate

inquiry before them. The effort has been to substitute for the literal and lexicographical and popular meaning of the phrase "wearing apparel," some supposed mercantile or commercial signification of these words, and to render subservient to that signification what was clearly accordant with the etymology of the language of the statute, with the essential purposes and action of the government, and with the wide-spread, if not the universal understanding, of all who may not happen to fall within the range of a limited and interested class. In instances in which words or phrases are novel or obscure, as in terms of art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations — language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. Perhaps within the compass of the English language, and certainly within the popular comprehension of the inhabitants of this country, there can scarcely be found terms the import of which is better understood than is that of the words "shawl" and "wearing apparel," or of "shawl" as a familiar, every day and indispensable part of wearing apparel. And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large, the legislature should select for that purpose language by which the nation or the mass of the people must necessarily be misled. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. If therefore the strange concession were admissible that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptation of language.

Another position pressed upon the Circuit Court in behalf of the plaintiffs in error, as is shown by the evidence and by one

of the prayers to the court, was this: that shawls, in the form in which they are fashioned and finished by the manufacturer, could not properly be termed wearing apparel, because they are by tailors and clothiers frequently purchased to be worked up into vests and other garments. This position might, with equal propriety, be urged with reference to any article of wearing apparel whatsoever which should be diverted from its primal and regular use and design. The consistency and force of this argument, if such it deserves to be called, may be aptly illustrated by the account of the varied uses of a familiar article of wearing apparel found in a poetical description of the privations and expedients of a needy author, in which we read that,

"A stocking decked his brow instead of *hay*,
A *cap* by night, *a stocking* all the day."

According to the logic of the position last referred to, a stocking transferred into a night-cap is shown never to have been a stocking, and therefore never wearing apparel, notwithstanding its primitive denomination, the design for which it was knit or woven; or the offices to which it may have been usually applied.

To the rulings of the Circuit Court upon the prayers presented on behalf of the plaintiffs and defendants respectively, we deem it unnecessary to apply a separate comment. It is sufficient here to remark, that upon a deliberate examination of those rulings, in reference to the facts and features of the case, we accord to the former our entire sanction, as being coincident with the principles laid down in this opinion, and with a just interpretation of those clauses of the statute under color of which this action was instituted. We therefore adjudge that the decision of the Circuit Court be, and the same is hereby affirmed.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the Southern 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 affirmed, with costs.

EDWIN BARTLETT, PLAINTIFF IN ERROR, *v.* GEORGE P. KANE.

By the Tariff Act of 1842, the custom-house appraisers are directed to ascertain, estimate and appraise, by all reasonable ways and means in their power, the true and actual market value of goods, &c., and have power to require the production, on oath, of all letters, accounts, or invoices relating to the same. If the importer shall be dissatisfied with the appraisement, he may appeal to two merchant appraisers.

Where there was an importation of Peruvian bark, and the appraisers directed a chemical examination to be made of the quantity of quinine which it contained, although the rule may have been inaccurate, yet it did not destroy the validity of the appraisement.

The importer having appealed, and the appraisers having then called for copies of letters, &c., the importer withdrew his appeal without complying with the requisition. The appraisement then stands good.

The appraisers having reported the value of the goods to be more than ten per cent. above that declared in the invoice, the collector assessed an additional duty of twenty per cent. under the eighth section of the act of 1846, (9 Stat. at Large, 43.) This additional duty was not entitled to be refunded, as drawback, upon re-exportation.

THIS case came up by writ of error, from the Circuit Court of the United States for the District of Maryland.

It was an action brought by Bartlett against Kane, who was the collector of the port of Baltimore, for the refunding of certain duties alleged to be illegally exacted upon the importation of Peruvian bark.

The circumstances of the case are fully stated in the opinion of the court.

It was argued by *Mr. Brune* and *Mr. Brown*, for the plaintiff in error, and by *Mr. Cushing*, (Attorney-General,) for the defendant.

The points and authorities relied upon by the counsel for the plaintiff in error, were the following:

1st. That the true dutiable value of the goods imported by the plaintiff in error, which were the production of Bolivia, and exported from that country by Messrs. Pinto & Co., to whom they belonged, was their market value in Bolivia, at the time of their procurement by Messrs. Pinto & Co.

2d. That if said goods are to be considered as exported from Peru, their true dutiable value was their market value in Bolivia at the date of their exportation from Peru; and the court below, which seems to consider them as exported from Peru, then erred in declaring that the law in such case fixes the duties upon the market value at the place of exportation.

3d. That as Bolivia was not an open market in which bark could be purchased during the continuance of the contracts between Pinto & Co. and the Bolivian government, the cost

price to Messrs. Pinto & Co. of the said goods, under their contracts of monopoly with the Bolivian government, must be esteemed the market value of said goods in Bolivia, for the purpose of fixing the dutiable value of said goods, whether considered as exports from Bolivia or Peru.

4th. That the invoice value of said goods which was declared on the entry, and upon which duty was then paid by the agents of the plaintiff in error, is clearly shown, by the evidence, not only to have been greater than the cost price to Messrs. Pinto & Co. under their said contracts, but was also fully equal to the value of such goods in the markets of Peru up to the period of their shipment from that country.

5th. That whatever may be the rule of law establishing the true dutiable value of said goods, their dutiable value as mentioned in the invoice, duly verified and declared on the entry, must be deemed their true dutiable value until superseded by a valid appraisement, fixing a different value.

6th. That the appraisement by which the dutiable value of the said goods was raised, and the importer was subjected to the additional duty prescribed by the eighth section of the act of 1846, was illegal and void, and the duties thus claimed and paid under said appraisement, were illegally exacted.

7th. That the court below erred in refusing the plaintiff's second prayer, and in the opinion which was given to the jury, by which it decided as a matter of law, and without submitting any facts to be found by the jury that said appraisement was valid.

8th. That the non-compliance of the plaintiff in error with the requirements of the appraisers, contained in their letter of the 6th of October, 1849, did not make valid the illegal appraisement of his goods, previously made, and then still appealed from.

9th. That the court below erred in refusing to grant the plaintiff's third and fourth prayers; and also in the opinion which it gave, by which it instructed the jury absolutely, and without submitting any facts to be found by them, that the plaintiff, by his conduct, had fixed the correctness of the said appraisement.

10th. That the court erred in rejecting the plaintiff's fifth prayer, and in instructing the jury that the plaintiff was not entitled to recover any part of the sum exacted by the defendant in error, as additional duty under the eighth section of the act of 1846, upon the goods entered by the plaintiff for warehouseing and subsequently exported.

To maintain the first seven points, having reference to the true dutiable value of the goods, and the invalidity of the ap-

praisement by which this value was raised, the plaintiff in error relies on the following acts of Congress: 1818, c. 79, 3 Stat. at Large, 433, and particularly to §§ 3, 4, 5, 9, 11, 12, 15, 16 and 17; 1823, c. 21, 3 Stat. at Large, 729, §§ 4, 5, 7, 8, 13, 14, 15, 16, 18, 19, 21; 1828, c. 55, 4 Stat. at Large, 270, §§ 8, 9; 1830, c. 147, 4 Stat. at Large, 409, §§ 1, 2, 3, 4; 1832, c. 227, 4 Stat. at Large, 583, §§ 7, 8, 15; 1833, c. 55, 4 Stat. at Large, 629, § 3; 1842, c. 270, 5 Stat. at Large, 548, §§ 16, 17, 21, 22, 23, 24; 1846, c. 74, 9 Stat. at Large, 42, §§ 1, 8, 11, schedule F.

And, by way of illustration, to the act of 1851, c. 38, 9 Stat. at Large, 629. And the Treasury Circular of the 27th of March, 1851, construing the same.

And the following authorities: Tappan *v.* The United States, 2 Mason, 396; Tappan *v.* The United States, 11 Wheat. 420 to 427; Tracy *v.* Swartwout, 10 Peters, 94, 95; Elliot *v.* Swartwout, Ib. 153–157; Marriott *v.* Brune, 9 Howard, 634, 635; Greely *v.* Thompson, 10 Howard, 225–241; Maxwell *v.* Griswold, Ib. 247 to 254; Reggio *v.* Greely, Mss. Mass. Circuit, June, 1851; Grinnell *v.* Lawrence, 1 Blatchford, 348–350.

To maintain his 8th and 9th points, the plaintiff in error refers to 1823, c. 21, 3 Stat. at Large, 729, §§ 16, 17; 1830, c. 147, 4 Stat. at Large, 409, § 3; 1832, c. 227, 4 Stat. at Large, 583, §§ 7, 8; 1842, c. 270, 5 Stat. at Large, 548, §§ 16, 17; 1848, c. 70, 9 Stat. at Large, 237.

And to Tappan *v.* The United States, 2 Mason, 403; Grinnell *v.* Lawrence, 1 Blatchford, 350; Tucker *v.* Kane, Mss. Md. Circuit; Reggio *v.* Greely, Mss. Mass. Circuit, June, 1851; Watson on Arbitrations, 59 Law Library, 36; Russell on Arbitrations, 63 Ib. 151; Tracy *v.* Swartwout, 10 Peters 95–96; Marriott *v.* Brune, 9 Howard, 634; Greely *v.* Thompson, 10 Howard, 229–238.

To maintain his 10th point he refers to the acts of 1799, c. 22, 1 Stat. at Large, 627, particularly §§ 56, 75, 76, 77, 78, 80, 81, 84; 1816, c. 107, 3 Stat. at Large, 310, § 4; 1818, c. 129, 3 Stat. at Large, 467; 1823, c. 21, 3 Stat. at Large, 729, §§ 28–37; 1830, c. 147, 4 Stat. at Large, 409, § 5; 1842, c. 270, 5 Stat. at Large, 548, §§ 12, 13, 15; 1846, c. 7, 9 Stat. at Large, 3, § 3; 1846, c. 84, 9 Stat. at Large, 53, §§ 1, 2; Treasury Circular of 12th June, 1847; Tremlett *v.* Adams, 13 Howard, 303.

The Attorney-General contended:

The said appraisement was final and conclusive upon the withdrawal of the appeal.

After enumerating the statutory provisions upon the subject, he said,

From the enactments of the statute, it is clear that the ap-

praisement by the custom-house appraisers becomes final and conclusive upon either of these events; by the failure of the owner, importer, or consignee, to ask an appeal to merchant appraisers, or by withdrawing that appeal after taken, or by refusing to produce the letters or accounts relating to the goods imported.

The statute cannot be evaded by taking an appeal and then withdrawing it, with notice of an intent to bring the question of the true market value before the judicial tribunals; nor by taking an appeal, refusing to produce the letters and accounts required, and withdrawing the appeal under protest against the appraisement appealed from, with notice that the appellant means to contest the appraisement and present his documents, called for by the appraisers, before a tribunal other than the merchant appraisers.

The statute has provided the appellate tribunal to settle finally the question of the true market value of the goods when the importer, owner, or consignee is dissatisfied with the appraisement, by the custom-house appraisers. That final appellate tribunal is to consist of merchants, "two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question." The ingenuity of the plaintiff cannot draw this question *ad aliud examen*.

The plaintiff says, "In looking more carefully to the requisition of your appraisers of bark per St. Joseph, I find that I shall have to have copied and translated a mass of correspondence from January last, when it was shipped, to August, (for reference to it is made in all my letters from Pinto & Co., and Alsop & Co.); and in order the more fully to explain Pinto & Co.'s mode of invoicing their bark, I shall have to present a series of documents, commencing in 1847, with their contract with the Bolivian government, proving its actual cost to be about $60 per quintal: all these are necessary to make out my own case, and I am unwilling to present less than all the documents. I do not see, however, of what use they can be at present to the appraisers, who have already made up their valuation of the bark, and made a return to the collector. I shall therefore defer the presentation of my documents for another tribunal, and not lose more time in delivering the bark to the purchaser. I wish you to inform the collector that by my instructions your appeal is withdrawn, and that you are prepared to pay, under protest, whatever duties may be exacted on the bark. . . . . At leisure we can then test the question of this exaction."

In plaintiff's second letter to his agents, he says: "One reason I have for taking the course directed in my letter of this date is, that my counsel informs me that I can more easily get the bark case into court before the appeal appraisement be re-

sorted to than afterwards. Some of our judges have held that an appeal appraisement is final and conclusive."

The plaintiff professed not to see what use could be made of the letters and correspondence called for after the appraisement by the custom-house appraisers had been reported to the collector. It would have been useful evidence before the merchant appraisers if the plaintiff had not withdrawn his appeal rather than to produce those letters, accounts, and correspondence. They might have enlightened the merchant appraisers. They might have enlightened the custom-house appraisers to amend or correct their report to the collector, for the duties were not then fixed and imposted. Did the plaintiff conjecture that the merchant appraisers, to whom he had appealed, were to decide without hearing any evidence? That the government was debarred from introducing evidence to sustain the appraisement appealed from?

The pretences in the plaintiff's letter of inability to see the use to be made of the letters and correspondence called for; that he would "defer the presentation of the documents for another tribunal" than the merchant appraisers, and that he could "more easily get the bark case into court before the appeal appraisement be resorted to than afterwards," cannot enable the plaintiff to evade the force and effect of the seventeenth section of the act of 1842.

The "actual market value or wholesale price," at the time when the article was purchased, in the principal markets of the country from which the same shall have been imported into the United States, is a question of fact, not of law.

The sixteenth and seventeenth sections of the act quoted plainly make the ascertainment of that fact an executive function; an adminstrative, not a judicial process. The particular executive and administrative jurisdiction and process are carefully specified in the law in a manner to exclude all other jurisdictions, and to make the ascertainment of the fact, by that particular jurisdiction, "final and conclusive."

The statute, if the owner, importer, or consignee be dissatisfied with the appraisement of the goods, has given a remedy by an appeal, "forthwith," to merchant appraisers: *Expressio unius est exclusiò alterius.* The express mention of the one remedy is the exclusion of another. Co. Litt. 210; Broom's Legal Maxims, 515, 516; the King *v.* Cunningham, 5 East, 478, 480; the King *v.* the Justices of Surrey, 2 Durnf. & E. 510; Cates *v.* Knight, and same *v.* Mellish, 3 Durn. & E. 444.

The fact to be thus ascertained is of vital importance to the revenue. The means given are necessary to protect the revenue from d ninution by evasions and frauds requiring promptitude.

The Congress have intended that the fact shall be speedily ascertained and adjusted, finally and conclusively fixed "forthwith," as quickly as may be after the master of the vessel shall have made entry of the cargo, as it were *velis levatis;* for it is a fact preceding the computation and payment of the duties; in its nature, purpose, and effect, an executive and administrative business. The views and ends intended in this respect cannot be answered by the dilatory proceedings of the courts.

II. No drawback is recoverable of the penal duty of twenty per cent. in addition to the regular duty inflicted by law, and paid on one hundred and twenty-five seroons of bark afterwards reëxported from the port of Baltimore to foreign parts.

The duty of fifteen per cent. *ad valorem* has been refunded upon the seroons of bark so reëxported to foreign parts.

This question as to the penal duty is so plain, as to afford little room for argument. The twenty per cent. is a rated penalty, inflicted for an attempt to defraud the revenue by an invoice and entry of the goods at the custom-house at an undervalue.

After the fact committed, the fraud detected, and the penalty paid, the party cannot demolish the fact, wipe out the fraud, and claim that the penalty shall be remitted because he has found it for his interest to reëxport the merchandise to a foreign country. By such a construction of the statute, the law would be stripped of its sanction, and terror to offenders.

The construction given by the Secretary of the Treasury, (Mr. Walker,) in his circular of the 12th of June, 1847, to the collectors, pp. 36, 37, is, that this is a "penal duty." . . . "This penal duty is not a subject of drawback, and cannot be returned on debenture:" . . . "such penalty is never returned on exportation of such goods."

On October 25, 1849, plaintiff applied to the Secretary of the Treasury (Mr. Meredith) for instructions to the collector to return "the excess of duty above that which would have accrued on the original and true invoice of the bark," pp. 13 to 15. To this the Secretary wrote to the collector the letter of February 14, 1850, p. 15, and to the plaintiff the letter of same date, p. 16, in which he instructed the collector, and answered the plaintiff, "that the 'additional duty' imposed in all cases of undervaluation, to a certain extent, was intended, and must be considered as entirely distinct in character and object from the regular tariff rates of duty exclusively in view when the law regulating the drawback of duties was enacted; and that consequently no return of such 'additional duty' could be legally made as debenture. It is thought proper to add, that the practice heretofore pursued, under the instructions of the department, has been uniformly governed by these views."

The views above quoted are not binding on this court. As contemporaneous constructions of the department charged by law with superintending the collection of the revenue from customs, however, they will draw forth the serious deliberations of this court, and will be suffered to stand unless some good cause can be found to the contrary.

Mr. Justice CAMPBELL delivered the opinion of the court.

This suit was commenced by the plaintiff as consignee of six hundred and fourteen seroons of Peruvian bark imported into the port of Baltimore, and entered at the custom-house, for an excess of duties charged by the defendant as collector, and paid under protest. Two hundred seroons of the first quality were entered for consumption, and the remainder for warehousing. On the 4th of October, 1849, the appraisers of the custom-house reported the value of the invoice to be ten per cent., and more, above the value declared by the agents of the plaintiff who made the entry, and in consequence the collector, besides the legal duty of fifteen per cent. *ad valorem*, assessed an additional duty of twenty per cent. under the eighth section of the act of 1846, 9 Stat. at Large, 43, c. 74, for undervaluation. On the 6th of October, 1849, the plaintiff duly protested against the appraisement, and requested that the case might be submitted to merchant appraisers, as provided by law. After notice of the appeal, the same day, the permanent appraisers required the plaintiff "to produce all their correspondence, letters, and accounts, relative to the shipment, and to make a deposition that the documents furnished were all that he had concerning the shipment."

In reply to this, some five days after, the plaintiff instructed his agents that it would be tedious and difficult to comply with the requisition, in consequence of the volume of the correspondence, says he cannot understand what use the appraisers could make of them, as they had made their report; that he should defer their presentation for another tribunal, and that he withdraws his appeal, and will pay the duties under protest. He still insists upon the overvaluation, but offers to settle at that rate, provided the additional duty is not charged. He says that this exaction is illegal, and they can test it at their leisure. That he had been advised that an appeal appraisement might interfere with his rights in a court of justice.

These letters of the plaintiff were submitted to the permanent appraisers, who replied they could make no alteration of their estimate, and the appeal of the plaintiff was withdrawn. The plaintiff paid the entire duties exacted upon the appraised value of the entire import, including those entered for consumption as

well as warehousing, and an additional duty of twenty per cent. for undervaluation. These sums were paid under protest. A portion of the bark was exported, and upon this the plaintiff became entitled to drawback, which was paid to the extent of the regular duty, but the additional duty was not refunded.

The complaint of the plaintiff is, that the appraisers, instead of estimating the value of the Peruvian bark, according to the cost price in the markets of its production, under the directions of the Secretary of the Treasury, caused a chemical analysis of samples to be made to ascertain the quantity of sulphate of quinine it contained, and, having ascertained its relative intrinsic value with other imports of the same article, regulated its appraised value by a comparison with the cost of such imports. The facts and the complaint were submitted to the Secretary of the Treasury, who replied as follows:

"It appears from the report of the United States appraisers, dated 20th October last, that the dutiable value of the article in question having been estimated and sustained by them in conformity with law, it was found that the appraised value exceeded, by ten per cent. or more, the value declared in the entry, and that an appeal from this appraisement, entered by the importer, was subsequently withdrawn by him. Under these circumstances it necessarily follows that the original appraisement, made by the United States appraisers, is to be taken as final and conclusive in determining the dutiable value, and that such value, exceeding by ten per cent. or more the value declared in the invoice and entry, the 'additional duty' of twenty per cent., as provided in the eighth section of the Tariff Act of 1846, is chargeable under the law, in addition to the regular tariff rate of fifteen per cent. *ad valorem*, levied on the enhanced value of the article in question. A supplemental question in reference to this importation having been submitted to the department, under date of 7th instant, namely, whether the importer is not entitled to the return of that portion of the 'additional duty' paid on that part of the importation withdrawn from warehouse by the importer, and exported from the United States, I have to advise you that, upon a careful examination of the subject, it is the opinion of the department that the 'additional duty' imposed in all cases of undervaluation, to a certain extent, was intended, and must be considered as entirely distinct in character and object from the regular tariff rates of duty exclusively in view when the laws regulating the drawback of duties were enacted; and that, consequently, no return of such 'additional duty' could be legally made as debenture. It is thought proper to add, that the practice heretofore pursued under the instructions of the department has been uniformly governed by these views."

Much evidence was given at the trial to prove that the value declared by the agents of the consignee at the time of the entry was strictly accurate, and that the rule of valuation adopted at the custom-house was deceptive, and injurious to the importer.

The conclusions of the Secretary of the Treasury, as before set forth, were sustained in the Circuit Court, and form the subject for examination in this court.

By the sixteenth section of the Tariff Act of 1842, (5 Stat. at L. 563, c. 270,) it is prescribed to the appraisers, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value, and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the said goods, wares, and merchandise, at the time purchased, and in the principal markets of the country wherever the same shall have been imported into the United States, with the proviso, that whenever the same shall have been imported into the United States from a country in which the same have not been manufactured and produced, the foreign value shall be appraised and estimated according to the current market value, or wholesale price of similar articles at the principal markets of the country of production or manufacture at the period of the exportation of said merchandise to the United States. The seventeenth section of the act authorizes the appraisers to call before them, and examine upon oath the owner, importer, consignee, or other person, "touching any matter or thing which they may deem material in ascertaining the true market value, or wholesale price of any merchandise imported; and to require the production on oath to the collector, or to any permanent appraiser of any letters, accounts, or invoices in his possession relating to the same, for which purpose they are hereby respectively authorized to administer oaths and affirmations; and if any person so called shall neglect or refuse to attend, or shall decline to answer, or shall, if required, refuse to answer in writing any interrogatories, or produce such papers, he shall forfeit and pay to the United States the sum of one hundred dollars; and if such person be the owner, importer, or consignee, the appraisement which the said appraisers . . . . . may make of the goods, wares, and merchandise, shall be final and conclusive, any act of Congress to the contrary notwithstanding. . . . . .

"Provided that if the importer, owner, agent, or consignee of any such goods shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall select two discreet and experienced merchants, citizens of the United

States, familiar with the character and value of the goods in question, to examine and appraise the same agreeably to the foregoing provisions; and if they shall disagree the collector shall decide between them, and the appraisement thus determined shall be final, and deemed and taken to be the true value of the said goods, and the duties shall be levied thereon accordingly, any act of Congress to the contrary notwithstanding."

The plaintiff contends that the rule of appraisement by which the dutiable value of the said goods was raised, and the importer was subjected to the additional duty prescribed by the eighth section of the act of 1846, was illegal and void, and the duties thus claimed and paid under said appraisement were illegally exacted. It may be admitted that the rule, if strictly applied, would in many cases lead to erroneous results, and could not be relied upon as a safe guide in any case, but this admission does not establish the nullity of the appraisement. The appraisers are appointed "with powers, by all reasonable ways and means, to ascertain, estimate, and appraise the true and actual market value and wholesale price" of the importation. The exercise of these powers involve knowledge, judgment, and discretion. And in the event that the result should prove unsatisfactory, a mode of correction is provided by the act. It is a general principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying their validity, are power in the officer and fraud in the party; all other questions are settled by the decision made, or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law." United States *v.* Arredondo, 6 Pet. 691.

The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them. Decatur *v.* Paulding, 14 Pet. 499.

The interposition of the courts, in the appraisement of importations, would involve the collection of the revenue in inextricable confusion and embarrassment. Every importer might feel justified in disputing the accuracy of the judgment of the appraisers, and claim to make proof before a jury, months and even years after the article has been withdrawn from the control of the government, and when the knowledge of the

transaction has faded from the memories of its officers. The consignee, after he has been notified of the appraisement, is authorized to appeal, and pending the appeal we can see no reason why he may not negotiate with the officers of the customs to correct any error in their judgment. We do not perceive a reason for holding that their control of the subject is withdrawn by the fact of the appeal. The appeal is one of the reasonable ways and means allowed to the importer for ascertaining the true and dutiable value, paramount in its operation to any other when actually employed, but until employed not superseding those confided to the officers. We think, therefore, that the permanent appraisers under the sanction of the collector, (which is to be presumed,) when informed that their decision was contested, had the right to call for the production of the correspondence, and that the plaintiff could not have prosecuted the appeal without a compliance with the requisition.

In this case the plaintiff neither complied with the requisition nor prosecuted the appeal, but withdrew it, and settled the duties on the basis of the appraisement of the permanent appraisers. After this, we think he could not dispute the exactness of the appraisement. In Rankin *v.* Hoyt, 4 How. 327, being the case of a disputed appraisement, the jury found the invoice to be correct, and it was urged that the collector could not be justified in following the higher valuation of the appraisers. The court say "that an appraisal made in a proper case must be followed, or the action of the appraisers would be nugatory, and their appointment and expenses become unnecessary. The propriety of following it cannot, in such a case, be impaired by the subsequent verdict of the jury, differing from it in amount, as the verdict did not exist to guide the collector when the duty was levied, but the appraisal did, and must justify him, or not only the whole system of appraisement would become worthless, but a door be opened to a new and numerous class of actions against collectors, entirely destitute of equity. We say destitute of it, because, in case the importer is dissatisfied with the valuation made by the appraisers, he is allowed by the act of Congress, before paying the duty, an appeal and further hearing before another tribunal."

In the case before us the plaintiff withheld the information which might have satisfied the officers of the government, after a legal requisition upon him. He abandoned the claim for a hearing before "persons familiar with the character and value of the goods in question," "discreet and experienced merchants," and preferred a tedious and vexatious litigation. We think, as was said by the court in the case above cited, "he cannot with much grace, complain afterwards that any overestimate existed."

We shall now inquire whether, upon the reëxportation of the Peruvian bark entered for warehousing, the plaintiff was entitled to a return of the twenty per cent. of additional duty charged upon the portion so exported.

An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty.

The provision for the return of the duty upon a reexportation, formed a part of the system of regulations for importation and revenue from the earliest period of the government, and has always been understood to establish relations between the regular and honest importer and the government.

It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice. A construction, which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing. We are satisfied that the existing laws relating to exportations, with the benefit of drawback, do not apply to relieve the person who has incurred, by an undervaluation of his import, this additional duty from the payment of any portion of it.

Our conclusion is, there is no error in the record, and the judgment of the Circuit Court is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of 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 affirmed, with costs.

JANE M. CARROLL, PLAINTIFF IN ERROR, *v.* LESSEE OF GEORGE W. CARROLL, DE ROSZ CARROLL, ROBERT D. CARROLL, CHARLES W. CARROLL, JOHN M. MARTIN AND AMERICA HIS WIFE, AND JOHN FORD AND MARY HIS WIFE.

By the common law of Maryland, lands of which the testator was not seized at the time of making his will, could not be devised thereby.

In 1850, the legislature passed the following act:

Sec. 1. Be it enacted, &c., That every last will and testament executed in due form of law, after the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will.

Sec. 2. That the provisions of this act shall not apply to any will executed, before the passage of this act, by any person who may die before the first day of June next, unless in such will the intention of the testator or testatrix shall appear that the real and personal estate which he or she may own at his or her death, should thereby pass.

Sec. 3. That this law shall take effect on the first day of June next.

In 1837, Michael B. Carroll duly executed his will, making his wife Jane, his residuary legatee and devisee. After the execution of his will, he acquired the lands in controversy, and died in August, 1851.

The lands which he purchased in 1842 did not pass to the devisee, but descended to the heirs.

The cases upon the subject examined.

A distinction is to be made between cases which decide the precise point in question and those in which an opinion is expressed upon it, incidentally.

Evidence that the name of the tract of land, conveyed by a deed, was the same with the name given in an early patent; that it had long been held by the persons under whom the party claimed; and that there was no proof of any adverse claim, was sufficient to warrant the jury in finding that the land mentioned in the deed was the same with that mentioned in the patent.

The lessee of the plaintiffs having claimed, in the declaration, a term of fifteen years in three undivided fourth parts of the land, and the judgment being that the lessee do recover his term aforesaid yet to come and unexpired, this judgment was correct.

THIS case came up, by writ of error, from the Circuit Court of the United States for the District of Maryland.

It was an action of ejectment brought by the defendants in error, as heirs of Michael B. Carroll, to recover three undivided fourth parts of all of three several tracts or parcels of plantable land, called, for the first of said three tracts, "Black Walnut Thicket" and "Content," contiguous to each other, lying and being in Prince George's county, in the State of Maryland, containing seven hundred acres, more or less; and called, for the second of said three tracts, "Addition to Brookfield," situate, lying, and being in Prince George's county aforesaid, containing one hundred and fifty acres, more or less; and called, for the third of said three tracts, "Lot No. 1," being part of a tract of land called Brookfield, containing four hundred and fifty acres, more or less.

Carroll made a will in 1837, in which, after some legacies, he devised all the rest of his property, real, personal, and mixed, to his wife, Jane M. Carroll.

In 1850, the legislature of Maryland passed a law, which is recited in the syllabus at the head of this report, and also in the opinion of the court.

In August, 1851, Carroll died, upon which the present action of ejectment was brought by three of the four branches of his heirs, to recover three undivided fourth parts of the lands mentioned in the beginning of this report. The claim to the two latter tracts did not appear to have been prosecuted, but the controversy turned exclusively upon the title of the plaintiffs below to "Black Walnut Thicket" and "Content."

Upon the trial in the Circuit Court the plaintiffs offered, in evidence, to support their title:

1. The patent for "Black Walnut Thicket," dated at the city of St. Mary's on the 27th September, 1680, and the patent for "Content," dated on the 10th of August, 1753.

2. A deed from W. B. Brooks and others, to Michael B. Carroll, dated on the 29th of January, 1842, which purported to convey all those tracts, parts of tracts, or parcels of land lying and being in Prince George's county, called "Black Walnut Thicket" and "Content," contiguous to each other, and contained within the following metes and bounds, courses and distances, namely, ... (these were not identical with those of either patent.)

3. The plaintiff then proved possession, by Carroll, of the parcel of land described in the deed to him, from the date of that deed until his decease; and also proved possession of the same by those under whom Carroll claimed from 1809.

The defendant, by her counsel, then prayed the court to instruct the jury that there was no sufficient evidence in the cause from which the jury could properly find that the land embraced in said deed, from said Walter B. Brooks and others, to said Michael B. Carroll, offered in evidence by the plaintiffs, is the same land, or parcel of the same lands, embraced in the said patents or in either of said patents. But the court refused said prayer, being of opinion that there was evidence in the cause proper to be left to the jury to determine whether the said land, mentioned in the deed, was the same, or part of the same, granted by the said patents. To which opinion of the court, and to the refusal of said court to grant the aforesaid prayer of the said defendant, the said defendant, by her counsel, prayed leave to except, and that the court would sign and seal this first bill of exceptions, according to the form of the statute in such case

made and provided; and which is accordingly done this fourth day of December, 1852.

R. B. TANEY, [SEAL.]
JOHN GLENN. [SEAL.]

Defendant's second exception. The defendant then offered in evidence the last will and testament of Michael B. Carroll, dated on the 10th of September, 1837, by which, as has been before mentioned, he made his wife, Jane, his residuary devisee. Thereupon, upon the prayer of the plaintiff, the court gave the following instruction to the jury.

If the jury find that the plaintiff, and those under whom he claims, have possessed and held the land called Black Walnut Thicket and Content, described in the deed from Walter B. Brooke and others, to Michael B. Carroll, dated 29, 1842, and that the said Michael B. Carroll died seized thereof August 30, 1851, and the lessors of the plaintiffs are his heirs at law, and that the said land is the same, or part of the same land mentioned in the patents for Black Walnut Thicket and Content, offered in evidence by the plaintiffs, then the plaintiffs are entitled to recover the land mentioned in the said deed, and that the same did not pass to the defendant by the said will of Michael B. Carroll.

To the giving of which said instruction the defendant, by her counsel, prayed leave to except, and that the court would sign and seal this second bill of exceptions, according to the form of the statute in such case made and provided; and which is accordingly done this fourth day of December, 1852.

R. B. TANEY, [SEAL.]
JOHN GLENN. [SEAL.]

Upon this instruction the jury found the following verdict.

Verdict. Who being impanelled and sworn to say the truth in the premises, upon their oath do say, the defendant is guilty of the trespass and ejectment in the declaration mentioned upon the tracts of the land therein stated, called Black Walnut Thicket and Content, in manner and form as the said lessee, John Doe, complains against her, and which is contained within the metes and bounds, courses and distances, set out and described in the paper hereto annexed, and made for that purpose a part of this verdict, being a deed from Walter B. Brooke, of Prince George's county, and State of Maryland, Alexander Middleton and Elizabeth A. Middleton, his wife, of Charles county, and said State, to Michael B. Carrol, dated the 29th January, eighteen hundred and forty-two; and they assess the damages of said John Doe, lessee, by occasion of the trespass and ejectment aforesaid at one dollar; and as to the other trespasses and eject-

ment upon the other tracts or parcels of land in said declaration, also mentioned, they find that the said defendant is not guilty. (Then followed the deed.)

Upon which verdict the court entered the following

Judgment. Therefore it is considered by the court here, that the said lessee, as aforesaid, do recover against the said Jane M. Carroll his term aforesaid yet to come and unexpired, of and in the said tracts of land called "Black Walnut Thicket" and "Content," with the appurtenances in the district aforesaid, wherein the said Jane M. Carroll is, by the jurors above, found to be guilty of the trespass and ejectment aforesaid; and the sum of one dollar his damages by the said jurors in manner aforesaid assessed; and also the sum of by the court now here adjudged unto the said lessee for his costs and charges by him about his suit in this behalf expended, and that he have thereof his execution, &c.

The case was argued by *Mr. Schley* and *Mr. Alexander*, for the plaintiff in error, and by *Mr. Nelson* and *Mr. Johnson*, for the defendants in error.

Before stating the points made by the counsel for the plaintiff in error, it is proper to mention that at December term, 1853, of the Court of Appeals of Maryland, a case came before that court, where a bill was filed by the executors of Mrs. Carroll, (who died in 1853,) against the administrators *de bonis non* of Mr. Carroll and his heirs at law. The question was whether an injunction ought to be granted to prevent the sale of the negroes of Michael B. Carroll, which sale had been ordered by the Orphans' Court of Prince George's county. In the opinion given by the Court of Appeals, in that case, it was held that the will of Mr. Carroll fell within the provisions of the act of the legislature of Maryland, and consequently that the land was devised to his wife.

The points on behalf of the plaintiff in error, in this court, upon the construction of the statute, were,

1. That (apart from the controlling effect of the decision of the Court of Appeals of Maryland upon the said act, and in relation to this very will) the said act, upon its true construction, does include the said after-acquired land.

2. That whatever might be the decision of this court, if the question were undecided, yet the decision of the highest tribunal in Maryland, upon a statute of that State, will be respected by this court as a true and binding construction thereof.

On the 1st point, the following authorities were cited: Broom's Legal Maxims, 246; Fowler *v.* Chatterton, 19 Eng. C. L. Rep. 75; Culley *v.* Doe dem. Taylerson, 39 Ib. 307; Freeman *v.* Moyes, 28 Ib. 103; Angell *v.* Angell, 58 Ib. 328; Brooks *v.*

Bockett, Ib. 855; 64 Ib. 121; Cushing *v.* Aylwin, 12 Metcalf, 169; Pray *v.* Waterston, Ib. 262; Tuck & Magrudur *v.* Carroll, MS. Court of Appeals of Maryland, at December term, 1853.

On the 2d point: Green *v.* Neal, 6 Pet. 291; and succeeding cases to the same point.

The counsel for the plaintiff in error also referred to the following error.

The plaintiff below only claimed three undivided parts of the land described in the declaration. By inadvertence the court's instruction asserted, upon the hypothesis of the prayer, the plaintiff's right of recovery of the entirety, and the verdict and judgment were conformable to the instruction.

The points on behalf of the defendant in error, were:

First. That the prayer of plaintiffs in error itself conceded that there was evidence from which the jury might find, as they did find, that the lands were the same as were included in the patents, and that it should therefore have been rejected, because where there is any evidence the jury is to decide on its sufficiency and not the court.

Second. That the evidence before the jury not only tended to establish the facts, but was conclusive.

Third. That the will of Michael B. Carroll did not embrace the lands recovered, because they were acquired after its date; that this was the settled law of Maryland at that date, and was, at the time of his death, also the law as far as wills executed at such a time, when the testator died when this testator died — such a will not being included within the act of Maryland of 1849, c. 229, passed the 22d of February, 1850.

Before that statute, after-acquired real estate did not pass. Kemp's Executors *v.* McPherson, 7 Harr. & Johns. 320.

Statutes are not to be construed to have a retrospective operation. Prince *v.* United States, 2 Gallis. 204; United States *v.* Schooner Peggy, 1 Cranch, 103; Butler *v.* Boarman, 1 H. & McH. 371.

Mr. Justice CURTIS delivered the opinion of the court.

This action of ejectment was brought in the Circuit Court of the United States for the District of Maryland, to recover three undivided fourth parts of three tracts of land lying in Prince George's county, in that State. Both parties claimed under Michael B. Carroll; the plaintiffs as heirs at law, the defendant as devisee. It appeared at the trial, in the court below, which was had at the November term, 1852, that on the 10th day of September, 1837, Michael B. Carroll duly executed his last will, the material parts of which are as follows:

To my dear wife, Jane, I give and bequeathe all my slaves, and do request that none of them may be sold or disposed of for the payment of my debts, but that provision shall be made for discharging the same out of the other personal property and effects which I shall leave at the time of my death.

All the rest and residue of my property, both real, personal, and mixed, I give, devise, and bequeathe to my said wife, Jane, who I do hereby constitute and appoint sole executrix of this my last will and testament, enjoining it upon her nevertheless to consult and advise with the said John B. Brooke, as occasion may require, respecting the settlement of estate, and make him a reasonable compensation for the same out of the funds hereinbefore bequeathed to her; and I do hereby revoke and annul all former wills by me heretofore made, declaring this, and none other, to be my last will and testament.

It further appeared, that after the execution of this will, Michael B. Carroll acquired other lands, and the plaintiffs, as heirs at law, claimed to recover three undivided fourth parts thereof as undevised land. The defendant insisted that these, together with all the other lands of the testator, passed to her under the residuary clause of the will. She admitted that, by the common law of Maryland, lands of which the testator was not seized at the time of making his will, could not be devised thereby, but insisted that an act passed by the legislature of Maryland, on the 22d day of February, 1850, so operated as to cause this will to devise the lands to her. That act is as follows:

Section 1. Be it enacted by the General Assembly of Maryland, That every last will and testament, executed in due form of law, after the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will.

Section 2. And be it enacted, That the provisions of this act shall not apply to any will executed before the passage of this act, by any person who may die before the first day of June next, unless in such will the intention of the testator or testatrix shall appear that the real and personal estate which he or she may own at his or her death, should thereby pass.

Section 3. And be it enacted, That this law shall take effect on the first day of June next.

It is argued by the counsel for the devisee that the first section of this act was intended to prescribe a new rule of construction of wills, and to fix the time when the courts should begin to apply that rule; that new rule being, that wills of the

realty should be deemed to speak at the time of the death of the testator; and the time when the courts should begin so to construe them, being the second day of June, 1850; and that the law should be so read as to mean that, after the first day of June, 1850, wills should be deemed to speak as if executed on the day of the testator's death, unless a contrary intention should appear.

To this construction there are insuperable objections. It would change the legal operation not only of existing wills, but of those which had already taken effect by the death of testators. It would make the same will, if offered in evidence on the 2d day of June, operative to pass after-acquired lands to a devisee, though if offered in evidence on the next preceding day it would be inoperative for that purpose. The object of the whole law concerning wills, is to enable the owners of property reasonably to control its disposition at their decease. To cause their real intentions and wishes to be so expressed, and their expression to be so preserved and manifested that they can be ascertained and carried into effect, are the chief purposes of legislation on this subject. So to interpret an act concerning wills as to cause those instruments to operate without regard to the intent of the testator, having one effect to-day and another to-morrow, would not only be arbitrary and a violation of the principles of natural justice, but in conflict with what must be presumed to have been the leading purpose of the legislature in passing the law, the better to give effect to the intent of the testator. To induce the court to believe the legislature intended to make this law retroactive upon a will then in existence, and cause it to pass after-acquired lands without any evidence that the testator desired or believed that it would do so, and to fix a particular day, before which the will should not so operate, and on and after which it should so operate, such intention of the legislature must be expressed with irresistible clearness. Battle *v.* Speight, 9 Ired. 288. It is very far from being so expressed in the first section of this act. On the contrary, its natural and obvious meaning is, that wills executed after the first day of June, 1850, are the only subjects of its provisions.

The words "after the first day of June next" refer to and qualify the words "executed in due form of law," which they follow, just as in the same section the words "on the day of the death of the testator" refer to and qualify the word "executed." In the former case they indicate the time when the will shall be deemed to have been executed; in the latter, the period of time when it was actually executed.

In our opinion, the first section of this law is free from ambi-

guity, and applies only to wills executed after the first day of June, 1850; and, as this will was executed before that day, it is not within this section.

Nor is it within the second section of the act; because that applies only to cases in which the testator having executed his will before the passage of the act, might die before the first day of June then next, and this testator survived till after that day.

It has been supposed however, that although the first section of this act is free from ambiguity standing by itself, and ought to be so construed as to apply only to wills executed after the first day of June, 1850, yet that the second section shows that wills executed before that day were intended to be included in the first section. The argument is that the second section excepts out of the operation of the first section certain wills executed before the first day of June, 1850, and thus proves that the first section embraces wills executed before that day. This argument requires a careful examination. To appreciate it, we must see clearly what are the nature and objects, as well as the form of the two enactments. The first prescribes a new rule of construction of wills. They are to be deemed to speak as of the time of the death of the testator; but power is reserved to him to set aside this rule by manifesting in his will an intention not to have it applied. The real substance and effect of the second section is to enable certain testators to pass their after-acquired lands by expressing an intention to pass them.

By force of the first section, the law prescribes a rule of construction, which a testator may set aside. By force of the second section, a testator may manifest an intention to have his will speak as of the time of his decease, and so adopt that rule of construction. It thus appears that the office of the second section is not to take certain cases out of the operation of the first section, but to prescribe another and substantially different rule of law for those cases. It is true, negative language is used, which leaves the law open to the suggestion that the provision of the act would have applied to such wills if the negative words had not been used.

But it must be remembered that this is only an inference, the strength of which must depend upon the subject-matter of the provisions and the language employed in making them.

If every part of the law can have its natural meaning and appropriate effect by construing this second section as an additional enactment, and if to construe it as an exception would affix to the first section a meaning which would be inconsistent with the great and leading purpose of the legislature, and at the same time be arbitrary and unjust; and if when viewed as an

exception, the cases can, on no just principle, be distinguished from those left unexcepted, then manifestly it should not be construed as an exception, but as a substantive enactment, prescribing for the particular cases a new rule of law not provided for in the first section. We have already pointed out the consequence of holding the first section applicable to all wills. In addition to this it is worth while to inquire if the second section was designed to except certain cases out of the first section, what those cases were, and how they are so distinguished from the cases left unexcepted as to be proper subjects of exception. The proposition is, that the first section includes all wills whenever executed, and the second excepts only wills executed before the passage of the act by persons dying after the passage of the act, and before the first day of June, 1851. Can any reason be imagined why a will executed before the passage of the act should be within the first section if the testator died the day before the passage of the act, and out of it if he died the day after its passage? If there is any distinction between the two cases, it would seem the first case had the stronger claim to exemption from the effect of the new rule.

Nor do we perceive any difficulty in so construing the two sections as to allow to each its appropriate effect, while neither of them violates any principle of natural right; the effect of the first section being to prescribe a new rule of interpretation for wills executed after the first of June, and the effect of the second being, to enable testators who had executed their wills before the passage of the act, and who might die before the first day of June, to pass after-acquired lands if they manifested an intention so to do. Cases of testators who should execute wills after the passage of the act and before the first day of June, or who should die after that day, having previous to that day executed their wills, are left unprovided for, either because it was thought that they would have sufficient time to conform their wills to this change of the law, or because their cases escaped the attention of the legislature, as happened in Barnitz's Lessee *v.* Carey, 7 Cranch, 468; and Blougher *v.* Brewer's Lessee, 14 Peters, 178.

We have been referred to two decisions in the Supreme Court of Massachusetts, in which a retroactive effect was allowed to a statute of that state upon existing wills. They are Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterston, 12 Met. 262. But an examination of those cases will show that the interpretation put by that court on that statute was attended with none of the difficulties which beset the construction of the statute of Maryland contended for by the counsel for the devisee. The law of Massachusetts did not enact a new rule of construction.

It simply enabled testators to devise after-acquired lands by plainly and manifestly declaring an intention to do so. The law could only operate in furtherance of the intention of the testator, and could never defeat that intent by applying to wills an arbitrary rule of construction.

This distinction was pointed out by this court in Smith et al. *v.* Edrington, 8 Cranch, 66, in reference to a similar statute in Virginia; respecting which Mr. Justice Washington said, "the law creates no new or different rule of construction, but merely gave a power to the testator to devise lands which he might possess or be entitled to at the time of his death, if it should be his pleasure to do so." Moreover the language of the act of Massachusetts was broad, and general enough to include in its terms all wills which should take effect after the law went into operation. There was therefore nothing in the words, or the subject-matter of the act, to lead the court to a more restricted construction. Still that court thought the retroactive effect of even such a law required some notice, and they vindicate the departure from an important principle in that case with some effort; and the reluctance with which it should be departed from, is well expressed by the Supreme Court of North Carolina, in Battle *v.* Speight, 9 Ired. 288, in construing a similar statute of that State.

We have also been referred to a manuscript opinion of the Court of Appeals of the State of Maryland upon the effect of this will. It appears that in November last the executors of Mrs. Carroll, the devisee, who is deceased, filed their bill in the Circuit Court of Prince George's County, praying that the administrators, *de bonis non* of Michael B. Carroll might be enjoined from making sale of his negro slaves. The heirs at law and the administrators *de bonis non* of Michael B. Carroll were made parties. The Circuit Court refused the injunction, the complainants appealed, the Court of Appeals affirmed the decree of the Circuit Court, and dismissed the bill. The grounds upon which the court rested its decree will best appear from the following extracts from the opinion:

"The bill is filed by the executors of Mrs Carroll against the administrators *de bonis non* of Mr. Carroll and his heirs at law. The gravamen of it is, that he specifically bequeathed his negroes to his wife, and desired they should not be sold, and that his debts should be paid out of his other estate; that she manumitted them, and that there is other personal and real estate enough to pay the debts due by his estate. Injunction is asked to prevent the sale of the negroes under an order of the Orphans' Court of Prince George's County, which, it is alleged, is about to be done. It is also claimed in the bill, that at the time of

the will of Mrs. Carroll she must be considered as holding the negroes as legatee, and not as executrix, the time specified by law for winding up the estate of her husband having elapsed.

"This last ground cannot avail. There is no allegation in the bill that a final account had been settled by her, and the bill shows that a large amount of debts remained unpaid, and that the creditors of the estate of her husband had commenced proceedings to secure their payment, which proceedings are still pending. In this claim of the bill we suppose but little confidence was, or is reposed by those who framed it; at all events, there is nothing in it. There is nothing in the facts of the case to justify the presumption that there had been a final settlement of the estate of Michael B. Carroll, and all his debts paid off; the truth is, the bill directly contradicts the facts out of which such a presumption could arise.

"It is contended, on the part of the complainants, that the real estate and personal property, other than the negroes of Michael B. Carroll, ought to be applied to the payment of his debts before the negroes are resorted to. This may or not be so; and in regard to it we pass no opinion, because the question is not before us in this case. This is not a bill filed on behalf of the negroes, but by the executors of Mrs. Carroll, and they must occupy the same position in regard to the creditors of Michael B. Carroll, who are represented by the administrators *de bonis non*, as she would have done had the bill been filed by her instead of by them. And if she were the party complainant, how would the case stand? Why, thus: Michael B. Carroll died in debt, leaving a will by which his real and personal estate is specifically devised and bequeathed to his wife. His creditors would have the right to proceed against his entire estate for payment; first, however, against the personal as the primary fund. Their rights could not be affected by any thing he might request in his will; their claims would attach to his entire estate. He did not manumit his slaves; and, moreover, this is not the case of contribution and marshalling of assets between different devisees and legatees, because here Mrs. Carroll was specific devisee and legatee, and residuary devisee and legatee; she, in fact, with but trifling exception, took under the will the whole estate. Had she, immediately on obtaining letters of administration, manumitted the negroes, it could not be pretended such manumission could have affected the rights of the creditors of her testator; and it must be obvious, if she could not do it by her act as executrix, that she could not accomplish it by her will.

"For these reasons we affirm the order of the Circuit Court refusing the injunction."

It is apparent that the question whether some of the lands of the testator were undevised could not enter into or affect the decision of this case. The negroes not being parties, no question could arise whether they were entitled to have the debts paid out of the land of the testator, and the court declares the question is not before them. As between Mrs. Carroll, the executrix of her husband's will or her representatives and the creditors of her husband, the right of the latter was complete to resort to the personal property, including the negroes, and it was therefore wholly immaterial who owned the land. The only prayer in the bill was that the creditors, through the administrators, might be restrained from making their debts out of the negroes. The only question in the case was whether they could be so restrained. And when it was decided that their legal right was, to have all the personalty, including the negroes, applied to their debts, it was immaterial what other rights they or others might have.

We do not consider, therefore, that a comparison of the titles of the heirs at law and the devisee of Michael B. Carroll to his lands was brought into judgment by this injunction bill.

If the court of Appeals had found it necessary to construe a statute of that State in order to decide upon the rights of parties subject to its judicial control, such a decision, deliberately made, might have been taken by this court as a basis on which to rest our judgment. But it must be remembered that we are bound to decide a question of local law, upon which the rights of parties depend, as well as every other question, as we find it ought to be decided. In making the examination preparatory to this finding, this court has followed two rules, one of which belongs to the common law, and the other is a part of our peculiar judicial system. The first is the maxim of the common law, *stare decisis*. The second grows out of the thirty-fourth section of the Judiciary Act, (1 Statutes at Large, 92,) which makes the laws of the several States the rules of decision in trials at the common law; and inasmuch as the States have committed to their respective judiciaries the power to construe and fix the meaning of the statutes passed by their legislatures, this court has taken such constructions as part of the law of the State, and has administered the law as thus construed. But this rule has grown up and been held with constant reference to the other rule, *stare decisis;* and it is only so far and in such cases as this latter rule can operate, that the other has any effect.

If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into

question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.

And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens *v.* The State of Virginia, 6 Wheat. 399, this court was much pressed with some portion of its opinion in the case of Marbury *v.* Madison. And Mr. Chief Justice Marshall said, "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The cases of Ex parte Christy, 3 How. 292, and Jenness et al. *v.* Peck, 7 How. 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains.

With these views we cannot regard the opinion of the Court of Appeals as an authority on which we have a right to rest our judgment. We have already stated the reasons which have brought us to a different construction of the statute; reasons which do not seem to us to be shaken by the opinion of the Court of Appeals.

Our conclusion is that the will of Michael B. Carroll was not within the statute, and the lands in question were consequently undevised.

One other exception was taken at the trial, respecting which it is only necessary to say that we think the identity of name of the two tracts of land in the same county, taken in connection with the long possession of those under whom the plaintiffs claimed, and the absence of all evidence of any adverse claim or outstanding title, was sufficient to warrant the jury in finding that the land was embraced in the patents from the State.

We are also of opinion that the judgment is correct in form, being for the term which the declaration alleges was created by

the plaintiffs as owners of three undivided fourth parts of the land.

The judgment 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 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 affirmed, with costs.

William A. Smith and others, v. Leroa Swormstedt and others.

In 1844, the Methodist Episcopal Church of the United States, at a General Conference, passed sundry resolutions providing for a distinct, ecclesiastical organization in the slaveholding States, in case the annual conferences of those States should deem the measure expedient.

In 1845, these conferences did deem it expedient and organized a separate ecclesiastical community, under the appellation of the Methodist Episcopal Church South.

At this time there existed property, known as the Book Concern, belonging to the General Church, which was the result of the labors and accumulation of all the ministers.

Commissioners appointed by the Methodist Episcopal Church South, may file a bill in chancery, in behalf of themselves and those whom they represent, against the trustees of the Book Concern, for a division of the property.

The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

The Methodist Church was divided. It was not a case of the secession of a part from the the main body. Neither division lost its interest in the common property.

The General Conference, of 1844, had the legitimate power thus to divide the church. In 1808, the General Conference was made a representative body, with six restrictive articles upon its powers. But none of these articles deprived it of the power of dividing the church.

The sixth restrictive article provided that the General Conference should not appropriate the profits of the Book Concern to any other purpose than for the benefit of the travelling ministers, their widows, &c.; and one of the resolutions of 1844 recommended to all the annual conferences to authorize a change in the sixth restrictive article. This was not imposed as a condition of separation, but merely a plan to enable the General Conference itself to carry out its purposes.

The separation of the church into two parts being legally accomplished, a division of the joint property by a court of equity follows, as a matter of course.

This was an appeal from the Circuit Court of the United States for the District of Ohio, which dismissed the bill.

The bill was originally filed in the names of Henry B. Bascom,

a citizen of Lexington, in the State of Kentucky; Alexander L. P. Green, a citizen of Nashville, in the State of Tennessee; Charles B. Parsons, a citizen of Louisville, in the State of Kentucky; John Kelly, a citizen of Wilson county, in the State of Tennessee; James W. Allen, a citizen of Limestone county, in the State of Alabama; and John Tevis, a citizen of Shelby county, in the State of Kentucky —

Against Leroy Swormstedt and John H. Power, agents of the "Book Concern" at Cincinnati, and James B. Finley, all of whom are citizens of the State of Ohio; and George Peck and Nathan Bangs, who are citizens of the State of New York; who are made defendants to this bill.

Bascom, Green, and Parsons were commissioners appointed by the Methodist Episcopal Church South, to demand and sue for the proportion belonging to it of certain property, and especially of a fund called the "Book Concern." Bascom having died whilst the suit was pending, William A. Smith, a citizen of Virginia, was substituted in his place. The other plaintiffs were supernumerary and superannuated preachers, belonging to the travelling connection of the said church south; and all the plaintiffs were citizens of other States than Ohio, and sued not only for themselves but also in behalf of all the preachers in the travelling connection of the church south, amounting to about fifteen hundred.

The defendants were Swormstedt and Power, agents of the Book Concern at Cincinnati, and Findley, all travelling preachers of the Methodist Episcopal Church, and citizens of Ohio; and the Methodist Book Concern a body politic, incorporated by an act of the General Assembly of Ohio, and having its principal office at Cincinnati, in that State.

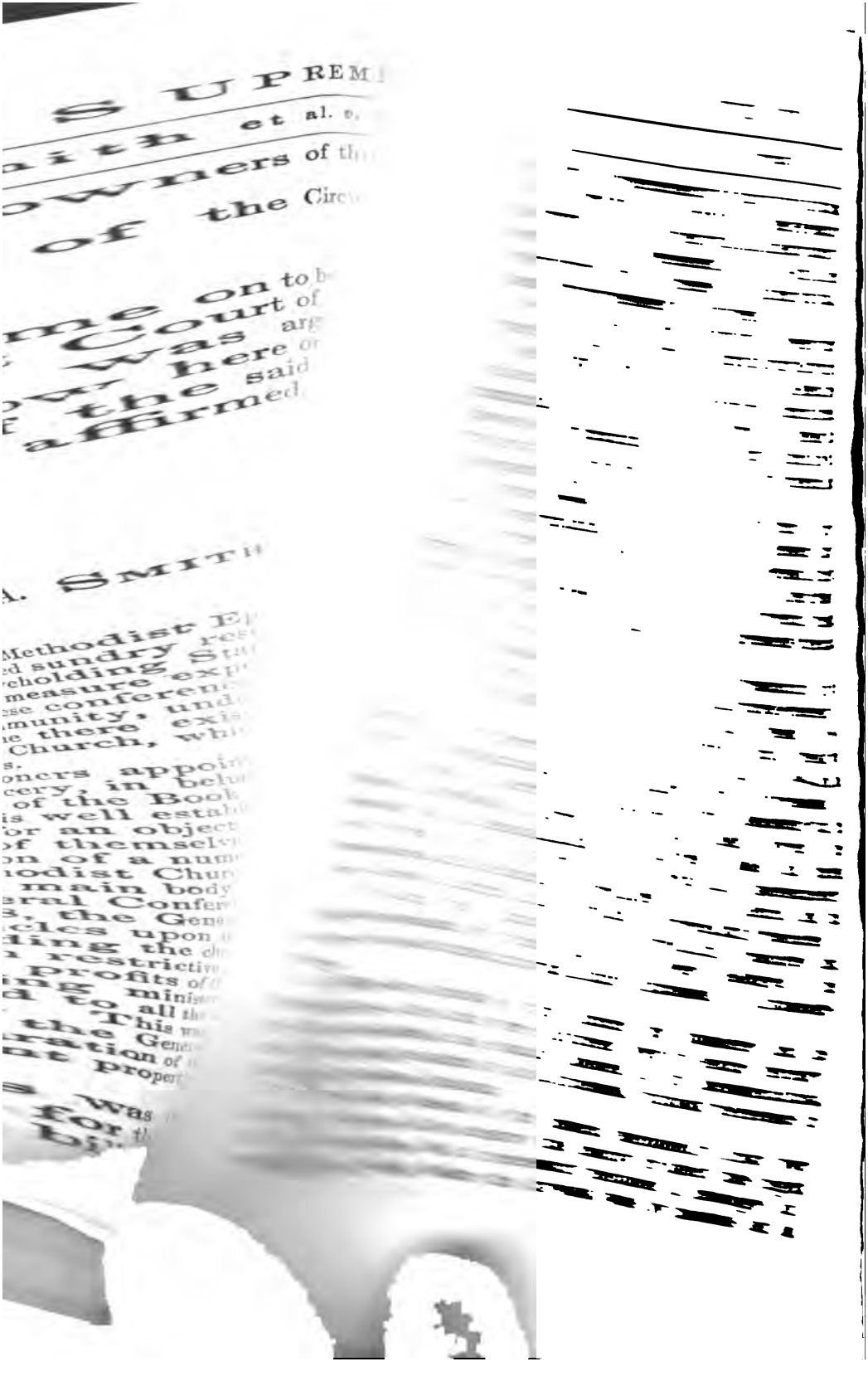
The nature of the dispute and the circumstances of the case are set forth in the opinion of the court.

It was argued by *Mr. Stanberry*, for the appellants, and by *Mr. Badger* and *Mr. Ewing*, for the appellees.

The following extract from the brief of *Mr. Stanberry* explains the points which he made.

We claim, in the first place, that the division of the church was a valid act, and thereby the original church was divided into two churches equally legitimate, and that the members and beneficiaries in each have equal rights to their distributive share of all the property and funds.

Secondly. That if there was no valid division of the original church, but only a separation of the southern portion from the original church, yet, under the circumstances in which it was



ce, having jurisdiction over all classes of the
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each church should be made on the basis of the
travelling preachers in 1844, each church to have the
tion of the entire fund as the number of travelling
within its bounds bore to the whole number then
entire territory of the church prior to the division.

t the refusal of the annual conferences to agree to the
division of the fund, as proposed in the plan of 1844,
continued refusal of the authorities of the northern
recognize the church south, or the beneficiaries within
diction, as entitled to the management or any distribu-
re of the fund, make a case for the interposition of a
f equity.

If the division of the church was not a constitutional act,
neficiaries within the jurisdiction of the church south, and
re now united to that church, have not forfeited their right
is charity.

. The bill presents the proper parties and the proper case
the interference of this court, in order to the due administra-
n of this charity, to meet the exigency arising out of the di-
ion of the church, whether the division was constitutional or
t.

(Mr. Stanberry's argument, both in the opening and in the eply, was very elaborate upon all these points, and therefore annot be reported for want of room. His view of the contingent nature of the resolutions of 1844, was as follows:)

I will here close the argument upon this question of the power of division, having shown its existence in every aspect — having shown it upon the true character of all Methodist organization, upon the usage of the church through all its history, and, finally, upon the express provisions and limitations embodied in the written articles.

If this ground is maintained, the division of the common charitable fund is a necessary result. If the church organization is divided, the temporalities of the church must also be divided, for the right of each of the divisions stands upon the same

made, the beneficiaries of this charity have not lost that charac- by adhering to the church south, because the separation was authorized by the highest official and legislative authority of the church, and the beneficiaries living in the south had no choice or alternative but adherence to that church or the total loss of all church membership and privileges.

We will discuss these propositions in the order in which they are stated, and as they are elaborated under the following points:

The plaintiffs' points. 1. Prior to 1844 the Methodist Episcopal Church in the United States was one church in doctrine and organization. It was one in doctrine as a Methodist Church, and one in organization as the Methodist Church in the United States, with jurisdiction coextensive with the territorial limits of the United States.

2. At the present time there is no such church *de facto* as to unity of organization, as the Methodist Episcopal Church of 1844. There is no longer one Methodist Episcopal Church with territorial jurisdiction coextensive with the United States, but there are two churches instead, divided in territorial jurisdiction by a fixed line, each existing by an independent organization, exclusive of the other.

3. This dissolution of the unity of organization not only exists *de facto* but *de jure;* not by unauthorized secession of a part from the original body, but by a valid division of the original body into two parts equally legitimate, which division was authorized by competent authority, in the plan of 1844, and has since been consummated in accordance with its provisions.

4. The Book Concern is a charitable fund connected with the Methodist Episcopal Church, the capital being devoted to the publication and dissemination of religious books and papers, and the profits to the support of the travelling, supernumerary, superannuated, and deficient preachers of the church, and the wives, widows, children, and orphans of travelling preachers.

5. This fund was founded by the travelling preachers, and chiefly accumulated by their labor. It never belonged to the church in absolute right, but was simply intrusted to its management.

6. Before the division of the church the founders and the beneficiaries of this fund were scattered over its entire territory, as then constituted, and equally labored in its accumulation, and were equally entitled to its dividends, without reference to particular territorial location.

7. The lawful division of the church, territorially, into two distinct churches, did not destroy this charity or affect the right of the beneficiaries, but it necessarily required a change of management, which, before the division, was by means of a

General Conference, having jurisdiction over all classes of the beneficiaries, wherever located, through the agency of annual conferences within the jurisdiction and subject to the control of the General Conference.

8. After such division, in the due administration of this charity, and as near as may be to its original foundation, each of the churches becomes the proper manager of so much of the fund as is to be distributed to the beneficiaries within its exclusive jurisdiction, through the agency of its own annual conferences.

9. That the division to be made of the capital and profits of this fund to each church should be made on the basis of the number of travelling preachers in 1844, each church to have the same proportion of the entire fund as the number of travelling preachers within its bounds bore to the whole number then within the entire territory of the church prior to the division.

10. That the refusal of the annual conferences to agree to the amicable division of the fund, as proposed in the plan of 1844, and the continued refusal of the authorities of the northern church to recognize the church south, or the beneficiaries within its jurisdiction, as entitled to the management or any distributive share of the fund, make a case for the interposition of a court of equity.

11. If the division of the church was not a constitutional act, the beneficiaries within the jurisdiction of the church south, and who are now united to that church, have not forfeited their right to this charity.

12. The bill presents the proper parties and the proper case for the interference of this court, in order to the due administration of this charity, to meet the exigency arising out of the division of the church, whether the division was constitutional or not.

(Mr. Stanberry's argument, both in the opening and in the reply, was very elaborate upon all these points, and therefore cannot be reported for want of room. His view of the contingent nature of the resolutions of 1844, was as follows:)

I will here close the argument upon this question of the power of division, having shown its existence in every aspect — having shown it upon the true character of all Methodist organization, upon the usage of the church through all its history, and, finally, upon the express provisions and limitations embodied in the written articles.

If this ground is maintained, the division of the common charitable fund is a necessary result. If the church organization is divided, the temporalities of the church must also be divided, for the right of each of the divisions stands upon the same

ground — one claims it precisely in the same character with the other.

Various objections are stated in the answer, and in the resolutions of the conference of the church north, in 1848, to the present validity of the plan of division. They say, as it passed the General Conference, it was not absolute, but contingent in many particulars. That it was passed to meet the contingency of a future ascertained necessity for division, and that no such necessity was found to exist; that it was made to depend, in all its parts, upon the concurrence of all the annual conferences in the proposed change of the sixth restrictive rule, and no such concurrence was given; and, finally, that it depended upon the due observance by the church south, and all its societies and members, of the jurisdictional line of division, which line was afterwards, as they say, invaded and disregarded by some of the southern preachers and members.

None of these positions need be argued, except only the matter of the non-concurrence of the annual conferences in the proposed change of the sixth rule.

That part of the plan of separation which respects this matter has nothing to do with the other parts of the plan, or with the taking effect of the plan as a whole. The principal thing, the division, was not in any way referred to the northern annual conferences. That was a matter exclusively between the General Conference and the southern annual conferences, in which the northern conferences had no voice. In order to provide for the contingency of division — seeing that the division of the fund must follow — and to avoid any doubt, the General Conference asks the annual conferences for express authority, not merely to divide the fund according to the division of the church organization, but for general authority to dispose of the entire fund for such purposes in general, as two thirds of the General Conference might determine upon.

This general authority, which would sanction a total misapplication of the fund, the annual conferences refused to give.

Now, the plan in no way provides that the southern conferences should not have any of this fund, except by the consent of the annual conferences; but, in the exercise of its own discretion, by its own authority, and as its own act, the General Conference chose to ask the annual conferences so to modify the restrictive rule. The annual conferences refused, and that leaves the matter at large, as a question to be settled upon the rights of the parties consequent on the division. If after the division the south had no right to any part of this fund — if it had forfeited its right by the new organisation — if the beneficiaries at the south had thereby lost their character as benefi-

ciaries, then, indeed, there would be some ground for putting us to show a new title by the consent of the annual conferences, or something else. But the ground on which we stand is, that we have never for a moment lost our character as beneficiaries; that our title is equal to that of the north; and that the refusal of the annual conferences is the common case of a refusal to perform a duty which drives the injured party into a court of justice.

The points made by the counsel for the appellees, were the following:

1. The first point was in answer to the one raised by Mr. Stanberry, namely, that the church was dissolved and destroyed by the action of the General Conference of 1844, and that two new churches have arisen out of its ruins.

In answer to the first two propositions of the complainants, involving this point, the defendants insist —

1st. That prior to 1844 the Methodist Episcopal Church was the only religious denomination bearing that name, and it was one in organization, discipline, and doctrine. A large part, but not the whole territory of the United States, was contained within its organization — it did not extend to the United States' possessions on the Pacific; it did embrace Texas, then a foreign country; it had been extended, but it did not then extend to the Canadas; its boundaries had been variable, and its identity or unity, its organization or existence, had no necessary dependence upon territorial limits.

2d. From 1844 to the present time, the same Methodist Episcopal Church has continued to exist identical in name, organization, discipline, and doctrine, and under a regular succession of the same officers: some conferences in the slaveholding States have withdrawn from it; it has lost and gained individual members; and the United States' possessions on the Pacific have been received into its connection; but these changes have not affected its organization or destroyed its identity.

2. With respect to the property called the "Book Concern," (after examining the constitution of this fund, the counsel came to the following conclusions:)

I take it then as clear, by proof and by concession, that a Methodist Episcopal Church, having a regular and well known organization, existed prior to 1844, and that the property now in controversy was held by trustees, in trust for the church so organized, and for certain specified beneficiaries in it, and that it was only through connection with the church, in and through its organization, in a mode pointed out by its organic law,

that any individual was or could be entitled to any portion of the fund.

I hold it equally clear, and of like necessity it must be conceded, that if the Methodist Episcopal Church of 1844 still exists, and retains its identity, the trustees still hold the property in trust for it only, and that it is by connection with it as an organized body, and by and through it alone, that any individual is now entitled as a beneficiary, unless indeed the church has by compact, or some equivalent act, qualified the condition of the trust, and changed its direction; and that no individual members of the church, or any section of it, large or small, could by mere secession entitle himself or themselves to any portion of the trust fund, separate from and independent of the organized, still subsisting church.

3. Then, to entitle these complainants to recover, they must establish as facts:

1st. That the Methodist Episcopal Church, as it existed in and prior to 1844, was destroyed by the acts of the General Conference of 1844 — or by the act of the Louisville Convention of 1845, in the exercise of power conferred on it by the General Conference — and thenceforth ceased to exist as an organized body — that out of a portion of its severed elements a new church was formed, composed in part of individuals who, under the former organization, were beneficiaries of the fund, and that thus the expressed object of the charity, as also its means of administration, having failed, there being now no Methodist Episcopal Church to administer the charity, and no travelling preachers, &c., of the Methodist Episcopal Church to receive and enjoy it, a court of equity will apply the charity, not according to its terms, which is no longer possible, but *cy. pres*, as nearly as possible according to its original object, and, to this end, divide the fund *pro ratâ* between the fragments of the defunct church.

2d. Or that if the Methodist Episcopal Church of 1844 still exists, some act by the General Conference of that year has changed, in part, the direction of the fund and the medium of its administration.

(After discussing these propositions, the counsel came to the following conclusions:)

We find, then, on examining the bill and the book of Doctrine and Discipline, which is filed with and made part of it,

1st. That the General Conference is not, since 1808, an original body possessed of inherent powers, but representative merely, having no other powers than those conferred on it by the constitution which created it.

2d. That the general grant of powers to this conference

extends only to the making rules and regulations for the Methodist Episcopal Church, not to the division, dissolution, or destruction of the church.

3d. That the restrictive articles forbid, by clear implication, the division or destruction of the organized Methodist Episcopal Church.

4th. That under the sixth restrictive article the General Conference cannot "appropriate the produce of the Book Concern, nor of the Charter Fund, to any purpose other than for the benefit of the travelling, supernumerary, superannuated, and worn-out preachers" of the Methodist Episcopal Church, within its organization, "their wives, widows, and children;" nor can that conference by any act so involve the fund or place it in such situation that a court of equity can apply it to objects, or in a manner forbidden by the declaration of trust and the constitution of the Methodist Episcopal Church.

4. We will now proceed to show that the General Conference never assumed the power of destroying the organization of the Methodist Episcopal Church, or of severing or dissolving it, but as often as they have spoken distinctly upon the subject, have disclaimed the power, and that they did not, in the case at bar, exercise or attempt to exercise it.

(The argument upon this point was very extensive, involving an examination of the Canada case, and of the records of the conferences, concluding as follows:)

It is, then, so far as the thirteen southern and south-western conferences are concerned, a case of voluntary withdrawal from the Methodist Episcopal Church as organized, and the formation of a new and separate organization; and I have already shown, that if the withdrawal be small or great, of one or many, the voluntary abandonment of the organized church is also the voluntary surrender of all the temporal privileges and immunities belonging to that organization. And it is very clear that this trust-fund, which was intrusted in its administration to the annual conferences of this organization, cannot be transferred by a court of equity to a conference which has ceased to belong to that organization, any more than to one which never had belonged to it. The southern conferences, now the Methodist Episcopal Church South, cannot, therefore, sustain their bill on the ground of former connection with the Methodist Episcopal Church, and of their present separate existence; and I have already shown that they cannot sustain it on the ground of contract. It is equally clear that they cannot sustain it on the gound that the General Conference of 1844 had caused the southern conferences to believe that the Book Concern would be divided, and induced them to act according to that belief. This point, however good

in law, fails as a matter of fact. There was no disguise, no concealment, no misrepresentation on the part of the General Conference, but the most open candor and directness; and the conferences south were fully advised — indeed, they advised themselves — that, in case of separation, a share of the Book Concern depended on the votes of the annual conferences, and they agreed that it did and should depend upon such vote. The church south, therefore, in its new organization, has no standing in court. The only remaining question which goes to the legal merits of the case is:

5. Do the individuals who join in this bill show any right to a distributive share of this fund?

They show that they "are preachers — Kelley and Allen are supernumerary, and Tevis superannuated preachers — of the Methodist Episcopal Church South, and that as such they have a personal interest in the real estate, personal property, debts, and funds now holden by the Methodist Episcopal Church through said defendants, as agents and trustees appointed by the General Conference of the Methodist Episcopal Church." So much for themselves.

As to those whom they choose to represent, they say, "That there are about fifteen hundred preachers belonging to the travelling connection of the Methodist Episcopal Church South, each of whom has a direct personal interest in the same right as your complainants to the said property," &c.

They say they are members of the church south, preachers belonging to the travelling connection of that church, and on that ground, and that alone, they set up this claim. They do not aver that they, or any one of them, or any one for whom they appear, ever belonged to the Methodist Episcopal Church, and acquired rights in its connection; but they simply claim that, by virtue of their connection with the Methodist Episcopal Church South, they are entitled to a distributive share of the property of the Methodist Episcopal Church. The case is certainly no better by making these persons complainants. If the church south be not entitled, as an organized body, on some ground shown in the bill, these persons are not entitled because they are members of its organization.

The case made by complainants' counsel for widows and orphans of travelling preachers of the Methodist Episcopal Church, who became entitled by the services of their husbands and fathers, but who, since their death, have by the mere force of circumstances been withdrawn from the Methodist Episcopal Church, and attached to the church south, if available at all, goes too far, entitles them to more than it has even contended that they have a claim to. If their relation to the Methodist Epis-

copal Church be not so sundered as to exonerate that church from their support, it is bound to support them out of whatsoever fund may be in its power, in common with the rest of its widows and orphans. They are not entitled to a support out of the charter-fund and the produce of the Book Concern, but out of the funds of the various annual conferences of the Methodist Episcopal Church into which the produce of the Book Concern enters, and of which it forms a part merely, and, indeed, but a small part. If entitled to any thing from the Methodist Episcopal Church since they ceased to belong to it, it is to their support, in whole or in part, according to their necessities, not to a distributive share of the produce of the Book Concern.

The separation of those who have passively suffered by the secession of so large a portion of the Methodist Episcopal Church from its ancient organization, is greatly to be commiserated and regretted, and the Methodist Episcopal Church is ready and anxious, in any possible mode, to reach and relieve them, for she still recognizes them as members. But she cannot, consistently with her discipline, deliver any part of her funds to another church, alien in organization, though the same in faith, to be administered among them. Nor can their necessities or their rights, if rights indeed they have, bring in and entitle ninety-five who voluntarily seceded, and who were active in secession, to come in and share in the funds of the Methodist Episcopal Church, with the five who were withdrawn from it by the mere force of circumstances. But those who were passive in the separation, those who did not withdraw, but who were withdrawn from the Methodist Episcopal Church, are not before the court. The only individuals here who claim as parties for themselves, and those standing in a like situation, claim merely by virtue of their connection with the church south, and do not profess to have ever been members of the Methodist Episcopal Church.

This, it appears to me, is the truth and reason of this branch of the case; and if so, no equitable right arises in their behalf. And this fund is not now wasted or scattered to the winds. It is still applied strictly according to the terms and intent of the trust, in the very way in which the written declaration of the trust, known and understood by all, directs it. Unhappily, some who enjoyed the benefit of the fund are withdrawn from the sphere of its application; others, perhaps, equally worthy and equally necessitous, are brought within it. This case does not come within the principle of any of the cases cited by counsel on the other side, if the Methodist Episcopal Church has not been destroyed. If it has, I admit the application of the cases. For while that church exists it is a trustee, in its various organism, to administer the charity, and the beneficiaries described by the declaration of trust are to be found within its bosom. The

trustee, the charity, the beneficiaries, have not failed, but merely certain individuals have ceased to be beneficiaries.

6. Certain it is, that this separation took place either by secession or by contract, the General Conference offering terms of separation, and the southern conferences acceding to them.

If the latter be the case, the condition precedent to the distribution of the charter-fund and Book Concern was also agreed upon; namely, the consent of the annual conferences.

If the southern conferences seceded without a contract, the legal consequences of simple secession follow. Those I have considered.

If with a contract, that contract is the law of the secession. And all that a court of equity can do is to compel the parties to carry out the contract in good faith.

7. The blame of the separation is cast by complainants on the Methodist Episcopal Church. It is contended, that the secession of the southern conferences was not only justified, but compelled, by the continued agitation of the slavery question in the northern annual conferences, and also in the General Conference itself. And more especially, say they, it was compelled by the illegal and oppressive acts of the General Conference of 1844, in the cases of Harding and Bishop Andrew. These matters of complaint I will now consider. And,

1st. The agitation of the slavery question in the Methodist Episcopal Church.

(The argument upon this branch of the subject is omitted.)

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 Ohio.

The bill is filed by the complainants, for themselves, and in behalf of the travelling and worn out preachers in connection with the society of the Methodist Episcopal Church South in the United States, against the defendants, to recover their share of a fund called the Book Concern, at the city of Cincinnati, consisting of houses, machinery, printing-presses, book-bindery, books, &c., claimed to be of the value of some two hundred thousand dollars.

The bill charges that, at and before the year 1844, there existed in the United States a voluntary association unincorporated, known as the Methodist Episcopal Church, composed of seven bishops, four thousand eight hundred and twenty-eight preachers belonging to the travelling connection, and in bishops, ministers, and members about one million one hundred and nine thousand nine hundred and sixty, united, and bound together in one organized body by certain doctrines of faith and morals, and by certain rules of government and discipline.

That the government of the church was vested in one body called the General Conference, and in certain subordinate bodies called annual conferences, and in bishops, travelling ministers, and preachers.

The bill refers to a printed volume, entitled "The Doctrines, and Discipline of the Methodist Episcopal Church," as containing the constitution, organization, form of government, and rules of discipline, as well as the doctrines of faith of the association.

The complainants further charge, that differences and disagreements had sprung up in the church between what was called the northern and southern members, in respect to the administration of the government with reference to the ownership of slaves by the ministers of the church, of such a character and attended with such consequences as threatened greatly to impair its usefulness, as well as permanently to disturb its harmony; and it became and was a question of grave and serious importance whether a separation ought not to take place, according to some geographical boundary to be agreed upon, so as that the Methodist Episcopal Church should thereafter constitute two separate and distinct organizations. And that, accordingly, at a session of the General Conference held in the city of New York in May, 1844, a resolution was passed by a majority of over three fourths of the body, by which it was determined, that, if the annual conferences of the slaveholding States should find it necessary to unite in a distinct ecclesiastical connection, the following rule should be observed with regard to the northern boundary of such connection — all the societies, stations, and conferences adhering to the church in the south, by a vote of a majority of the members, should remain under the pastoral care of the southern church; and all adhering to the church north, by a like vote, should remain under the pastoral care of that church. This plan of separation contains eleven other resolutions relating principally to the mode and terms of the division of the common property of the association between the two divisions, in case the separation contemplated should take place; and which, in effect, provide for a *pro ratâ* division, taking the number of the travelling preachers in the church north and south as the basis upon which to make the partition.

The complainants further charge that, in pursuance of the above resolutions, the annual conferences in the slaveholding States met, and resolved in favor of a distinct and independent organization, and erected themselves into a separate ecclesiastical connection, under the provisional plan of separation based upon the discipline of the Methodist Episcopal Church, and to

be known as the Methodist Episcopal Church South. And they insist that, by virtue of these proceedings, this church, as it had existed in the United States previous to the year 1844, became and was divided into two separate churches, with distinct and independent powers, and authority composed of the several annual conferences, stations, and societies, lying north and south of the aforesaid line of division. And, also, that by force of the same proceedings, the division of the church south became and was entitled to its proportion of the common property real and personal of the Methodist Episcopal Church, which belonged to it at the time the separation took place; that the property and funds of the church had been obtained by voluntary contributions, to which the members of the church south had contributed more than their full share, and which, down to the time of the separation, belonged in common to the Methodist Episcopal Church, as then organized.

The complainants charge, that they are members of the church south, and preachers, some of them supernumerary, and some superannuated preachers, and belonged to the travelling connection of said church; and that, as such, have a personal interest in the property, real and personal, held by the church north, and in the hands of the defendants; and, further, that there are about fifteen hundred preachers belonging to the travelling connection of the church south, each of whom has a direct and personal interest in the same right with the complainants in the said property, the large number of whom make it inconvenient and impracticable to bring them all before the court as complainants.

They also charge, that the defendants are members of the Methodist Episcopal Church North; and that each, as such, has a personal interest in the property; and further, that two of them have the custody and control of the fund in question; and that, in addition to these defendants, there are nearly thirty-eight hundred preachers belonging to the travelling connection of the church north, each of whom has an interest in the fund in the same right, so that it is impossible, in view of sustaining a just decision in the matter, to make them all parties to the bill.

The complainants also aver, that this bill is brought by the authority, and under the direction of the general and annual conferences of the church south, and for the benefit of the same, and for themselves, and all the preachers in the travelling connection, and all other ministers and persons having an interest in the property.

The defendants, in their answer, admit most of the facts charged in the bill, as it respects the organization, government,

discipline, and faith of the Methodist Episcopal Church as it existed at and previous to the year 1844. They admit the passage of the resolutions, called the plan of separation, at the session of the General Conference of that year, by the majority stated; but deny that the resolutions were duly and legally passed; and also deny that the General Conference possessed the competent power to pass them, and submit that they were therefore null and void. They also submit that, if the General Conference possessed the power, the separation contemplated was made dependent upon certain conditions, and among others a change of the sixth restrictive article in the constitution of the church, by a vote of the annual conferences, which vote the said conferences refused.

The defendants admit the erection of the church south into a distinct ecclesiastical organization; but deny, that this was done agreeably to the plan of separation. They deny that the Methodist Episcopal Church, as it existed in 1844, or at any time, has been divided into two distinct and separate ecclesiastical organizations; and submit that the separation and voluntary withdrawal from this church of a portion of the bishops, ministers, and members, and organization into a church south, was an unauthorized separation; and that they have thereby renounced and forfeited all claim, either in law or equity, to any portion of the property in question. The defendants admit that the Book Concern at Cincinnati, with all the houses, lots, printing-presses, &c., is now and always has been beneficially the property of the preachers belonging to the travelling connection of the Methodist Episcopal Church; but insist that, if such preachers do not, during life, continue in such travelling connection, and in the communion, and subject to the government of the church, they forfeit for themselves and their families all ownership in, or claim to the said Book Concern, and the produce thereof; they admit that the Book Concern was originally commenced and established by the travelling preachers of this church, upon their own capital, with the design in the first place of circulating religious knowledge, and that, at the General Conference of 1796, it was determined that the profits derived from the sale of books should in future be devoted wholly to the relief of travelling preachers, supernumerary and worn out preachers, and the widows and orphans of such preachers — and the defendants submit that the Methodist Episcopal Church South is not entitled at law or in equity to have a division of the property of the Book Concern, or the produce, or to any portion thereof; and that the ministers, preachers, or members, in connection with such church are not entitled to any portion of the same; and further, that being no

longer travelling preachers belonging to the Methodist Episcopal Church, they are not so entitled, without a change of the sixth restrictive article of the constitution of 1808, provided for in the plan of separation, as a condition of the partition of said fund.

The proofs in the case consist chiefly of the proceedings of the General Conference of 1844, relating to the separation of the church and of the proceedings of the southern conferences, in pursuance of which a distinct and separate ecclesiastical organization south took place.

There is no material controversy between the parties, as it respects the facts. The main difference lies in the interpretation and effect to be given to the acts and proceedings of these several bodies and authorities of the church. Our opinion will be founded almost wholly upon facts alleged in the bill, and admitted in the answer.

An objection was taken, on the argument, to the bill for want of proper parties to maintain the suit. We think the objection not well founded.

The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. Story's Eq. Pl. §§ 97, 98, 99, 103, 107, 110, 111, 116, 120; 2 Mitf. Pl. (Jer. Ed.) 167, 2 Paige R. 19; 4 Mylne & Cr. 134, 619; 2 De Gex & Smale, 102, 122.

Mr. Justice Story, in his valuable treatise on Equity Pleadings, after discussing this subject with his usual research and fulness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court.

In this latter class, though the rights of the several persons may be separate and distinct, yet there must be a common interest or a common right, which the bill seeks to establish or enforce. As an illustration, bills have been permitted to be brought by the lord of a manor against some of the tenants, and *vice versa*, by some of the tenants in behalf of themselves and the other tenants, to establish some right — such as suit to a mill, or right of common, or to cut turf. So by a parson of a

parish against some of the parishioners to establish a general right to tithes — or conversely, by some of the parishioners in behalf of all to establish a parochial modus.

In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise.

As it respects the persons into whose hands the fund in question should be delivered for the purpose of distribution among the beneficiaries, in case of a division of it, we shall recur to the subject in another part of this opinion.

We will now proceed to an examination of the merits of the case.

The Book Concern, the property in question, is a part of a fund which had its origin at a very early day, from the voluntary contributions of the travelling preachers in the connection of the Methodist Episcopal Church. The establishment was at first small; but at present, is one of very large capital, and of extensive operations, producing great profits. In 1796, the travelling preachers in General Conference assembled, determined that these profits should be thereafter devoted to the relief of the travelling preachers, and their families; and, accord-

ingly resolved, that the produce of the sale of the books, after the debts were paid, and sufficient capital provided for carrying on the business, should be applied for the relief of distressed travelling preachers, for the families of travelling preachers, and for supernumerary and worn out preachers, and the widows and orphans of preachers.

The establishment was placed under the care and superintendence of the General Conference, the highest authority in the church, which was composed of the travelling preachers; and it has grown up to its present magnitude, its capital amounting to nearly a million of dollars, from the economy and skill with which the concern has been managed, and from the labors and fidelity of the travelling preachers, who have always had the charge of the circulation and sale of the books in the Methodist connection throughout the United States, accounting to the proper authorities for the proceeds. The agents who have the immediate charge of the establishment make up a yearly account of the profits, and transmit the same to the several annual conferences, each, an amount, in proportion to the number of travelling preachers, their widows and orphans comprehended within it, which bodies distribute the fund to the beneficiaries individually, agreeably to the design of the original founders. These several annual conferences are composed of the travelling preachers residing or located within certain districts assigned to them; and comprehended, in the aggregate, the entire body in connection with the Methodist Episcopal Church. The fund has been thus faithfully administered since its foundation down to 1846, when the portion belonging to the complainants in this suit, and those they represent, was withheld, embracing some thirteen of the annual conferences.

In the year 1844 the travelling preachers in General Conference assembled, for causes which it is not important particularly to refer to, agreed upon a plan for a division of the Methodist Episcopal Church in case the annual conferences in the slaveholding States should deem it necessary; and to the erection of two separate and distinct ecclesiastical organizations. And, according to this plan, it was agreed that all the societies, stations, and conferences adhering to the church south, by a majority of their respective members, should remain under the pastoral care of that church; and all of these several bodies adhering, by a majority of its members, to the church north, should remain under the pastoral care of that church; and, further, that the ministers, local and travelling, should, as they might prefer, attach themselves, without blame, to the church north or south. It was also agreed that the common property of the church, including

this Book Concern, that belonged specially to the body of travelling preachers, should, in case the separation took place, be divided between the two churches in proportion to the number of travelling preachers falling within the respective divisions. This was in 1844. In the following year the southern annual conferences met in convention, in pursuance of the plan of separation, and determined upon a division, and resolved that the annual conferences should be constituted into a separate ecclesiastical connection, and based upon the discipline of the Methodist Episcopal Church, comprehending the doctrines and entire moral, ecclesiastical, and economical rules and regulations of said discipline, except only so far as verbal alterations might be necessary; and to be known by the name of the Methodist Episcopal Church South.

The division of the church, as originally constituted, thus became complete; and from this time two separate and distinct organizations have taken the place of the one previously existing.

The Methodist Episcopal Church having been thus divided, with the authority and according to the plan of the General Conference, it is claimed, on the part of the complainants, who represent the travelling preachers in the church south, that they are entitled to their share of the capital stock and profits of this Book Concern; and that the withholding of it from them is a violation of the fundamental law prescribed by the founders, and consequently of the trust upon which it was placed in the hands of the defendants.

The principal answer set up to this claim is, that, according to the original constitution and appropriation of the fund, the beneficiaries must be travelling preachers, or the widows and orphans of travelling preachers, in connection with the Methodist Episcopal Church, as organized and established in the United States at the time of the foundation of the fund; and that, as the complainants, and those they represent, are not shown to be travelling preachers in that connection, but travelling preachers in connection with a different ecclesiastical organization, they have forfeited their right, and are no longer within the description of its beneficiaries.

This argument, we apprehend, if it proves any thing, proves too much; for if sound, the necessary consequence is that the beneficiaries connected with the church north, as well as south, have forfeited their right to the fund. It can no more be affirmed, either in point of fact or of law, that they are travelling preachers in connection with the Methodist Church as originally constituted, since the division, than of those in connection with the church south. Their organization covers but about half of the

territory embraced within that of the former church; and includes within it but a little over two thirds of the travelling preachers. Their general conference is not the general conference of the old church, nor does it represent the interest or possess, territorially, the authority of the same; nor are they the body under whose care this fund was placed by its founders. It may be admitted that, within the restricted limits, the organization and authority are the same as the former church. But the same is equally true in respect to the organization of the church south.

Assuming therefore that this argument is well founded, the consequence is that all the beneficiaries of the fund, whether in the southern or northern division, are deprived of any right to a distribution, not being in a condition to bring themselves within the description of persons for whose benefit it was established: in which event the foundation of the fund would become broken up, and the capital revert to the original proprietors, a result that would differ very little in its effect from that sought to be produced by the complainants in their bill.

It is insisted, however, that the General Conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division; and hence, that the organization of the church south was without authority, and the travelling preachers within it separated from an ecclesiastical connection which is essential to enable them to participate as beneficiaries. Even if this were admitted, we do not perceive that it would change the relative position and rights of the travelling preachers within the divisions north and south, from that which we have just endeavored to explain. If the division under the direction of the General Conference has been made without the proper authority, and for that reason the travelling preachers within the southern division are wrongfully separated from their connection with the church, and thereby have lost the character of beneficiaries, those within the northern division are equally wrongfully separated from that connection, as both divisions have been brought into existence by the same authority. The same consequence would follow in respect to them, that is imputable to the travelling preachers in the other division, and hence each would be obliged to fall back upon their rights as original proprietors of the fund.

But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt but that the General Conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal

Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one.

In 1784, when this church was first established, and down till 1808, the General Conference was composed of all the travelling preachers in that connection. This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities to administer its polity, and promulgate its doctrines and teachings throughout the land.

It cannot therefore be denied, indeed, it has scarcely been denied that this body, while composed of all the travelling preachers, possessed the power to divide it and authorize the organization and establishment of the two separate independent churches. The power must necessarily be regarded as inherent in the General Conference. As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might, at any subsequent period, the power remaining unchanged.

But, it is insisted, that this power has been taken away or given up, by the action of the General Conference of 1808. In that year the constitution of this body was changed so as to be composed, thereafter, by travelling preachers, to be elected by the annual conferences, in the ratio of one for every five members. This has been altered from time to time, so that, in 1844, the representation was one for every twenty-one members. At the time of this change, and as part of it, certain limitations were imposed upon the powers of this General Conference, called the six restrictive articles: — 1. That they should not alter or change the articles of religion, or establish any new standard of doctrine. 2. Nor allow of more than one representative for every fourteen members of the annual conferences, nor less than one for every thirty. 3. Nor alter the government so as to do away with episcopacy, or destroy the plan of itinerant superintendencies. 4. Nor change the rules of the united societies. 5. Nor deprive the ministers or preachers of trial by a committee, and of appeal: nor members before the society, or lay committee, and appeal. And 6. Nor appropriate the proceeds of the Book Concern, nor the charter-fund, to any purpose other than for the benefit of the travelling, supernumerary, superannuated, and worn out preachers, their wives, widows, and children. Subject to these restrictions, the delegated conference possessed the same powers as when composed of the entire body of preachers.

And it will be seen that these relate only to the doctrine of the church, its representation in the General Conference, the episcopacy, discipline of its preachers, and members, the Book Concern, and charter-fund. In all other respects, and in every thing else that concerns the welfare of the church, the General Conference represents the sovereign power the same as before. This is the view taken by the General Conference itself, as exemplified by the usage and practice of that body. In 1820 they set off to the British Conference of Wesleyan Methodists the several circuits and societies in Lower Canada. And in 1828 they separated the Annual Conference of Upper Canada from their jurisdiction, and erected the same into a distinct and independent church. These instances, together with the present division, in 1844, furnish evidence of the opinions of the eminent and experienced men of this church in these several conferences, of the power claimed, which, if the question was otherwise doubtful, should be regarded as decisive in favor of it. We will add, that all the northern bishops, five in number, in council in July, 1845, acting under the plan of separation, regarded it as of binding obligation, and conformed their action accordingly.

It has also been urged on the part of the defendants that the division of the church, according to the plan of the separation, was made to depend not only upon the determination of the southern annual conferences, but also upon the consent of the annual conferences north, as well as south, to a change of the sixth restrictive article, and as this was refused, the division which took place was unauthorized. But this is a misapprehension. The change of this article was not made a condition of the division. That depended alone upon the decision of the southern conferences.

The division of the Methodist Episcopal Church having thus taken place, in pursuance of the proper authority, it carried with it, as matter of law, a division of the common property belonging to the ecclesiastical organization, and especially of the property in this Book Concern, which belonged to the travelling preachers. It would be strange if it could be otherwise, as it respects the Book Concern, inasmuch as the division of the association was effected under the authority of a body of preachers who were themselves the proprietors and founders of the fund.

It has been argued, however, that, according to the plan of separation, the division of the property in this Book Concern was made to depend upon the vote of the annual conferences to change the sixth restrictive article, and that whatever might be the legal effect of the division of the church upon the com-

mon property otherwise, this stipulation controls it and prevents a division till the consent is obtained.

We do not so understand the plan of separation. It admits the right of the church south to its share of the common property, in case of a separation, and provides for a partition of it among the two divisions, upon just and equitable principles; but, regarding the sixth restrictive article as a limitation upon the power of the General Conference, as it respected a division of the property in the Book Concern, provision is made to obtain a removal of it. The removal of this limitation is not a condition to the right of the church south to its share of the property, but is a step taken in order to enable the General Conference to complete the partition of the property.

We will simply add, that as a division of the common property followed, as matter of law, a division of the church organization, nothing short of an agreement or stipulation of the church south to give up their share of it, could preclude the assertion of their right; and, it is quite clear, no such agreement or stipulation is to be found in the plan of separation. The contrary intent is manifest from a perusal of it.

Without pursuing the case further, our conclusion is, that the complainants and those they represent, are entitled to their share of the property in this Book Concern. And the proper decree will be entered to carry this decision into effect.

The complainants represent, not only all the beneficiaries in the division of the church south, but also the General Conference and the annual conferences of the same. The share therefore of this Book Concern belonging to the beneficiaries in that church, and which its authorities are entitled to the safekeeping and charge of, for their benefit, may be properly paid over to the complainants as the authorized agents for this purpose.

We shall accordingly direct a decree to be entered reversing the decree of the court below, and remanding the proceedings to that court, directing a decree to be entered for the complainants against the defendants; and a reference of the case to a master to take an account of the property belonging to the Book Concern, and report to the court its cash value, and to ascertain the portion belonging to the complainants, which portion shall bear to the whole amount of the fund the proportion that the travelling preachers in the division of the church south bore to the travelling preachers in the church north, at the time of the division of said church. And on the coming in of the report, and confirmation of the same, a decree shall be entered in favor of the complainants for that amount.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the District of Ohio, and was argued by counsel. On consideration whereof it is ordered, adjudged, and decreed by this court, that the decree of said Circuit Court in this cause be, and the same is hereby, reversed and annulled. And this court doth further find, adjudge, and decree:

1. That, under the resolutions of the General Conference of the Methodist Episcopal Church, holden at the city of New York, according to the usage and discipline of said church, passed on the eighth day of June, in the year of our Lord one thousand eight hundred and forty-four, (in the pleadings mentioned,) it was, among other things, and in virtue of the power of the said General Conference, well agreed and determined by the Methodist Episcopal Church in the United States of America, as then existing, that, in case the annual conferences in the slaveholding States should find it necessary to unite in a distinct ecclesiastical connection, the ministers, local and travelling, of every grade and office, in the Methodist Episcopal Church, might attach themselves to such new ecclesiastical connection, without blame.

2. That the said annual conferences in the slaveholding States did find and determine that it was right, expedient, and necessary to erect the annual conferences last aforesaid into a distinct ecclesiastical connection, based upon the discipline of the Methodist Episcopal Church aforesaid, comprehending the doctrines and entire moral and ecclesiastical rules and regulations of the said discipline, (except only in so far as verbal alterations might be necessary to, or for a distinct organization,) which new ecclesiastical connection was to be known by the name and style of the Methodist Episcopal Church South; and that the Methodist Episcopal Church South was duly organized under said resolutions of the said General Conference, and the said decision of said annual conferences last aforesaid, in a convention thereof held at Louisville, in the State of Kentucky, in the month of May, in the year of our Lord one thousand eight hundred and forty-five.

3. That, by force of the said resolutions of June the eighth, eighteen hundred and forty-four, and of the authority and power of the said General Conference of the Methodist Episcopal Church as then existing, by which the same were adopted, and by virtue of the said finding and determination of the said annual conferences in the slaveholding States therein mentioned, and by virtue of the organization of such conferences into a

distinct ecclesiastical connection as last aforesaid: the religious association known as the Methodist Episcopal Church in the United States of America as then existing, was divided into two associations, or distinct Methodist Episcopal Churches, as in the bill of complaint is alleged.

4. That the property denominated the Methodist Book Concern at Cincinnati, in the pleadings mentioned, was, at the time of said division, and immediately before, a fund subject to the following use — that is to say, that the profits arising therefrom, after retaining a sufficient capital to carry on the business thereof, were to be regularly applied towards the support of the deficient travelling, supernumerary, superannuated, and worn out preachers of the Methodist Episcopal Church, their wives, widows, and children, according to the rules and discipline of said church; and that the said fund and property are held under the act of incorporation in the said answer mentioned, by the said defendants, Leroy Swormstedt and John H. Power, as agents of said Book Concern, and in trust for the purposes thereof.

5. That, in virtue of the said division of said Methodist Episcopal Church in the United States, the deficient, travelling, supernumerary, superannuated, and worn out preachers, their wives, widows, and children comprehended in, or in connection with, the Methodist Episcopal Church South, were, are, and continue to be beneficiaries of the said Book Concern to the same extent, and as fully as if the said division had not taken place, and in the same manner and degree as persons of the same description who are comprehended in, or in connection with, the other association, denominated since the division of the Methodist Episcopal Church; and that as well the principal as the profits of said Book Concern, since said division, should of right be administered and managed by the respective general and annual conferences of the said two associations and churches, under the separate organizations thereof, and according to the shares or proportions of the same as hereinafter mentioned, and in conformity with the rules and discipline of said respective associations, so as to carry out the purposes and trusts aforesaid.

6. That so much of the capital and property of said Book Concern at Cincinnati, wherever situate, and so much of the produce and profits thereof as may not have been heretofore accounted for to said church south, in the New York case hereinafter mentioned, or otherwise, shall be paid to said church south, according to the rate and proportions following, that is to say, in respect to the capital, such share or part, as corresponds with the proportion which the number of the travel-

ling preachers in the annual conferences which formed themselves into the Methodist Episcopal Church South, bore to the number of all the travelling preachers of the Methodist Episcopal Church before the division thereof, which numbers shall be fixed and ascertained as they are shown by the minutes of the several annual conferences next preceding the said division and new organization in the month of May, A. D. eighteen hundred and forty-five.

And in respect to the produce or profits, such share or part as the number of annual conferences which formed themselves into the Methodist Episcopal Church South bore, at the time of said division, in May, A. D. 1845, to the whole number of annual conferences then being in the Methodist Episcopal Church, excluding the Liberia Conference: so that the division or apportionment of said produce and profits shall be had by conferences, and not by numbers of the travelling preachers.

7. That said payment of capital and profits, according to the ratios of apportionment so declared, shall be made and paid to the said Smith, Parsons, and Green, as commissioners aforesaid, or their successors, on behalf of said church south and the beneficiaries therein, or to such other person or persons as may be thereto authorized by the General Conference of said church south, the same to be subsequently managed and administered so as to carry out the trusts and uses aforesaid, according to the discipline of said church south, and the regulations of the General Conference thereof.

8. And in order more fully to carry out the matters hereinbefore settled and adjudged, it is further ordered and decreed, that this cause be remanded to the said Circuit Court for further proceedings — that is to say,

That the same be referred to a master to take and state an account as follows:

(1.) Of the amount and value of the said Book Concern at Cincinnati, on the first day of May, 1845, and of what specific property and effects (according to a general description or classification thereof) the same then consisted, whether composed of real or personal estate, and of whatever nature or description the same may have been; and a similar account as of the date or time when the said master shall take this account.

(2.) Of the produce and profits of said Book Concern, from the time of the General Conference of May, 1844, as reported thereto, (if so reported,) up to the time of the said division in May, 1845, and from the last-mentioned date down to the time of making up his report: specifying how much of said profits and produce have been transferred to said Book Concern, at New York, and accounted for to said church south in the

settlement of the case there; and how much remains to be accounted for to said church south on the basis settled by this decree.

And in taking said accounts, and in the execution of said reference, the said defendants shall produce, on oath, all deeds, accounts, books of account, instruments, reports, letters, and copies of letters, memoranda, documents, and writings, whatever pertinent to said reference, in their possession or control, and the said defendants may be examined, on oath, on the said reference; and each party may produce evidence before the master, and have process to compel the attendance of witnesses.

And the said master is further directed, in respect to any annual profits of said concern, not heretofore accounted for to said church south, to allow to said church south interest at the rate of 6 per cent. upon such unpaid balances from the date at which the same ought to have been paid.

And in respect to all the costs in this case, including the costs of the reference, and all other costs from the commencement of the case until its conclusion, and in respect to the fees of counsel and solicitors therein, of both parties, so far as the same may be reasonable, and in respect of just and necessary expenses, as well of plaintiffs as of defendants in conducting the suit, the same ought to be paid out of said Book Concern, and a common charge thereon, before apportionment and division, and the master is accordingly directed to allow and pay the same to the respective parties entitled thereto, and then to apportion the residue according to the principles fixed in this decree.

And the master is further directed to return his report to the said Circuit Court with all convenient despatch, which court shall then proceed to enforce the payment of whatever sum or sums may be found due to said church south, on the confirmation of the master's report, in such instalments as may be by said court adjudged reasonable, each party having due opportunity of excepting to the master's report; and all questions arising upon said report, and not settled by this decree, may be moved before said Circuit Court, to which court either party shall be at liberty to apply on the footing of this decree.

Alexander J. Marshall, Plaintiff in error, v. The Baltimore and Ohio Railroad Company.

A citizen of Virginia may sue the Baltimore and Ohio Railroad Company in the Circuit Court of the United States for Maryland, and an averment that the defendants are a body corporate, created by the Legislature of Maryland, is sufficient to give the court jurisdiction.

The constitutional privilege which a citizen of one State has to sue the citizens of another State in the federal courts cannot be taken away by the erection of the latter into a corporation by the laws of the State in which they live. The corporation itself may, therefore, be sued as such.

The preceding cases upon this subject, examined.

Where a contract was made to obtain a certain law from the legislature of Virginia, and stated to be made on the basis of a prior communication, this communication is competent evidence in a suit upon the contract.

A contract is void, as against public policy, and can have no standing in court by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the legislature of a State, and the other party promises to pay a large sum of money in case the law should pass.

It was also void if, when it was made, the parties agreed to conceal from the members of the legislature the fact that the one party was the agent of the other, and was to receive a compensation for his services in case of the passage of the law.

And if there was no agreement to that effect, there can be no recovery upon the contract, if in fact the agent did conceal from the members of the legislature that he was an agent who was to receive compensation for his services in case of the passage of the law.

Moreover, in this particular case, the law which was passed was not such a one as was stipulated for, and upon this ground there could be no recovery.

There having been a special contract between the parties by which the entire compensation was regulated and made contingent, there could be no recovery on a count for *quantum meruit*.

This case was brought up, by writ of error, from the Circuit Court of the United States for the District of Maryland.

Marshall, a citizen of Virginia, sued the Railroad Company, to recover the sum of fifty thousand dollars, which he alleged that they owed him under a special contract, for his services in obtaining a law from the Legislature of Virginia, granting to the company a right of way through Virginia to the Ohio River.

The declaration set out the special contract, and also contained a count for a *quantum meruit*.

The circumstances of the case are related in the opinion of the court.

Inasmuch as one of the instructions of the Circuit Court was that if "the services of the plaintiff were to be of the character and description set forth in his letter to the president of the company, dated November 17th, 1846, and the paper therein inclosed" no "action could be maintained on the contract," it is proper, for future reference, that both of those papers should be inserted. They were as follows:

Letter from A. J. Marshall to L. McLane, 17th November, 1846.

Warrenton, November 17.

Dear Sir: In an interview with you a few days since, I pro-

mised to submit in writing a plan, by which I thought your much desired "right of way" through this State might be procured from our legislature. I herewith inclose my views on that subject, and shall respectfully await your reply.

In offering myself as the agent of your company to manage so delicate and important a trust, I am aware I lack that commanding reputation which of itself would point me out as best qualified for such a post. Of my qualification and fitness it is not for me to speak; and, in consequence of the absolute secrecy demanded, I cannot seek testimonials of my capacity, lest I should excite inquiry. If your judgment approves my scheme, it is probable you might get satisfactory information respecting me by a cautious conversation with John M. Gordon, A. B. Gordon, Dr. John H. Thomas, or Joseph C. Wilson, all of your city. Without impropriety, I may say for myself I have had considerable experience as a lobby member before the legislature of Virginia. For several winters past I have been before that body with difficult and important measures, affecting the improvement of this region of the country; and I think I understand the character and component material of that honorable body.

I shall have to spend six or eight weeks in Richmond, next winter, to procure important amendments to the charter of the Rappahannock Company. This will furnish reason for my presence in Richmond.

There is an effort in progress to divide our county, to which we of Warrenton are violently hostile. This furnishes another reason for myself, and also for one or two other agents, to remain in the city of Richmond during the winter.

Col. Walden and myself are interested in large bodies of land in western Virginia, near which the track of your railroad will pass. This is an ostensible reason for our active interference. I live in a range of country whose representation ought to be entirely disinterested on this question of the "right of way." Notwithstanding which, I believe a plurality of our representatives have heretofore been in opposition. I know the influences that effected this, and am happy to say they will not exist next winter.

Edmund Broaddus, for many years a representative from Culpepper, a shrewd, intelligent man, influenced this result. Broaddus was a sort of protégé of the Richmond and James River whigs, was distinguished and promoted by them, and habitually acted with them. His place is now filled by Slaughter, a personal friend of mine. I should have little fear to carry this section of the State.

The proposed plan best speaks for itself; if you think it feasi-

ble, there is no time to be lost. I hope to hear from you at your earliest leisure. With entire respect, I am your humble servant, &c. A. J. MARSHALL.

I tax you with the postage, as I do not wish to be known as in correspondence.

Document accompanying the foregoing letter.

In explanation of the plan I wish to submit, it is necessary to indulge some latitude of remark on the causes which have heretofore thwarted the just pretensions of your company.

Richmond City, the Petersburg, Richmond, and Potomac Railroad, the James River Canal, and the Wheeling interests, acting in concert, have heretofore successfully combated "the right of way." These interests fall far short of a majority in the two branches of the Virginia legislature. There is no sufficient ground, in the numeric force of this antagonist interest, to discourage the hope of an eventual success. On an examination of their arguments, based either upon justice or expediency, I find nothing to challenge a conviction of right, or an assurance of high State policy. On the contrary, standing heretofore as a disinterested spectator of the struggle, I have condemned the emptiness and arrogance of their pretensions, and felt indignant at the success of their narrow, selfish, and bigoted policy.

I have observed no superiority of talent, no greater zeal, or power of advocacy in the opposition, than in favor of the "right of way." The success of a cause before our legislature, having neither justice, greater expediency, stronger advocacy, or greater numeric strength, is matter of just amazement to the defeated party. The elements of this success should be a subject of curious and deeply anxious investigation; for when the cause is known, a remedy or counteracting influence may be readily applied. I have no idea that any dishonorable measures or appliances (further than log-rolling may be one) have been used to defeat the "right of way." As to log-rolling, I am sorry to say it has grown into a system in our legislature. Members openly avow and act on it, and never conceal their bargain, except where publicity would jeopard success. No delegation are more skilful or less scrupulous at this game than our western right-of-way men; so, in that regard, there is a stand off. It seems to me the great secret of this success is the propinquity, the presence on the ground, of your opponents. The legislature sits in their midst. They exercise a vigilant, pressing, present out-of-door influence upon the members. If the capitol were located at Weston or Clarksburg, who would question success? The Richmond interest is ever present and ever pressing; her associates of the railroad

and canal are at hand, and equally active. You have no counteracting influence, and hence the success and triumph of your opponents. If I am right in these views, your claims, resting alone on justice, sectional necessity, or even high State policy, will be urged in vain, and must become as mere sounding clamor in the hall, unless you meet your opponents with the weapons they use so successfully against yourselves. Experience shows that something beyond what you have heretofore done is necessary to success; and in this necessity the plan I have to submit has its origin.

The mass of the members in our legislature are a thoughtless, careless, light-hearted body of men, who come there for the "per diem," and to spend the "per diem." For a brief space they feel the importance and responsibility of their position. They soon, however, engage in idle pleasures, and, on all questions disconnected with their immediate constituents, they become as wax, to be moulded by the most pressing influences. You need the vote of this careless mass, and if you adopt efficient means you can obtain it. I never saw a class of men more eminently kind and social in their intercourse. Through these qualities they may be approached and influenced to do any thing not positively wrong, or which will not affect prejudicially their immediate constituency. On this question of the "right of way," a decided majority of the members can vote either way without fear of their constituents. On this question, therefore, I consider the most active influences will ever be the most successful.

Before you can succeed, in my judgment, you must reënforce the "right-of-way" members of the house with an active, interested, well-organized influence about the house. You must inspire your agents with an earnest, nay, an anxious wish for success. The rich reward of their labors must depend on success. Give them nothing if they fail — endow them richly if they succeed. This is, in brief space, the outline of my plans. Reason and justice are with you; an enlarged expediency favors your claim. You have able advocates, and the best of the argument; yet, with all these advantages, you have been defeated. I think I have pointed out the cause. Your opponents better understand the nature of the tribunal before which this vast interest is brought. They act on individuals of the body out of doors and in their chambers. Your adversaries are on the spot, and hover around the careless arbiters of the question in vigilant and efficient activity. The contest, as now waged, is most unequal. My plan would aim to place the "right-of-way" members on an equality with their adversaries, by sending down

a corps of agents, stimulated to an active partisanship by the strong lure of a high profit.

In considering the details of the plan, I would suggest that all practicable secrecy is desirable. It strikes me the company should have or know but one agent in the matter, and let that agent select the subagents from such quarters and classes, and in such numbers, as his discreet observation may dictate.

I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice. This is all. I require secrecy from motives of policy alone, because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make.

In regard to the cost of all this it must necessarily be great. The subagency must be extensive, and of first influence and character. All your agents must be inspired by an active zeal and a determined purpose of success. This can only be accomplished for you by offers of high contingent compensation.

I will illustrate this point by a single example. Were I to become your agent on my plan, I should like to have the services of Major Charles Hunton, of this county. Hunton, for many years, was a member of our State senate. His last year of service was as president of that body. He is an unpretending man, of good understanding and excellent address. He is a great favorite with his own party, (democratic,) and universally esteemed as a gentleman of highest character. He is in moderate circumstances, with a large family. I have no doubt, if I would bear his expenses, and secure him a contingent of one thousand dollars, he would spend the winter in Richmond, and do good service; but if I could offer him two thousand, it would become an object of great solicitude. It would pay all his debts and smooth the path of an advancing old age. Two thousand dollars would stimulate his utmost energies. If I am enabled to offer such inducements, I should have great confidence of success. Under this plan you pay nothing unless a law be passed which your company will accept. Of what value would such a law be to you? Measure this value, and let your own interests, in view of the high stake you play for, fix the price. There is no use in sending a boy on a man's errand; a low offer, and that contingent, is bad judgment; high service can't be had at a low bid.

I have surveyed the difficulties of this undertaking, and think they may be surmounted. The cash outlay for my own expenses, and those of the subagents, would be heavy. I know the

effective service of such agents as I would employ cannot be had except on a heavy contingent. Taking all things into view, I should not like to undertake the business on such terms, unless provided with a contingent fund of at least fifty thousand dollars, secured to my order on the passage of a law, and its acceptance by your company.

If the foregoing views are deemed worthy of consideration, I hold myself in readiness to meet any call in that behalf that may be made upon me. Respectfully, &c.

A. J. MARSHALL.

After the evidence had been closed, the counsel for the plaintiff asked the court to instruct the jury as follows:

1. That there is nothing in the terms or provisions of the agreement embraced in the resolution of the committee of correspondence, dated 12th December, 1846 (which is set forth in the opinion of the court) offered in evidence, which renders the same void, on grounds of public policy.

2. That the plaintiff is not precluded from recovering under the agreement aforesaid, dated 12th December, 1846, as modified by the agreement stated in the letter of 11th of February, 1847, by reason merely of the second proviso contained in the first section of the act of 6th of March, 1847, which has been offered in evidence, provided the jury shall find that the route, entering the ravine of the Ohio River at the mouth of Fish Creek, and running so as to pass from a point in the ravine of Buffalo Creek, at or near the mouth of Pile's Fork, to a depôt to be established by the defendant on the northern side of Wheeling Creek, in the city of Wheeling, upon minute estimates made in the manner and on the basis prescribed in said act, and made after full examination and instrumental surveys of the feasible or practicable routes, appeared to be the cheapest upon which to construct, maintain, and work said railroad; and provided they shall also find that the city of Wheeling did not agree to pay the difference of cost, as specified in said act, but on the contrary renounced the right to do so as early as the 10th of July, 1847; and provided they shall also find that said act was accepted by the stockholders of the defendant, as a part of its charter, on the 25th of August, 1847.

3. Upon the evidence aforesaid, the plaintiff prays the court to instruct the jury —

That if they find the contract contained in the resolution of the committee of correspondence of 12th of December, 1846, and in the resolution of the committee of correspondence of the 18th of January, 1847, and in the letter of Louis McLane of the 11th of February, 1847, aforesaid, to have been made with

the plaintiff by the defendant; and also that the act of Virginia of the 6th of March, 1847, was passed at the session of the Legislature of Virginia for 1846–1847, in the contract mentioned; and also that the Baltimore and Ohio Railroad, by the cheapest route to the city of Wheeling, entering the ravine of the Ohio at or north of Grave Creek, was ascertained, by such estimates as the law prescribed, to be more costly to construct, maintain, and work, than said road would be by the route passing into the ravine of the Ohio at or near the mouth of Fish Creek, and then to the city of Wheeling, and that the difference of said probable cost was then in like manner ascertained; that the defendants accepted the said law within six months from the passage thereof; and also, that when the difference of probable cost between said two routes was ascertained, according [to] said act, the city of Wheeling did not agree to pay to the defendant such difference of cost by the time specified in said act, and that the plaintiff did attend at Richmond during the session aforesaid, and did then and there superintend and further the applications and other proceedings to obtain the right of way through the State of Virginia, on behalf of the defendant, then the plaintiff is entitled to recover, on the special contract contained in the instrument aforesaid, the value of the contingent compensation therein stipulated.

And the defendants, by their counsel, prayed the court to instruct the jury that the plaintiff was not entitled to recover, because the contract, which stipulated for the payment of a contingent fee of fifty thousand dollars, in the event of the obtaining from the Legislature of Virginia such a law as is described therein, was against public policy, and void.

2. That if the jury shall believe that it was agreed between the parties to the said contract that the same should be kept secret, either in the terms of it or otherwise, from the Legislature of Virginia or the public, such contract, if otherwise proper and legal, was invalid as against public policy, and the plaintiff is not entitled to recover.

3. If the jury find that the special contract offered in evidence by the plaintiff was proposed to be entered into by plaintiff from the reasons and motives, and to be executed by him in the way suggested in his communication of the 17th of November, and its inclosure, offered in evidence by the defendant, (if the jury shall find that such communication was so made by plaintiff,) and if they shall find that the contract aforesaid was entered into accordingly, and that said contract, or plaintiff's agency under it, was not made known to the Legislature of Virginia, but in fact concealed, that then said contract was illegal and void, upon grounds of public policy.

4. That the contract between the plaintiff and defendants of 12th of December, 1846, looked to the obtaining of a law authorizing the defendants to extend their road through the State of Virginia, to a point on the Ohio River as low down the river as Fishing Creek, which law should be afterwards accepted by the defendants with a determination to act under it, or to the incorporation of an independent company, which the defendants should determine to accept and adopt, or of whose charter they should become the proprietors, authorizing the construction of a railroad from any point on the Ohio River between the mouth of Little Kenawha and Wheeling, and that no such law having been obtained, the plaintiff is not entitled to recover.

5. That the modified contract of the 11th of February looked to the obtaining of the passage of Hunter's substitute, with the adoption of Fish Creek instead of Fishing Creek, as the point of striking the Ohio. That the law which was passed on the 6th of March, 1847, was a law which did not, in its terms or effect, fulfil the stipulations of the modified agreement of February 11th, 1847.

6. That the acceptance of the law of March 6th, 1847, by the defendants, even supposing it to be substantially the same as Hunter's substitute, did not entitle the plaintiff to recover unless the jury should believe that such law was obtained through his agency, under the agreement with the defendants.

7. That even if the jury should believe that the law of March 6th, 1847, was obtained through the plaintiff's agency, the plaintiff is not entitled to recover if they shall believe that it was accepted by the defendants in consequence of the waiver, by the city of Wheeling, of the privileges accorded to it therein, and the stipulations contained in the agreement between the city of Wheeling and the defendants of March 6th, 1847.

8. That the modified agreement of February 11th, 1847, which made Hunter's substitute, modified as stated in the foregoing prayer, the standard of the law which was to be obtained to entitle the plaintiff to the stipulated compensation, made it necessary that such law should give to the defendants the absolute right to approach the city of Wheeling by way of Fish Creek; should release them from the necessity of continuing their road to Wheeling, unless the city should, within one year, or the citizens of Ohio county should, in the same time, subscribe one million dollars to the stock of the defendants; should enable the defendants to open and bring into use, as they progressed, the sections of their road as they were successively finished; and should authorize the defendants to charge, in proportion to distance, upon passengers and goods taken from Baltimore to Wheeling, should the road be continued to the

latter place; while the law that was actually passed made it the right of the defendants to take the Fish Creek route depend upon its being the cheapest, and even then placed the defendants' right to go to Fish Creek at the option of the city of Wheeling; made it imperative that Wheeling should be the terminus of the road, without any subscription on the part of herself or others; prevented the opening of any portion of her road west of Monongahela until the whole road could be opened to Wheeling, and obliged the defendant to charge no more for passengers or tonnage to Wheeling than they charged to a point five miles from the river; and that before the defendant accepted the law thus differing from that referred to in the modified agreement of February 11th, 1847, the city of Wheeling waived its control of the route, leaving it to depend upon its comparative cost, agreed to subscribe five hundred thousand dollars to the stock of the defendants, and provided a depot for the defendants at the terminus of the road; and that the adoption and acceptance of the law of March the 6th, 1847, thus differing from Hunter's substitute, and induced by the waiver and stipulation of Wheeling, already mentioned, and action under it, was not such an acceptance, adoption, and action, as entitled the plaintiff to recover.

9. That if the jury shall believe that the plaintiff received from the defendants the six hundred dollars given in evidence in full discharge of his claims for compensation under the agreement in question, then the plaintiff is not entitled to recover.

But the court refused to give the instructions as prayed, by either plaintiff or defendant, but instructed the jury as follows:

1. If at the time the special contract was made, upon which this suit is brought, it was understood between the parties that the services of the plaintiff were to be of the character and description set forth in his letter to the president of the railroad company, dated November 17, 1846, and the paper therein inclosed, and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in his letter and the accompanying paper, for the purpose of obtaining the passage of the law mentioned in the agreement, the contract is against the policy of the law, and no action can be maintained.

2. If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication referred to in the preceding instruction, yet the contract is against the policy of the law, and void, if at the time it was made the parties agreed to conceal from the members of the Legislature of Virginia the fact that the plaintiff was employed by the defendant.

as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation, in money, for his services in case the law was passed by the legislature at the session referred to in the agreement.

3. And if there was no actual agreement to practise such concealment, yet he is not entitled to recover if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as agent for the defendant, and was to receive a compensation, in money, in case the law passed.

4. But if the law was made upon a valid and legal consideration, the contingency has not happened upon which the sum of fifty thousand dollars was to be paid to the plaintiff — the law passed by the legislature of Virginia being different, in material respects, from the one proposed to be obtained by the defendant by the agreement of February 11th, 1847; and the passage of which, by the terms of that contract, was made a condition precedent to the payment of the money.

5. The subsequent acceptance of the law as passed, under the agreement with the city of Wheeling, stated in the evidence, was not a waiver of the condition, and does not entitle the plaintiff to recover in an action on the special contract.

6. There is no evidence that the plaintiff rendered any services, or was employed to render any, under any contract, express or implied, except the special contract stated in his declaration; and as no money is due to him under that contract, he cannot recover upon the count upon a *quantum meruit.*

And thereupon the plaintiff excepts, as well to the refusal of his prayers as to the granting of the instructions aforesaid given; and tenders this his second bill of exceptions, and prays that the same may be signed and sealed by the court, which is accordingly done day of November, 1852.

R. B. TANEY. [SEAL.]

The first bill of exceptions was to the admissibility of the evidence above mentioned.

Upon these two exceptions the case came up to this court.

It was argued by *Mr. Davis* and *Mr. Schley*, for the plaintiff in error, and by *Mr. Latrobe* and *Mr. Johnson*, for the defendants in error.

All the points, on either side, relating to the particular route to be attained, are omitted, because it would be impossible to explain them without maps and minute geographical details.

With respect to the three first instructions, the counsel for the plaintiff in error contended:

1. That the first instruction is erroneous — because

a. There is no proof of any understanding between the parties at the time of the contract, that the services were to be of the nature mentioned in the paper No. 1.

b. No service is proposed in paper No. 1, which is against the policy of the law, if the paper be fairly construed.

The paper describes the characters of the members, the conduct of the opponents of the company in influencing them, and the necessity of a counteracting influence out of doors; but it expressly disclaims all improper means and appliances, and the proposal is confined to "surrounding the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice."

c. Even if the paper be open to a doubt, the law resolves that doubt against the conclusion of illegality, as well in object as in means. Lewis *v.* Davison, 4 M. & W. 654.

2. That the second instruction is erroneous — because

a. There is no proof of any agreement at the time of the contract for the concealment of the agency of the plaintiff from the members of the legislature.

b. There is no difference between the obligation of an agent to procure a law and an agent for any other purpose legal in itself; and the law does not avoid a contract of agency because it is to be kept secret.

3. That the third instruction is erroneous — because

a. There is no proof of any actual concealment.

b. In the absence of proof of disclosure, the law does not presume concealment.

c. The proof is that, in point of fact, the agency was so conducted as to be apparent to the members of the legislature without being in words disclosed.

d. It is proved that it was expressly disclosed both by the plaintiff and the company.

e. But in the absence of any agreement or understanding as to concealment, which is the hypothesis of the instruction, it is clearly erroneous to avoid the contract at the instance of the company for the failure of the plaintiff to disclose his agency. That is to avoid the contract at the instance of the defendants by matter subsequent entirely foreign to it.

f. The law does not require disclosure of an agency as a condition precedent to the right of the agent to recover from the principal.

And, upon these points, the counsel referred to the following authorities: Davis *v.* Bank of Eng. 2 Bing. 393; Richardson *v.* Millish, 2 Bing. 229; Harrington *v.* Kloprogge, 4 Doug. 5; Stiles *v.* Causten, 2 G. & J. 49; Kalkman *v.* Causten, 2 G. & J. 357; Fishmonger Co. *v.* Robertson, 5 Mann. & Gr. 131; Howdon *v.*

Simpson, 10 Ad. & Ellis, 793, 800, and on appeal, 9 Cl. & Fin. 61; Wood *v.* McCann, 6 Dana, 366; Hunt *v.* Test, 8 Alab. 713; Edwards *v.* Gr. J. R. R. Co. 7 Sim. 337, and on appeal, 1 M. & Cr. 65; Vauxhall Br. Co. *v.* Spencer, 2 Madd. 356; Jacob, 64.

Upon the principal point in the case, namely, that the contract was against public policy, and therefore void, the counsel for the defendant in error cited the following authorities: Hunt *v.* Test, 8 Alabama, 713; Hatzfeld *v.* Gulden, 7 Watts, 152; Clippinger *v.* Hepbaugh, 5 Watts & Sergt. 315; Wood *v.* McCann, 6 Dana, 366; Fuller *v.* Dame, 18 Pick. 472.

Mr. Justice GRIER delivered the opinion of the court.

A question, necessarily preliminary to our consideration of the merits of this case, has been brought to the notice of the court, though not argued or urged by the counsel.

The plaintiff in error, who was also plaintiff below, avers in his declaration that he is a citizen of Virginia, and that "The Baltimore and Ohio Railroad Company, the defendant, is a body corporate by an act of the General Assembly of Maryland." It has been objected, that this averment is insufficient to show jurisdiction in the courts of the United States over the "suit" or "controversy." The decision of this court in the case of the Louisville Railroad *v.* Letson, 2 Howard, 497, it is said, does not sanction it, or if some of the doctrines advanced should seem so to do, they are extrajudicial, and therefore not authoritative.

The published report of that case (whatever the fact may have been) exhibits no dissent to the opinion of the court by any member of it. It has, for the space of ten years, been received by the bar as a final settlement of the questions which have so frequently arisen under this clause of the Constitution; and the practice and forms of pleading in the courts of the United States have been conformed to it. Confiding in its stability, numerous controversies involving property and interests to a large amount, have been heard and decided by the circuit courts, and by this court; and many are still pending here, where the jurisdiction has been assumed on the faith of the sufficiency of such an averment. If we should now declare these judgments to have been entered without jurisdiction or authority, we should inflict a great and irreparable evil on the community. There are no cases, where an adherence to the maxim of "*stare decisis*" is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts. For this reason alone, even if the court were now of opinion that the principles affirmed in the case just mentioned, and that of

The Bank *v.* Deveaux, 5 Cranch, 61, were not founded on right reason, we should not be justified in overruling them. The practice founded on these decisions, to say the least, injures or wrongs no man; while their reversal could not fail to work wrong and injury to many.

Besides the numerous cases, with similar averments, over which the court have exercised jurisdiction without objection, we may mention that of Rundle *v.* The Delaware and Raritan Canal, 14 Howard, 80, as one precisely in point with the present. The report of that case shows that the question of jurisdiction, though not noticed in the opinion of the court, was not overlooked, three of the judges having severally expressed their opinion upon it. Its value as a precedent is therefore not merely negative. But as we do not rely only on precedent to justify our conclusion in this case, it may not be improper, once again, to notice the argument used to impugn the correctness of our former decisions, and also to make a brief statement of the reasons which, in our opinion, fully vindicate their propriety.

By the Constitution, the jurisdiction of the courts of the United States is declared to extend, *inter alia*, to "controversies between citizens of different States." The Judiciary Act confers on the circuit courts jurisdiction "in suits between a citizen of the State where the suit is brought and a citizen of another State."

The reasons for conferring this jurisdiction on the courts of the United States, are thus correctly stated by a contemporary writer (Federalist, No. 80.) "It may be esteemed as the basis of the Union, 'that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.' And if it be a just principle, that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, the national judiciary ought to preside in all cases, in which one State or its citizens are opposed to another State or its citizens."

Now, if this be a right, or privilege guaranteed by the Constitution to citizens of one State in their controversies with citizens of another, it is plain that it cannot be taken away from the plaintiff by any legislation of the State in which the defendant resides. If A, B, and C, with other dormant or secret partners, be empowered to act by their representatives, to sue or to be sued in a collective or corporate name, their enjoyment of these privileges, granted by State authority, cannot nullify this important right conferred on those who contract with them. It was

well remarked by Mr. Justice Catron, in his opinion delivered in the case of Rundle, already referred to, that "if the United States courts could be ousted of jurisdiction, and citizens of other States be forced into the State courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution; and in many cases be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist, if he could help it. State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution. All corporations must have trustees and representatives who are usually citizens of the State where the corporation is created: and these citizens can be sued, and the corporate property charged by the suit. Nor can the courts allow the constitutional security to be evaded by unnecessary refinements, without inflicting a deep injury on the institutions of the country."

Let us now examine the reasons which are considered so conclusive and imperative, that they should compel the court to give a construction to this clause of the Constitution, practically destructive of the privilege so clearly intended to be conferred by it.

"A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible."

This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity "cannot be a citizen" is a logical conclusion from the premises which cannot be denied.

But a citizen who has made a contract, and has a "controversy" with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name. But these important faculties, conferred on them by State legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with

words and names, without regard to the things or persons they are used to represent.

Nor is it reasonable that representatives of numerous unknown and ever-changing associates should be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat the plaintiff's privilege. It is true that these stockholders are corporators, and represented by this "juridical person," and come under the shadow of its name. But for all the purposes of acting, contracting, and judicial remedy, they can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs. The individual or personal appearance of each and every corporator would not be a compliance with the exigency of the writ of summons or distringas. Though, nominally, they are not really parties to the suit or controversy. In courts of equity, where there are very numerous associates having all the same interest, they may plead and be impleaded through persons representing their joint interests; and, as in the case between the northern and southern branches of the Methodist Church, lately decided by this court, the fact that individuals adhering to each division were known to reside within both States of which the parties to the suit were citizens, was not considered as a valid objection to the jurisdiction.

In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of a numerous association to sue and be sued. "And this corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation." Bank of Augusta *v.* Earle, 13 Pet. 512. The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there, and can find them there and nowhere else. If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege, and compel them to resort to State tribunals in cases in which, of all others, such privilege may be considered most valuable.

But it is contended that, notwithstanding the court in deciding the question of jurisdiction, will look behind the corporate

or collective name given to the party, to find the persons who act as the representatives, curators, or trustees, of the association, stockholders, or *cestui que trusts*, and in such capacity are the real parties to the controversy; yet that the declaration contains no sufficient averment of their citizenship. Whether the averment of this fact be sufficient in law, is merely a question of pleading. If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the "defendants are a body corporate by the act of the General Assembly of Maryland," is a sufficient averment that the real defendants are citizens of that State. This form of averment has been used for many years. Any established form of words used for the expression of a particular fact, is a sufficient averment of it in law. In the case of Gassies *v.* Ballon, 6 Pet. 761, the petition alleged that "the defendant had caused himself to be naturalized an American citizen, and that he was at the time of filing the petition residing in the parish of West Baton Rouge." This was held to be a sufficient averment that he was a citizen of the State of Louisiana. And the court say, "a citizen of the United States residing in any State of the Union, is a citizen of that State." They also express their regret that previous decisions of this court had gone so far in narrowing and limiting the rights conferred by this article of the Constitution. And we may add, that instead of viewing it as a clause conferring a privilege on the citizens of the different States, it has been construed too often, as if it were a penal statute, and as if a construction which did not adhere to its very letter without regard to its obvious meaning and intention, would be a tyrannical invasion of some power supposed to be secured to the States or not surrendered by them.

The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State. It is of importance also to corporations themselves that they should enjoy the same privileges, in other States, where local prejudices or jealousy might injuriously affect them.

With these remarks on the subject of jurisdiction we will now proceed to notice the various exceptions to the rulings of the court on the trial.

The declaration, besides a count for work and labor done and

services rendered in procuring certain legislation in Virginia, demands the sum of fifty thousand dollars on a special contract made with the defendants, through a committee of the board of directors, dated 12th of December, 1846, as follows:

"On motion, it was resolved, that the President be, and is hereby authorized, in addition to the agent heretofore employed by the committee for the same purpose, to employ and make arrangements, with other responsible persons, to attend at Richmond during the present session of the legislature, in order to superintend and further any application or other proceeding to obtain the right of way through the State of Virginia, on behalf of this company, and to take all proper measures for that purpose; that he also be authorized to agree with such agent or agents, in case a law shall be obtained from the said legislature, during its present session, authorizing the company to extend their road through that State to a point on the Ohio River as low down the river as Fishing Creek; and the stockholders of this company shall afterwards accept such law as may be obtained, and determine to act under it; or, in case a law should be passed authorizing the construction of a railroad from any point on the Ohio River above the mouth of the Little Kenawha and below the city of Wheeling, with authority to intersect with the present Baltimore and Ohio Railroad; and the stockholders of the Baltimore and Ohio Railroad Company shall determine to accept and adopt said law, or shall become the proprietors thereof, and prosecute their road according to its provisions, then, in either of the said cases, the president shall be and is authorized to pay to the agent or agents whom he may employ in pursuance of this resolution, the sum of fifty thousand dollars, in the six per cent. bonds of this company, at their par value, and to be made payable at any time within the period of five years. Resolved, That it shall be expressly stipulated in the agreement with the said agent or agents employed pursuant to this resolution, and as a condition thereof, that if no such law as aforesaid shall pass, or if any law that may be passed shall not be accepted, or adopted, or used by the stockholders, the said agents shall not be entitled to receive any compensation whatever for the service they may render in the premises, or for any expense they may incur in obtaining such law or otherwise."

And also the following resolution of January 18th, 1847:

"On motion it was unanimously resolved, that the right of Mr. Marshall to the compensation under the existing contract shall attach upon the passage of a law at the present session of the legislature, giving the right of way to Parkersburg or to Fishing Creek, either to the Baltimore and Ohio Railroad Company, or to an independent company: Provided this company

accept the one, and adopt and act under the other, as contemplated by the contract."

And also a letter from the president of the company, of February 11th, 1847, containing a further modification of the terms as exhibited in the following extract:

"In this crisis, if after the utmost exertion nothing better can be done, if it were practicable to pass Mr. Hunter's substitute with Fish Creek instead of Fishing Creek, we would not undertake to prevent the passage of such a law. We would then refer the whole question to the stockholders; and I am authorized to say that, every thing else failing, if such a law as is indicated pass, and the stockholders adopt it and act under it in the manner contemplated by the contract, your compensation shall apply to that as to any other aspect of the case."

The defendants gave notice of the following grounds of defence, as those upon which they intended to rely:

"1. That the agreement sought to be enforced by the plaintiff, admitting his ability to make it out by legal proof to the extent of his pretensions, was an agreement contrary to the policy of the law, and which cannot be sustained.

"2. That, admitting the said agreement to be a valid one, which the courts would enforce, yet the plaintiff is not entitled to recover, because he failed to accomplish the object for which it was entered into.

"3. That the law of Virginia, which was accepted by the defendants after it had been modified by the waiver of the city of Wheeling, as mentioned in the plaintiff's notice, was not obtained through the efforts of the plaintiff, but against his strenuous opposition, and furnishes him no ground for his present claim.

"4. That there was a final settlement between the plaintiff and defendants, after the passage of the Virginia law aforesaid, which concludes him on this behalf."

On the trial the plaintiff, after giving in evidence the contract as above stated, produced various letters and documents tending to show the measures pursued, and their result — a particular recapitulation of these facts is not necessary, and would encumber the case. A very brief outline will suffice to an understanding of the points to be considered.

It appears that the defendants were desirous to obtain, from the Legislature of Virginia, the grant of a right of way so as to strike the Ohio River as low down as possible in view of a connection from thence towards Cincinnati. It was the interest of the people of Wheeling to prevent, if possible, the terminus o the road on the Ohio from being anywhere else but at their city. In the winter of 1846 - 7 the antagonist parties came into

collision again before the Legislature of Virginia, at Richmond. In this contest the plaintiff acted as general agent of the defendants, under the contract in question. The bills granting the desired franchise to the defendants were defeated in every form proposed by them, and a substitute, altered and amended to suit the interests of Wheeling, was finally passed in face of the strenuous opposition of the defendants.

The plaintiff afterwards admitted his defeat, and want of success in fulfilling the conditions of his contract. He at the same time demanded and received the sum of six hundred dollars for expenses of agents, &c. But as Wheeling and defendants both desired the extension of the road to the Ohio, they finally agreed to a compromise, modifying the operation of the act under which the road has since been completed.

The defendants then offered in evidence, in support of their defence, on the ground of illegality of the contract, a letter from the plaintiff to the president of the board, dated 17th November, 1846, with an accompanying document, in which plaintiff proposes himself as agent, and states his terms; and the course he advises to be pursued, and the means to be used to ensure success; and also a letter from the president in answer thereto, stating his inability to act on his individual responsibility, and inviting an interview; together, also, with a letter from the same, dated 12th of December, in which he says: "I am now prepared to close an arrangement with you on the basis of your communication of the 17th of November."

The plaintiff's objection to the admission of these documents in evidence, and the reception of them, form the subject of the first bill of exceptions.

In order to judge of the competency and relevancy of these documents to the issue in the case, it will be necessary to give a brief statement of some portion of their contents.

The letter of November 17th commences by referring to a former interview and a promise to submit a plan, in writing, by which it was supposed the much desired right of way through Virginia might be procured from the legislature. It proposes that the writer should be appointed, as agent of the company, to manage "the delicate and important trust." It states that, as the business required "absolute secrecy," he could not safely get testimonials as to his qualifications; but that he had "considerable experience as a lobby member" before the legislature of Virginia, and could allege "an ostensible reason" for his presence in Richmond, and his active interference, without disclosing his real character and object.

The accompanying document explains the cause of previous failures, and shows what remedy or counteracting influence

should be employed. It announces that "log-rolling" was the principal measure used to defeat them before. That it has grown into a system; that however "skilful and unscrupulous" the friends of defendants may have been in this respect, still their opponents had got the advantage, being present on the ground, and "using out-door influence." That it was necessary to meet their opponents with their own weapons. That the mass of the members of the legislature were "careless and good natured," and "engaged in idle pleasures," capable of being "moulded like wax" by the "most pressing influences." That, to get the vote of this careless mass, "efficient means" must be adopted. That through their "kind and social dispositions" they may be approached and influenced to do any thing not positively wrong, "where they can act without fear of their constituents." That to the accomplishment of success it was necessary to have "an active, interested, and well organized influence about the house." That these agents "must be inspired with an earnest, nay, anxious wish for success," "and have their whole reward depending on it." "Give them nothing if they fail, endow them richly if they succeed." "Stimulate them to active partisanship by the strong lure of high profit."

That, in order to the "requisite secrecy," the company should know but one agent, and he select the others; that the cost of all this will "necessarily be great," as the result can be obtained "only by offers of high contingent compensation;" that "high services cannot be had at a low bid," and that he would not be willing to undertake the business unless "provided with a fund of at least $50,000."

As the contract was made "on the basis of this communication," there can be no doubt as to its legal competence as evidence to show the nature and object of the agreement. As parts of one and the same transaction, they may be considered as incorporated in the contract declared on. The testimony is therefore competent. Is it relevant?

As the first three propositions, contained in the charge of the court, have reference to the question of the relevancy of this matter to the issues, they may well be considered together.

They are as follows:

"1. If at the time the special contract was made, upon which this suit is brought, it was understood between the parties that the services of the plaintiff were to be of the character and description set forth in his letter to the president of the railroad company, dated November 17th, 1846, and the paper therein inclosed, and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in his letter and the accompanying paper,

for the purpose of obtaining the passage of the law mentioned in the agreement, the contract is against the policy of the law, and no action can be maintained.

"2. If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication referred to in the preceding instruction, yet the contract is against the policy of the law, and void, if at the time it was made the parties agreed to conceal from the members of the Legislature of Virginia the fact that the plaintiff was employed by the defendant, as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation, in money, for his services, in case the law was passed by the legislature at the session referred to in the agreement.

"3. And if there was no actual agreement to practise such concealment, yet he is not entitled to recover if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as agent for the defendant, and was to receive a compensation, in money, in case the law passed."

It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. Hence all contracts to evade the revenue laws are void. Persons entering into the marriage relation should be free from extraneous or deceptive influences; hence the law avoids all contracts to pay money for procuring a marriage. It is the interest of the State that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office. The pardoning power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court; consequently, the law will not enforce a contract to pay money for soliciting petitions or using influence to obtain a pardon. Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

All persons whose interests may in any way be affected by

any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practising deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent "stimulated to active partisanship by the strong lure of high profit." Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are "proper means;" and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or "careless" members in favor of his bill. The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome — "*omne Romæ venale.*"

That the consequences we deprecate are not merely visionary, the act of Congress of 1853, c. 81, "to prevent frauds upon the treasury of the United States" may be cited as legitimate evidence. This act annuls all champertous contracts with agents of private claims.

2d. It forbids all officers of the United States to be engaged as agents or attorneys for prosecuting claims or from receiving any gratuity or interest in them in consideration of having aided or assisted in the prosecution of them, under penalty of fine and imprisonment in the penitentiary.

3d. It forbids members of Congress, under a like penalty, from acting as agents for any claim in consideration of pay or compensation, or from accepting any gratuity for the same.

4th. It subjects any person who shall attempt to bribe a member of Congress to punishment in the penitentiary, and the party accepting the bribe to the forfeiture of his office.

If severity of legislation be any evidence of the practice of the offences prohibited, it must be the duty of courts to take a firm stand, and discountenance, as against the policy of the law, any and every contract which may tend to introduce the offences prohibited.

Nor are these principles now advanced for the first time. Whenever similar cases have been brought to the notice of courts they have received the same decision.

Without examining them particularly, we would refer to the cases of Fuller *v.* Dame, 18 Pick. 470; Hatzfield *v.* Gulden, 7 Watts, 152; Clippinger *v.* Hepbaugh, 5 Watts & Sergt. 315; Wood *v.* McCan, 6 Dana, 366; and Hunt *v.* Test, 8 Alabama, 719. The Commonwealth *v.* Callaghan, 2 Virginia Cases, 460.

The sum of these cases is.— 1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law.

2d. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation.

3d. That what, in the technical vocabulary of politicians is termed "log-rolling," is a misdemeanor at common law, punishable by indictment.

It follows, as a consequence, that the documents given in evidence under the first bill of exceptions were relevant to the issue; and that the court below very properly gave the instructions under consideration.

We now come to the last three exceptions to the instructions of the court, which were as follows:

"4. But if the contract was made upon a valid and legal consideration, the contingency has not happened upon which the sum of fifty thousand dollars was to be paid to the plaintiff — the law passed by the legislature of Virginia being different, in material respects, from the one proposed to be obtained by the defendant by the agreement of February 11th, 1847; and the passage of which, by the terms of that contract, was made a condition precedent to the payment of the money."

"5. The subsequent acceptance of the law as passed, under the agreement with the city of Wheeling, stated in the evidence, was not a waiver of the condition, and does not entitle the plaintiff to recover in an action on the special contract."

"6. There is no evidence that the plaintiff rendered any services, or was employed to render any, under any contract, express or implied, except the special contract stated in his declaration; and as no money is due to him, under that contract, he cannot recover upon the count of *quantum meruit*."

We do not think it necessary, in order to justify these instructions of the court below, or to vindicate our affirmance of them, to enter into a long and perplexed history of the various schemes of legislative action, and their results, as exhibited by the testimony in the case. It would require a map of the country, and tedious and prolix explanations. Suffice it to say, that after a careful examination of the admitted facts of the case, we are fully satisfied of the correctness of the instructions.

1. Because the plaintiff, by his own showing, had not performed the conditions which entitled him to demand this stipulated compensation.

2. The act of assembly which was passed, and afterwards used by defendant for want of better, was obtained by the opponents of defendants, and in spite of the opposition of plaintiff; and the fact that the company were compelled to accept the act under modifications, by compromise with their opponents, would not entitle plaintiff to his stipulated reward.

3. By the stipulations of his contract he is estopped from claiming under a *quantum meruit*, as his whole compensation depended on success in obtaining certain specified legislation, which he acknowledged he had failed to achieve.

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

Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice Campbell, dissented.

Mr. Justice CATRON said that he concurred with his bro-

ther, Mr. Justice Campbell, in the opinion which he was about to pronounce, and had authorized him so to state. But inasmuch as reference had been made in the opinion of the court, which had just been delivered, to an opinion which he himself had given in the case of Rundle *v.* the Delaware and Raritan Canal Company, 14 Howard, 80, he felt it to be a duty to himself to remark, that he had at all times denied that a corporation is a citizen within the sense of the Constitution, and so he had declared in the opinion just referred to. He had there stated the necessity of the existence of jurisdiction in the federal courts as against corporations, but held that citizenship of the president and directors must be averred to be of a different State from the other party to the suit; without which averment, this court could not proceed, according to the settled practice of fifty years standing. Letson's case (which is the foundation of the new doctrine) contained the necessary averment within the settled practice, and consequently it was not necessary to give a separate opinion in that case.

He remarked, further, that according to the assumption that a corporation was a citizen of the State where it was incorporated, a company having a charter for a railroad in two States (and there were many such) might sue citizens of the State and place where the president and directors resided, averring that the company was a citizen of the other State, and *vice versa*. In such case the corporation could sue in every federal court in the Union.

Mr. Justice DANIEL.

From the opinion just delivered I must declare my dissent. In the settlement of the discreditable controversy between the parties to this cause, I take no part. If I did, I should probably say that it is a case without merits, either in the plaintiff or in the defendants, and that in such a case they should be dismissed by courts of justice to settle their dispute by some standard which is cognate to the transaction in which they have been engaged.

My participation in this case has reference to a far different and more important ingredient involved in the opinion just announced, namely, the power of this court to adjudicate this cause consistently, with a just obedience to that authority from which, and from which alone, their being and their every power are derived.

Having in former instances, and particularly in the case of the Rundle *v.* Delaware and Raritan Canal Company, endeavored to expose the utter want of jurisdiction in the courts of the United States over causes in which corporations shall be parties

either as plaintiffs or defendants, I hold it to be unnecessary in this place to repeat or to enlarge upon the positions maintained in the case above mentioned, as they are presented in 14 Howard, 95. Indeed, from any real necessity for enforcing the general fundamental proposition contended for by me in the case of Rundle and the Delaware and Raritan Canal Company, namely, that under the second section of the third article of the Constitution, citizens only, that is to say men, material, social, moral, sentient beings, must be parties, in order to give jurisdiction to the federal courts, I am wholly relieved by the virtual, obvious, and inevitable concessions, comprised in the attempt now essayed, to carry the provision of the Constitution beyond either its philological, technical, political, or vulgar acceptation. For in no one step in the progress of this attempt, is it denied that a corporation is not and cannot be a citizen, nor that a citizen does not mean a corporation, nor that the assertion of a power by an individual outside of the corporation, and interfering with and controlling its organization and functions, (whatever might be the degree of interest owned by that individual in the corporation,) would be incompatible with the existence of the corporate body itself. Nothing of this kind is attempted. But an effort is made to escape from the effect of these concessions, by assumptions which leave them in all their force, and show that such concessions and assumptions cannot exist in harmony with each other.

Thus it has been insisted that a corporation, created by a State, can have no being or faculties beyond the limits of that State; and if its president and officers reside within that State such a conjuncture will meet and satisfy the predicament laid down by the Constitution.

The want of integrity, in this argument, is exposed by the following questions:

1. Does the restriction of the corporate body within particular geographical limits, or the residence of its officers within those limits, render it less a corporation, or alter its nature and legal character in any degree?

2. Does the restriction of the corporate faculties within given bounds, necessarily or by any reasonable presumption, imply that the interest of its stockholders, either in its property or its acts, is confined to the same limits? If it does, then a change of residence by officers, agents, or stockholders, or a transfer of a portion of the interests of the latter, would destroy the qualification of citizenship depending upon locality. If it would not have this effect, then this anomalous citizen may possess the rights of both plaintiff and defendant, nay, by a sort of plural being or ubiquity, may be a citizen of every State in the Union,

may even be a State and a citizen of the same State at the same time.

Again it has been said, that the Constitution has reference merely to the interests of those who may have access to the federal courts; and that provided those interests can be traced, or presumed to have existence in persons residing in different States, it cannot be required that those by whom such interests are legally held and controlled, or represented, should be alleged or proved to be citizens, or should appear in that character as parties upon the record. In reply to this proposition it may be asked, upon what principle any one can be admitted into a court of justice apart from the interest he may possess in the matter in controversy; and whether it is not that interest alone and the position he holds in relation thereto, which can give him access to any court? But, again, the language of the Constitution refers expressly and conclusively to the civil or political character of the party litigant, and constitutes that character the test of his capacity to sue or be sued in the courts of the United States.

In strict accordance with this doctrine has been the interpretation of the Constitution from the early, and what may in some sense be called the cotemporaneous interpretation of that instrument, an interpretation handed down in an unbroken series of decisions, until crossed and disturbed by the anomalous ruling in the case of Letson *v.* The Louisville Railroad Company.

Beginning with the case of Bingham *v.* Cabot, in the 3d of Dallas, 382, and running through the cases of Turner *v.* The Bank of North America, 4 Dallas, 8; Turner's Admr. *v.* Enrille, Ib. 7; Mossman *v.* Higginson, Ib. 12; Abercrombie *v.* Dupuis, 1 Cranch, 343; Wood *v.* Wagnon, 2 Ib. 1; Capron *v.* Van Noorden, 2 Ib. 126; Strawbridge *v.* Curtis, 3 Ib. 267; The Bank of the United States *v.* Deveaux, 5 Ib. 61; Hodgson *v.* Bowerbank, 5 Ib. 303; The Corporation of New Orleans *v.* Winter, 1 Wheat. 91; Sullivan *v.* The Fulton Steamboat Company, 6 Wheat. 450 — the doctrine is ruled and reiterated, that in order to maintain an action in the courts of the United States, under the clause in question, not only must the parties be citizens of different States, but that this character must be averred explicitly, and must appear upon the record, and cannot be inferred from residence or locality, however expressly stated, and that the failure to make the required averment will be fatal to the jurisdiction of a federal court, either original or appellate; and is not cured by the want of a plea or of a formal exception in any other form. But the decisions have not stopped at this point; they have ruled that to come within the meaning of the Constitution, the cause of action

must have existed *ab origine* between citizens of different States, and that the article in question cannot be evaded by a transfer of rights which, by their primitive and intrinsic character, were not cognizable in the courts of the United States as between citizens of different States. See Turner *v.* The Bank of North America, already cited, and the cases of Montalet *v.* Murray, 4 Cranch, 46; and Gibson *v.* Chew, 16 Peters, 315. It is remarkable to perceive how perfectly the case of Turner *v.* The Bank of North America covers that now under consideration, and how strongly and emphatically it rebukes the effort to claim by indirect and violent construction, powers for the federal courts which not only have never been delegated to them, nor implied by the silence of the Constitution, but still more powers assumed in defiance of its express inhibition. In the case last mentioned, the plaintiffs were well described as citizens of Pennsylvania, suing Turner and others, who were properly described as citizens of North Carolina, upon a promissory note made by the defendants, and payable to Biddle and Company, and which, by assignment, became the property of the plaintiffs. Biddle & Co. were not otherwise described than as "using trade and partnership" at Philadelphia or North Carolina. Upon an exception upon argument, taken for the first time in this court, Ellsworth, Chief Justice, pronounced its decision in these words: "A Circuit Court is one of limited jurisdiction, and has cognizance not of causes generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is, (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears.

This renders it necessary, inasmuch as the proceedings of no court can be valid farther than its jurisdiction appears or can be presumed, to set forth upon the record of a circuit court, the facts or circumstances which give it jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Amongst those circumstances it is necessary, where the defendant appears to be a citizen of one State, to show that the plaintiff is a citizen of some other State, or an alien; or if, as in the present case, the suit be upon a promissory note by an assignee, to show that the original promisee is so, for by a special provision of the statute it is his description as well as that of the assignee, which effectuates the jurisdiction; but here the description given of the promisee only is, that he used trade at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that

he was a citizen of a State other than that of North Carolina. or an alien, nor any thing which by legal intendment can amount to such an averment." Let it be remembered, that the statute alluded to by Chief Justice Ellsworth is nothing more nor less than an assertion in terms of the second section of the third article of the Constitution; and it may then be asked, what becomes of this awkward attempt to force upon both the Constitution and statute a construction which the just meaning of both absolutely repels? Every one must be sensible that the seat of a man's business, of his daily pursuits and occupations, must probably, if not necessarily, be the place of his residence; yet here we find it expressly ruled, that such a commorancy by no just legal intendment any more than by express language, constitutes him a citizen of that community or State in which he may happen to be then residing or transacting his business; moreover, it is familiar to every lawyer or other person conversant with history, that during the periods of greatest jealousy and strictness of the English polity, aliens were permitted, for the convenience and advancement of commerce, to reside within the realm and to rent and occupy real property; but it never was pretended that such permission or residence clothed them with the character or with a single right pertaining to a British subject.

Nor has the doctrine ruled by the cases just cited been applied to proceedings at law alone, in which a peculiar strictness or an adherence to what may seem to partake of form is adhered to. The overruling authority of the Constitution has been regarded by this court as equally extending itself to equitable as to legal rights and proceedings in the courts of the United States. Thus in the case of Course *v.* Stead in 4 Dallas, 22. That was a suit in equity in the Circuit Court of the United States for the District of Georgia, in which it was deemed necessary to make a new party by a supplemental bill. This last bill recited the original bill, and all the orders which had been made in the cause, but omitted to allege the citizenship of the newly made defendant. In this case, when brought here by appeal from the court below, this court say, in reference to the omission to aver the citizenship of the new party, "it is unnecessary to form or to deliver any opinion upon the merits of this cause; let the decree of the Circuit Court be reversed." The case of Jackson *v.* Ashton, in 8 Peters, 148, is still more in point. This also was a suit in equity. The caption of the bill was in these words: "Thomas Jackson and others, citizens of the State of Virginia *v.* The Rev. William E. Ashton, a citizen of Pennsylvania." What said this court by its organ, Marshall, Chief Justice, upon this state of the case? "The title or cap-

tion of the bill is no part of the bill, and does not remove the objection of the defects in the pleadings. The bill and proceedings should state the citizenship of the parties to give the court jurisdiction." In these last decisions must be perceived the most emphatic refutation of this newly assumed version of the Constitution, which affirms that, although by the language of that instrument citizenship and neither residence nor property, but citizenship, the civil and political relation or *status* independently of either, is explicitly demanded, yet this requisition is fully satisfied by the presumption of a beneficiary interest in property apart either from possession or right of possession or from any legal estate or title makes the interest thus inferred equivalent with citizenship of the person to whom interest is thus strangely imputed. Perhaps the most singular circumstance attending the interpolation of this new doctrine is the effort made to sustain it upon the rule *stare decisis*. After the numerous and direct authorities before cited, showing the inapplicability to this case of this rule, it would have been thought *à priori* that the very last aid to be invoked in its support would be the maxim *stare decisis*. For this new class of citizen corporations, incongruous as it must appear to every legal definition or conception, is not less incongruous nor less novel to the relation claimed for it, or rather for its total want of relation to the settled adjudications of this court. It is strictly a new creation, an alien and an intruder, and is at war with almost all that has gone before it; and can trace its being no farther back than the case of Letson *v.* The Louisville Railroad Company.

The principle *stare decisis*, adopted by the courts in order to give stability to private rights, and to prevent the mischiefs incident to mutations for light and insufficient causes, is doubtless a wholesome rule of decision when derived from legitimate and competent authority, and when limited to the necessity which shall have demanded its application; but, like every other rule, must be fruitful of ill when it shall be wrested to the suppression of reason or duty, or to the arbitrary maintenance of injustice, of palpable error, or of absurdity. Such an application of this rule must be necessarily to rivet upon justice, upon social improvement and happiness, the fetters of ignorance, of wrong, and usurpation. It is a rule which, whenever applied, should be derived from a sound discretion, a discretion having its origin in the regular and legitimate powers of those who assert it. It can never be appealed to in derogation or for the destruction of the supreme authority, of that authority which created and which holds in subordination the agents whose functions it has defined, and bounded by clear and plainly-marked limits.

Wherever the Constitution commands, discretion terminates. Considerations of policy or convenience, if ever appealed to, I had almost said if ever imagined in derogation of its mandate, become an offence. Beyond the Constitution or the powers it invests, every act must be a violation of duty, an usurpation.

There cannot be a more striking example than is instanced by the case before us, of the mischiefs that must follow from disregarding the language, the plain words, or what may be termed the body, the *corpus*, of the Constitution, to ramble in pursuit of some *ignis fatuus* of construction or implication, called its spirit or its intention, — a spirit not unfrequently about as veracious, and as closely connected with the Constitution, as are the spirits of the dead with the revolving tables and chairs which, by a fashionable metempsychosis of the day, they are said to animate.

The second section of the third article of the Constitution prescribes citizenship as an indispensable requisite for obtaining admission to the courts of the United States — prescribes it in language too plain for misapprehension. This court, in the case of Deveaux and the Bank of the United States, yielded obedience, professedly at any rate, to the constitutional mandate: for they asserted the indispensable requisite of citizenship; but in an unhappy attempt to reconcile that obedience with an unwarranted claim to power, they utterly demolished the legal rights, nay, the very existence of one of the parties to the controversy, thereby taking from that party all standing or capacity to appear in any court. This was *ignis fatuus*, No. 1. This was succeeded by the case of Letson *v.* The Cincinnati and Louisville Railroad Company, in which, by a species of judicial resurrection, this party (the corporation) was *deterré*, raised up again, but was not restored to the full possession of life and vigor, or to the use of all his members and faculties, nor even allowed the privilege of his original name; but semianimate, and in virtue of some rite of judicial baptism, though "curtailed of his natural dimensions," he is rendered equal to a release from the thraldom of constitutional restriction, and made competent at any rate to the power of commanding the action of the federal courts. This is *ignis fatuus*, No. 2. Next in order is the case of Marshall *v.* The Baltimore and Ohio Railroad Company. This is indeed the *chef d'œuvre* amongst the experiments to command the action of the spirit in defiance of the body of the Constitution.

It is compelled, from the negation of that instrument, by some necromantic influence, potent as that by which, as we read, the resisting Pythia was constrained to yield her vaticinations of an occult futurity. For in this case is manifested the most en-

tire disregard of any and every qualification, political, civil, or local. This company is not described as a citizen or resident of any State; nor as having for its members the citizens of any State; nor as a *quasi* citizen; nor as having any of the rights of a citizen; nor as residing or being located in any State, or in any other place. No intimation of its "whereabout" is alluded to. It is said to have been incorporated by the State of Maryland; but whether the State of Maryland had authority to fix its locality or ever directed that locality, and whether that be in the moon or *in terra incognita*, is no where disclosed. It is said that because this company was incorporated by the Legislature of Maryland, we may conjecture, and are bound to conjecture, that it is situated in Maryland, and must possess all the qualifications appertaining to a citizen of Maryland to sue or be sued in the courts of the United States; and this inference we are called upon to deduce, in opposition to the pleadings, the proofs, and the arguments, all of which demonstrate, that this corporation claims to extend its property, its powers, and operations, and of course its locality, over a portion of the State of Virginia, and that it was in reference to its rights and operations within the latter State, that the present controversy had its origin.

Thus does it appear to me that this court has been led on from dark to darker, until at present it is environed and is beaconed onward by varying and deceptive gleams, calculated to end in a deeper and more dense obscurity. In dread of the precipices to which they would conduct me, I am unwilling to trust myself to these rambling lights; and if I cannot have reflected upon my steps the bright and cheering day-spring of the Constitution, I feel bound nevertheless to remit no effort to halt in what, to my apprehension, is the path that terminates in ruin. And in considering the tendencies and the results of this progress, there is nothing which seems to me more calculated to hasten them than is the too evidently prevailing disposition to trench upon the barrier which, in the creation by the several States of the federal government, they designed to draw around and protect their sovereign authority and their social and private rights; and to regard and treat with affected derision every effort to arrest any hostile approach, either indirectly or openly, to the consecrated precincts of that barrier. It is indeed a sad symptom of the downward progress of political morals, when any appeal to the Constitution shall fail to "give us pause," and to suggest the necessity for solemn reflection. Still more fearful is the prevalence of the disposition, either in or out of office, to meet the honest or scrupulous devotion to its commands with a sneer, as folly unsuited to the times, and condemned by that

new-born wisdom which measures the Constitution only by its own superior and infallible standard of policy and convenience. By the disciples of this new morality it seems to be thought that the mandates or axioms of the Constitution, when found obstructing the way to power, and when they cannot be overstepped by truth or logic, may be conveniently turned and shunned under the denomination of abstractions or refinements; and the loyal supporters of those mandates may be borne down under the reproach of a narrow prejudice or fanaticism incapable of perceiving through the letter, and, in contradiction of the language of the charter, its true spirit and intent; and as being wholly behind the sagacity and requirements of the age.

We cannot, however, resist the disposition to ask of those whose expanded and more pervading view can penetrate beyond the palpable form of the charter, what it is they mean to convey by the term *abstraction*, which is found so well adapted to their purposes? We would, with becoming modesty, inquire whether every axiom or precept, either in politics or ethics, or in any other science, is not an abstraction? Whether truth itself, whether justice or common honesty is not an abstraction? And we would farther ask those who so deal with what they call abstractions, whether they design to assail all general precepts and definitions as incapable of becoming the fixed and fundamental basis of rights or of duties. The philosophy of these expositions may easily embrace the rejection of the decalogue itself, and might be particularly effectual in reference to that injunction which forbids the coveting of all that appertains to our neighbor. The Constitution itself is nothing more than an enumeration of general abstract rules, promulged by the several States, for the guidance and control of their creature or agent, the federal government, which for their exclusive benefit they were about to call into being. Apart from these abstract rules the federal government can have no functions and no existence. All its attributes are strictly derivative, and any and every attempt to transcend the foundations (those proscribed abstractions) on which its existence depends, is an attempt at anarchy, violence, and usurpation. Amongst the most dangerous means, perhaps, of accomplishing this usurpation, because its application is noiseless whilst it is persevering, is the habitual interference, for reasons entirely insufficient, by the federal authorities with the governments of the several States; and this too most commonly under the strange (I had almost called it the preposterous) pretext of guarding the people of the States against their own governments, constituted of, and administered by, their own fellow-citizens, bound to them by the sympathies arising from a community or identity of interests,

from intimate intercourse, and selected by and responsible to themselves. Or it may be said, under the excuse of protecting the people of the States against themselves, converting the federal government in reference to the States into one grand commission, "*De lunatico inquirendo.*" The effect of this practice is to reduce the people of the States and their governments under an habitual subserviency to federal power; and gives to the latter what ever has been and ever must be, the result of intervention by a foreign, a powerful, and interested mediator, the lion's share in every division. For myself I would never hunt with the lion. I would anxiously avoid his path; and as far as possible keep him from my own; always bearing in mind the pregnant reply told in the Apologue as having been made to his gracious invitation to visit him in his lair; that although in the path that conducted to its entrance, innumerable footprints were to be seen, yet in the same path there could be discerned "*Nulla vestigia retrorsum.*" The vortex of federal incroachment is of a capacity ample enough for the engulfing and retention of every power; and inevitably must a catastrophe like this ensue, so long as a justification of power, however obtained, and the end of every hope of escape or redemption can, to the sickening and desponding sense, in the iron rule of *stare decisis*, be proclaimed. A rule which says to us, "The abuse has been already put in practice; it has, by practice merely, become sanctified; and may therefore be repeated at pleasure." The promulgation of a doctrine like this does indeed cut off all hope of redress, of escape, or of redemption, unless one may be looked for, however remote, in a single remedy — that sharp remedy to be applied by the true original sovereignty abiding with the States of this Union, namely, a reorganization of existing institutions, such as shall give assurance that if in their definition and announcement their rights can, by their appointed agents, be esteemed as abstractions merely, yet in the concrete, that is, in the exercise and enjoyment, these rights are real and substantive, and may neither be impaired nor denied.

My opinion is, that this cause should have been dismissed by the Circuit Court for want of jurisdiction, and should now be remanded to that court with instruction for its dismission.

Mr. Justice CAMPBELL.

I dissent from that portion of the opinion of the court which affirms the jurisdiction of the Circuit Court in this case. The question involves a construction of a clause in the Constitution, and arises under circumstances which make it proper that I should record the reasons for the dissent.

The conditions under which corporations might be parties to suits in the courts of the United States engaged the attention of this court not long after its organization. At the session of the court, in 1809, three cases exhibited questions of jurisdiction in regard to them, under three distinct aspects. The Bank of the United States *v.* Deveaux, was the case of a corporation plaintiff, whose corporators were described as citizens of Pennsylvania suing a citizen of Georgia in the Federal Court of that State. The case of Wood *v.* Maryland Insurance Company, was that of a corporation defendant, whose corporators were properly described, sued in the State of its charter. And the case of Hope Insurance Company *v.* Boardman, was that of a "legally incorporated body," sued in the State from which it derived its charter, and was "legally established," but of whose corporators there was no description, 5 Cranch, 57, 61, 78.

The cases were argued together by counsel of eminent ability, with preparation and care, and were decided by the court with much deliberation and solemnity. Chief Justice Marshall declared the opinion of the court to be "that the invisible, intangible, and artificial being, the mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States unless the rights of the members in this respect can be exercised in the corporate name." As it appeared in the two cases first mentioned that the corporators might sue and be sued in the courts of the United States under the circumstances of the cases, the court on those cases treated them "as a company of individuals who, in transacting their joint concerns, had used a legal name," and for the reason "that the right of a corporation to litigate depended upon the character (as to citizenship) of the members which compose it, and that a body corporate cannot be a citizen within the meaning of the Constitution. The judgment in the last case was reversed for want of jurisdiction."

In Sullivan *v.* Fulton Steamboat Company, 6 Wheat. 450, the defendant was described as a body corporate, incorporated by the Legislature of the State of New York, for the purpose of navigating, by steamboats, the waters of East River or Long Island Sound, in that State." This corporation was sued in New York. Upon appeal, this court determined that the Circuit Court had no jurisdiction of the defendant. In Breithaupt *v.* The Bank of Georgia, that corporation was sued in that State, but this court certified "that as the bill did not aver that the corporators of the Bank of Georgia are citizens of the State of Georgia, the Circuit Court had no jurisdiction of the case." In the Vicksburg Bank *v.* Slocomb, 14 Pet. 60, a corporation was sued by a citizen of a different State, in the State of its char-

ter, but it appearing by plea, that two of its corporators were citizens of the same State as the plaintiff, this court declined jurisdiction for the federal tribunals. This was in accordance with the circuit decisions, 4 Wash. C. C. 597; 3 Sumn. 472; 1 Paine; and their doctrine was repeated in Irvine *v.* Lowrey, 14 Pet. 293. Such was the condition of the precedents in this court when, in 1844, the case of Louisville Railroad Company *v.* Letson, 2 How. 497, arose. The case was one of a New York plaintiff suing a South Carolina corporation, in that State, and describing its corporators as citizens. It appeared by plea, among other things, not material to the present discussion, "that two of the corporators were citizens of North Carolina."

In similar pleas, before this, it had appeared that the corporators belonged to the State of the adverse party, and consequently were within the exclusion of the eleventh section of the Judiciary Act of 1789. In the present case the plaintiff was a citizen from a different State from these corporators. The court notices this fact as a peculiarity. "The point," they say, "has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits until it was made in this case. It has not then been directly ruled in any case." The court proceeded then to decide that there was jurisdiction under the Constitution, for the parties were citizens of different States, and that the Judiciary Act did not exclude it. Thus was this point in the plea disposed of, upon grounds which unsettled none of the cases before cited. The court avows this, and says, "that the case might be safely put upon these reasonings," conducted "in deference to the doctrines of former cases." It then proceeds, "but there is a broader ground, upon which we desire to be understood upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular State, is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person."

Since the decision of Letson's case, there have been cases of corporations, suing in the federal courts beyond the State of their location, and suing and being sued in the State of their location, in which this question might have been considered in this court. But there was no argument at the bar, and no notice of it in the opinion of the court. In one of these, one of the six judges who assisted in the decision of Letson's case expressed strongly a disapprobation of its doctrine, while another limited

the conclusions of the court to the decision of the case then before it. Rundle *v.* Delaware Canal Company, 14 How. 80.

The case of the Indiana Railroad Company *v.* Michigan Railroad Company, 15 How. 233 presented the question now before us, and at that time I was favorable to its reexamination; but this was expressly waived by the court, and the case decided upon another question of jurisdiction.

In the case of the Methodist Church, there was but one corporation before the court as a party. The two corporators who composed that were defendants in their corporate, as well as individual capacity. The citizenship of all the parties to the record was legally declared; and the parties to the record legally represented, all the interests of the voluntary association at issue. In reference to jurisdiction, Justice Washington says, "the cases of a voluntary association, trustees, executors, partners, legatees, distributees, parishioners, and the like, are totally dissimilar to a corporation, and this dissimilarity arises from the peculiar character of a corporation, (4 Wash. C. C. R. 595,) and this is clear by the decisions of this court. 4 Cranch, 306; 8 Wheat. 642.

I have been thus specific in the statement of the precedents in the court, that it may appear that this dissent involves no attempt to innovate upon the doctrines of the court, but the contrary, to maintain those sustained by time and authority in all their integrity.

The declaration before us describes the defendant "as a body corporate by act of the General Assembly of Maryland," and corresponds therefore with the cases cited from 5 Cranch, 57; 6 Wheat. 450; 1 Pet. 238; and in those cases jurisdiction was first questioned and disclaimed in this court. These cases were not cited in Letson's case, and are decisive of this.

If we search the record for facts to sustain the jurisdiction, we can collect that the defendant has been recognized as a body corporate by the Legislature of Virginia, is commorant, and transacts business there by its authority, has for its corporators citizens and a city of that State, and that the plaintiff is also a citizen of Virginia. If these facts are considered with reference to the question of jurisdiction, all the cases decided by this court on this subject have principles which would exclude it. Even Letson's case prescribes, that the corporation should carry on its business in the State of its charter, and that case hardly contemplated an estoppel, such as is described in the opinion of the court.

I am compelled to consider this case as uncontrolled by the declaration of doctrine in Letson's case; nor do I consider the cases in which the decision of the question has been waived as obligatory. I cannot look for the conclusions of this court or

any of its members, except from the public, authorized and responsible opinions delivered here in cases legitimately calling for them. For this conclusion I have the sanction of the highest authority. Chief Justice Marshall, replying to the argument that corporations under no circumstances, and by no averment, could be a party to a suit in the courts of the United States, says "repeatedly has this court decided cases betwen a corpotion and an individual without feeling a doubt of its jurisdiction," and adds, "those decisions are not cited as authority, for they were made without a consideration of the particular point."

The inquiry now presented is, shall I concur in a judgment which removes the ancient landmarks of the court, in reference to its jurisdiction, and which it established with care and solemnity, and maintained for so long a period with consistency and circumspection? I am compelled to reply in the negative.

A corporation is not a citizen. It may be an artificial person, a moral person, a juridical person, a legal entity, a faculty, an intangible, invisible being; but Chief Justice Marshall employed no metaphysical refinement, nor subtlety, nor sophism, but spoke the common sense, "the universal understanding," as he calls it, of the people, when he declared the unanimous judgment of this court, "that it certainly is not a citizen."

Nor were corporations within the contemplation of the framers of the Constitution when they delegated a jurisdiction over controversies between the citizens of different States. The citation by the court from the Federalist, proves this. It is said by the writers of that work, "that it may be esteemed as the basis of union that the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States." And if it be a just principle that every government ought to possess the means of executing its own provisions, by its own authority, it will follow that, in order to the inviolable maintenance of that equality of immunities and privileges to which citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens." Thus to administer the rights and privileges of citizens of the different States, held under a constitutional guaranty, when brought into collision or controversy — rights and immunities derived from the constitutional compact, and forming one of its fundamental conditions, was the object of this jurisdiction. The commonplace, that it resulted as a concession to the possible fears and apprehensions of suitors, that justice might not be impartially administered in State jurisdiction, soothing as it is to the official sensibilities of the federal courts, furnishes no satisfactory explanation of it.

Hence the interpretation of that instrument which transferred to the artificial persons created by State legislation, the rights or privileges of the corporators, derived from the Constitution of the United States, as citizens of the Union, and held independently and without any relation to their rights as corporators — was, to say no more, a broad and liberal interpretation. Nor did the court in Deveaux's case affect the least self-denial or diffidence in making the bounds of its power. It declared that "the duties of the court, to exercise a jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation," and in this spirit rejected a jurisdiction over a case exactly like the present.

The doctrine of the court in Earle's case, 13 Peters, 519, and Runyan's case, 14 Peters, 122, to the result that corporations have no extraterritorial rights, but that the legal exercise of their faculties, extraterritorially, was the effect of a rule of comity among the States, dependent upon their policy and convenience, and revocable at their pleasure, was in harmony with these judgments of the court, and the constitutional principles I have stated. The administration of the rules of domestic policy adopted by the several States, in reference to these artificial creatures of a domestic legislation, belonged to State jurisdictions, and were ascertainable from its laws and judicial interpretations. But when, from the later case of Letson, it was supposed that these legal entities had a status which admitted them to the federal tribunals by a constitutional recognition, the inquiry at once arose, for what purpose was this privilege held? The interdependence between the sections of the Constitution which defined the privileges and immunities of citizens of the Union, and the jurisdiction of the federal courts in controversies between citizens of the States, was known and felt. It was argued that the capacity to sue was only a consequent of the right to contract, to hold property, and to perform civil acts. They commenced, therefore, an agitation of the State courts for their rights as "citizens of the Union." The Supreme Court of Kentucky, (12 B. Mon. 212,) repelling these pretensions and exposing their perilous character, thus refers to Letson's case, which had been relied on for their support: "There are some expressions in that opinion which indicate that corporations may be regarded as citizens to all intents and purposes. But in saying this, the court went far beyond the question before them, and to which it may be assumed that their attention was particularly directed." So, too, in New Jersey, 3 Zabris. 429, it was argued that the existence of the extraterritorial rights of corporations "is not now a question of comity in the United States, but a constitutional principle incapable of being altered by State legislation."

And opinions from jurists of preëminence in Massachusetts and New York were laid before the court to sustain the argument founded upon the relaxing doctrines of this court.

Thus the introduction of new subjects of doubt, contest, and contradiction, is the fruit of abandoning the constitutional landmarks.

Nor can we tell when the mischief will end. It may be safely assumed that no offering could be made to the wealthy, powerful, and ambitious corporations of the populous and commercial States of the Union so valuable, and none which would so serve to enlarge the influence of those States, as the adoption, to its full import, of the conclusion, "that to all intents and purposes, for the objects of their incorporation, these artificial persons are capable of being treated as a citizen as much as a natural person."

The Supreme Court of Kentucky says, truly, "The apparent reciprocity of the power would prove to be a delusion. The competition for extraterritorial advantages would but aggrandize the stronger to the disparagement of the weaker States. Resistance and retaliation would lead to conflict and confusion, and the weaker States must either submit to have their policy controlled, their business monopolized, their domestic institutions reduced to insignificance, or the peace and harmony of the States broken up and destroyed." To this consummation this judgment of the court is deemed to be a progress. The word "citizen," in American constitutions, state and federal, had a clear, distinct, and recognized meaning, understood by the common sense, and interpreted accordingly by this court through a series of adjudications.

The court has contradicted that interpretation, and applied to it rules of construction which will undermine every limitation in the Constitution, if universally adopted. A single instance of the kind awakens apprehension, for it is regarded as a link in a chain of repetitions.

The litigation before this court, during this term, suffices to disclose the complication, difficulty, and danger of the controversies that must arise before these anomalous institutions shall have attained their legitimate place in the body politic. Their revenues and establishments mock at the frugal and stinted conditions of State administration; their pretensions and demands are sovereign, admitting impatiently interference by State legislative authority. And from the present case we learn that disdainful of "the careless arbiters" of State interests, they are ready "to hover about them" in "efficient and vigilant activity," to make of them a prey; and, to accomplish this, to employ corrupting and polluting appliances.

I am not willing to strengthen or to enlarge the connections between the courts of the United States and these litigants. I can consent to overturn none of the precedents or principles of this court to bring them within their control or influence. I consider that the maintenance of the Constitution, unimpaired and unaltered, a greater good than could possibly be effected by the extension of the jurisdiction of this court, to embrace any class either of cases or of persons.

Mr. Justice Catron authorizes me to say that he concurs in the conclusions of this opinion.

Our opinion is, that the judgment of the Circuit Court should be affirmed for the want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of 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 affirmed, with costs.

FITZ HENRY HOMER, PLAINTIFF IN ERROR, *v.* GEORGE L. BROWN.

In April, 1815, William Brown, of Massachusetts, made his will by which he made sundry bequests to his youngest son, Samuel. One of them was of the rent or improvement of the store and wharf privilege of the Stoddard property, during his natural life, and the premises to descend to his heirs. After two other similar bequests, the will then gave to Samuel, absolutely, a share in certain property when turned into money.

In May, 1816, the testator made a codicil, revoking that part of the will wherein any part of the estate was devised or bequeathed to Samuel, and in lieu thereof, bequeathing to him only the income, interest, or rent. At his decease it was to go to the legal heirs.

Under the circumstances of this will and codicil, the revoking part applied only to such share of the estate as was given to Samuel, absolutely; leaving in the Stoddard property a life estate in Samuel, with a remainder to his heirs, which remainder was protected by the laws of Massachusetts until Samuel's death.

At the death of Samuel the title to the property became vested in fee simple in the two children of Samuel.

One of these children had a right to bring a real action by a writ of right for his undivided moiety of the property.

The writ of right was abolished by Massachusetts, in 1840, but was previously adopted as a process by the acts of Congress of 1789 and 1792. Its repeal by Massachusetts did not repeal it as a process in the Circuit Court of the United States.

A judgment of *non pros* given by a State court in a case between the same parties, for the same property, was not a sufficient plea in bar to prevent a recovery under the writ of right; nor was the agreement of the plaintiff to submit his case to that

court upon a statement of facts, sufficient to prevent his recovery in the Circuit Court.
The consequences of a nonsuit examined.

(Mr. Justice Curtis, having been of counsel, did not sit in the argument of this case.)

This case came up by writ of error, from the Circuit Court of the United States for the District of Massachusetts.

Brown, who was a citizen of Vermont, brought a writ of right to recover an undivided moiety of certain property in Boston. He was one of the two sons of Samuel Brown, and the grandson of William Brown, the testator, the construction of whose will and codicil was the principal point in controversy.

As to part of the demanded premises there was a joinder of the mise. As to another part of the premises a plea of non-tenure on which issue was joined. The verdict on the joinder of the mise was for the plaintiff, the now defendant in error.

Upon the issue on the plea of non-tenure, the verdict was for the tenant, now plaintiff in error.

Before pleading, the tenant submitted a motion that the writ be quashed because writs of right were by the one hundred and first chapter of the Revised Statutes of Massachusetts, abolished.

This motion was disallowed.

At the trial, the demandant put in evidence the will of William Brown, dated 26th April, 1815, and a codicil thereto, dated 30th May, 1816, upon which his claim of title rests.

The substance of the said will and codicil was as follows, the demandant, Brown, claiming under the devise to Samuel L. Brown, his father.

Item: For my youngest child and son, Samuel Livermore Brown, who was born of my last wife, Elizabeth Livermore, I make the following arrangement of property in my estate for him: The property of my first wife has been in some measure mingled in common stock; the property which might otherwise have descended to me by my last wife, Elizabeth, was, after her decease, conveyed by her father, by deed, and by a brother, by will, to her only surviving child, (the said Samuel,) which was perfectly consistent with my approbation; and the property, being in land, is sufficient for several farms; and if the said Samuel should quit seafaring pursuits, which he has selected for his employment, and turn his attention to agricultural pursuits, he will not need any addition to his acres, but it may be necessary and convenient to have some annual income to aid him in his labor; therefore I give and bequeathe to my son, Samuel L. Brown, the rent or improvement of my store and

wharf privilege, situate on the northerly side of the town dock, in Boston; he to receive the rent annually or quarterly (if the same should be leased or let) during his natural life, and the premises to descend to his heirs; this being the estate I purchased of Mr. Stoddard — reference to the records will give the bounds. Also, I do hereby direct my son, William, to vest one thousand dollars in bank stock, or the stocks of this State or the United States, the interest of which, as it arises, to be paid by him to the said Samuel during his life, and the stock to descend to the heirs of the said Samuel. This is to be advanced by the said William as some consideration for the difference in the value of the two stores.

(The will then went on to create a fund, which was to be divided into four equal parts, one of which was for Samuel, and then proceeded thus:)

But I do hereby direct my executor, hereafter named, to vest one half of the said Samuel's fourth part of this property in the stock of some approved bank in Boston, or in the stocks of this State or the United States, or in real estate; the dividend or rent to [be] paid by him to the said Samuel as it may arise, and the principal or premises to descend to his heirs; and the other half of this fourth part to be paid to the said Samuel in money, when collected, to stock his farm, or for other purposes.

This will was executed on the 26th of April, 1815.

On the 30th of May, 1816, the testator added the following codicil:

Whereas my son Samuel has sold his two farms which were left to him, one by his late grandfather Livermore, by deed, and the other by his uncle George Livermore, by will; and whereas it appears he has relinquished every intention to agricultural pursuits, and is now absent at sea, with a view to qualify himself for a seafaring life, and, under these circumstances, considering it to be more for his interest and happiness, I do hereby repeal and revoke the part of my will wherein any part of my estate, real or personal, is devised or bequeathed to my son, Samuel, therein named, and in lieu thereof do bequeathe to my son, the said Samuel, only the income, interest, or rent of said real or personal estate, as the case may be, so that no more than the income, interest, or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real estate may come to the said Samuel, my son, which, at his decease, it is my will that the said real and personal estate shall then go to the legal heirs.

The demandant, George L. Brown, was at the date of his writ, a citizen of the State of Vermont, and made actual entry on the land demanded in his writ, January twenty-ninth, eigh-

teen hundred and fifty-one, claiming an undivided moiety thereof in fee simple against the defendant as in no way entitled to said land.

The demandant maintained that, under and by virtue of the said will and codicil of William Brown, he was entitled, at the death of his father, Samuel Livermore Brown, to one undivided moiety of the demanded premises in fee simple absolute.

The tenant produced the record of a judgment in a writ of entry, brought by the defendant in error against the plaintiff in error in the Supreme Judicial Court of Massachusetts, embracing the premises now demanded, and submitted to that court on an agreement of facts, in which suit judgment of nonsuit was directed by the court; and this agreement of facts and judgment the tenant offered in evidence as a bar or estoppel to the demandant, so far as the premises were identical with those claimed in this writ of right, and moved the court so to instruct the jury.

The tenant put in the deeds of William Brown, Zebiah C. Tilden, Sally Brown, and Samuel Livermore Brown, dated May 5th, 1824, who were the only children and sole heirs at law of William Brown, the testator, and he maintained that the aforenamed grantors were enabled, by virtue of the will and codicil, to pass, and by these deeds did pass, all the title to the demanded premises which the testator had at the time of his death.

The counsel for the defendant then prayed the court to instruct the jury, 1st. That this action cannot be maintained, because writs of right to recover land situate in the State of Massachusetts have been abolished by its laws.

2d. That this action is barred by the judgment of the Supreme Judicial Court of Massachusetts, which was rendered in a case between the same parties and upon the same cause of action; if that judgment be not a bar to this action, the demandant is estopped by his agreement to submit in that case from prosecuting this action.

3d. That the demandant takes nothing under the will of William Brown, and that he has no title to the demanded premises or any part thereof.

4th. That the rights and title of the demandant, and those under whom he claims, in and to the demanded premises, or any part thereof, have been barred by the statute of limitations of Massachusetts.

5th. That on the pleadings and facts in this case, all of which herein before appear, the demandant cannot maintain this action.

But the honorable court did refuse then and there to give the said instructions to the jury, in the terms and manner in which the same were prayed, but did instruct the jury as follows:

That the demandant was entitled to a verdict for that part of the demanded premises as to which the tenants had pleaded the general issue; and that as to that part of the demanded premises to which the tenants had put in pleas of non-tenure, their verdict should be for the tenants.

Whereupon the counsel for the defendant did then and there except to the aforesaid refusals and to the instructions and charge of the honorable court; and thereupon the jury returned a verdict for the said demandant, in words following to wit: (finding for the demandant on the joinder of the mise and for the tenant on the plea of non-tenure.)

Upon these exceptions, the case came up to this court, and was argued by *Mr. Chandler* and *Mr. Bartlett*, for the plaintiff in error, and by *Mr. Lawrence* and *Mr. Dow*, for the defendant.

I. That the statute of Massachusetts is not a mere act to regulate process, but that it establishes a rule of property and of evidence, and so furnishes a "rule of decision" within the thirty-fourth section of the Judiciary Act, 1789, chapter 20; and in support of this proposition the plaintiff refers to Rev. Sts. of Mass. c. 101; Act of 1786, c. 13; Act of 1807, c. 75; Rev. Stat. of Mass. c. 146; Act of February 20th, 1836, repealing expressly previous acts, Rev. Sts. 814, 821; Rev. Sts. of Mass. c. 119; Report of the Commissioners of Revision of Mass. Sts. part 3d, p. 154; Report of the Commissioners of Revision of Mass. Sts. part 3d, p. 268; Ross *v.* Duval, 13 Peters's R. 45–60; Fullerton *v.* Bank of the United States, 1 Peters's R. 604–613; McNeil *v.* Holbrook, 12 Peters, 84, 88; The Society, &c. *v.* Wheeler, 2 Gallison, 104, 138; Jackson *v.* Chew, 12 Wheaton, 153.

II. The defendant in error takes nothing under the will of William Brown, and has no title to the demanded premises. Baskin's Appeal, 3 Barr, 304.

1. The devise to Samuel L. Brown, under whom the demandant claims the estate, was in the following words: (then followed a recital of the will.)

2. When this will was executed and when it was proved, the statute of Massachusetts of 1791, c. 60, § 3, was in force, and provided that "whenever any person shall hereafter in and by his last will and testament devise any lands, tenements, or hereditaments, to any person for and during the terms of such person's natural life, and after his death to his children or heirs, or right heirs in fee, such devise shall be taken and concluded to vest an estate for life only in such devise, and a remainder in fee simple in such children, heirs, and right heirs, any law, usage, or custom to the contrary notwithstanding."

By the rule in Shelly's case, 1 Coke's Rep. 94, modified in Massachusetts, by the statute of 1791, the Stoddard estate, by the clause of the will just quoted, would have been devised to Samuel L. Brown for life, with remainder in fee to his own heirs.

3. But by the codicil to the will, executed May 30, 1815, the testator, for reasons therein stated, determined to change the character of the original devise, and he then proceeded to "revoke the part of my [his] will wherein any part of my [his] estate, real or personal, is devised or bequeathed to my [his] son Samuel therein named," and in lieu thereof to bequeathe to the said Samuel "only the income, interest, or rent of said real or personal estate, as the case may be, so that no more than the income, interest, or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real estate may come to the said Samuel, my son, which, at his decease, it is my will that the said real and personal estate shall then go to the legal heirs."

4. Unless the testator intended that the fee of his estate should go to his own heirs, he made no change in the direction of the property whatever, because by the devise in the body of the will, which he wished to change, he had already provided that the fee should go to the heirs of his son.

And the legal construction in such a case is, that the estate goes to those who were the legal heirs at the time of the testator's death. Childs *v.* Russell, 11 Met. 16; Doe *v.* Prigg, 8 B. & Cr. 231.

5. The devise in the codicil created a vested remainder in the heirs of the testator; and the plaintiff in error, claiming under the deeds of all the legal heirs, takes the estate. 4 Kent's Com. 202; Fearne on Cont. Remainders, Introduction; Moore *v.* Lyons, 25 Wend. 119; Doe *v.* Prigg, 8 Barn. & Cress. 231.

6. The construction of this will involves also the construction of a local statute, namely, the act of 1791, c. 60; and both have been the subject of adjudication by the highest local tribunal, in a suit between the same parties.

This court will, therefore, give effect to that construction and adjudication, to the end that rights and remedies respecting lands may be regulated and governed by one law, and that, the law of the place where the land is situated. Brown *v.* Homer, 3 Cushing, 390; Jackson *v.* Chew, 12 Wheaton, 153, 168; Henderson *v.* Griffin, 5 Peters, 151; Daly *v.* James, 8 Wheaton, 535; Lane *v.* Vick, 3 Howard, 464; Society *v.* Wheeler, 2 Gallison, 137.

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

First. That as to the first prayer, the writ of right was a proper remedy in this case, because in Massachusetts the writ of right was ever, prior to 1840, a proper remedy in the State courts for a demandant claiming lands therein in fee simple, and having had actual seisin under title coming by purchase. Laws of Massachusetts, Stat. 1786, c. 13, and 1807, c. 75; Jackson on Real Actions, 276, 279, 280; Stearns on Real Actions, 357, 359.

And this remedy became, by the Judiciary Act of Congress of 1789, continued by act of 1792, c. 36, § 2, the proper remedy in like cases in the Circuit Court of the United States, sitting in and for the District of Massachusetts, in the absence of any rule to the contrary prescribed by said Circuit or the Supreme Court of the United States.

And because c. 101, § 51, of the Rev. Stat. of Massachusetts, abolishing writs of right, and taking effect in 1840, with certain exceptions, has no force *ex proprio vigore* in the courts of the United States, as it relates merely to process. Springer *v.* Foster, 1 Story's Rep. 602; Judiciary Act of 1789, § 32; Wayman *v.* Southard, 10 Wheat. 1–54; Fiedler et al. *v.* Carpenter, 2 Woodb. & Minot, 211.

Second. That, as to the second prayer, the judgment of nonsuit between these parties in the State court was no bar nor estoppel to the demandant in the court below. Knox *v.* Waldoborough, 5 Greenl. Rep. 185; 1 Pick. 371; Snowhill *v.* Hillyer, 4 Halstead, 38; 2 Mass. 113; Bank of Illinois *v.* Hicks, 4 J. J. Marshall, 128; 16 Mass. 317.

Third. That as to the third prayer, by the following language in the will, "I give and bequeathe to my son, Samuel L. Brown, the rent or improvement of my store and wharf privilege, situate on the northerly side of the town dock in Boston, he to receive the rent annually or quarterly, (if the same should be leased or let,) during his natural life, and the premises to descend to his heirs, this being the estate I purchased of Mr. Stoddard," a life estate, in the premises named, was given to Samuel L. Brown, and the remainder to his heirs, and that this remainder became by the laws of Massachusetts a distinct estate, protected by statute abolishing the rule in Shelly's case, and was contingent till the heirs of the said Samuel were ascertained by his death, occurring January 31, 1831, when it vested absolutely and became a title in fee simple in George L. Brown, the defendant in error, and Josiah Brown, the only children and heirs at law of said Samuel. Laws of Massachusetts, Stat. 1791, c. 60, § 3; Revenue Statutes of same, c. 59, § 9; Richardson *v.*

Wheatland, 7 Metc. Rep. 169; Holm et ux. *v.* Low, 4 Metc. Rep. 201; Wheatland *v.* Dodge, 10 Metc. Rep. 502; White *v.* Woodbury, 9 Pick. Rep. 136.

Also, that the foregoing gift was not disturbed by the codicil to the will, as to which the burden is on the plaintiff in error to show that it was disturbed.

"To revoke a clear devise the intention to revoke must be as clear as the devise." Doe dem. Hearle et ux. *v.* Hicks, upon error, 8 Bingham Rep. 475.

"A revocation must be by express words or necessary implication." Per Shaw, Ch. J., *arguendo.* Lamb *v.* Lamb, 11 Pick. Rep. 375, 376.

Also, the defendant contends that the revocation in the codicil was carefully guarded and limited, "so that no more than the income, interest, or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real estate may come to the said Samuel."

And to prevent misapprehension, the testator repeated the devise to the heirs of Samuel, in the will already cited as to "the principal of said personal and fee of said real estate," by the words, "which at his decease it is my will that the said real and personal estate shall then go to the legal heirs," obviously of Samuel, because "his interest and happiness" was the sole object of the codicil.

Also, that the real and personal estate of which the testator had by his will given "more than the income," &c., was the large mass of property, both real and personal, given to the executor in trust to be divided into four equal parts, half of one of which fourth parts was given to Samuel for life, remainder to his heirs, "and the other half of this fourth part to be paid to the said Samuel in money, when collected, to stock his farm, or for other purposes."

And that the revocation in the codicil made, because "Samuel had sold his two farms," was intended merely to revoke the gift to Samuel of this "other half of said fourth part," in terms carrying all the interest therein, to enable him "to stock his farm, or for other purposes."

That besides these interests in such fourth part, and his life interest in the Stoddard lot, (the land in controversy,) the will contains no gift whatever to Samuel, except some trifles in books and clothing.

Fourth. That as to the fourth prayer — if the time of limitation prescribed by the Revised Statutes of Massachusetts, chapter 119, be the governing rule in this case, allowing twenty years from the death of Samuel L. Brown, with ten years after disability removed — the defendant could have brought his action

at any time before February 6th, 1852; but if the act of Massachusetts of 1786, chapter 13, (the only limitation act in force prior to Revised Statutes touching real actions,) be the governing rule in this case, then entry made and action brought before January 31st, 1861, would be sufficient, as to time of entry and action brought.

Fifth. That as to the fifth prayer — on the pleadings and facts in this case — the defendant rightfully recovered in the court below on the following grounds, collectively:

1st. Because he had title in fee simple to real estate, lying within the jurisdiction of the court to which he brought suit.

2d. Because he had actual seisin (see Ward *v.* Fuller et al. 15 Pick. 185) of the same within the time of limitation allowed by law, and brought his action therefor in season.

3d. Because his writ of right against the tenant in possession of the freehold for the recovery of a fee simple after actual entry, was a proper remedy. Green *v.* Liter, 8 Cranch, 229; Wells *v.* Prince, 4 Mass. 64; Hunt *v.* Hunt, 3 Metc. 175; Jackson on Real Actions, 15; Stearns on Real Actions, 350, 370. As to forms of writs in all actions in Massachusetts, Stearns, 91, 92, 200, 244.

4th. Because, by the Judiciary Act of Congress of 1789, the court below had jurisdiction over the subject of controversy and the parties.

5th. Because no fact in the case for the jury to consider was in dispute between the parties.

6th. Because the pleadings put in issue the whole subject in dispute and passed upon by the court and jury.

7th. Because the opinion of the State court (which seems not to have at all considered the very important and essential feature of the will touching the large mass of real and personal property given in trust to the executor, and divisible in four parts) being upon the construction of a will only, had no binding force in the United States courts, and was entitled only to the confidence created by its reasoning. Lane et al. *v.* Vick, 3 How. 464; Foxcraft *v.* Mallet, 4 How. 379; Thomas et al. *v.* Hatch, 3 Sumn. 170.

8th. That if the judgment in the State court, instead of a nonsuit, had been for the tenant; yet as that action was by writ of entry, it would be no bar to a writ of right, which would be a higher remedy. Stearns on Real Actions, p. 359.

9th. Because the conveyances of Samuel and others worked no forfeiture of the remainder given to the heirs of Samuel. Stearns et ux. *v.* Winship et ux. 1 Pick. 318; 4 Kent. 255.

Commissioner's notes to Revised Statutes of Massachusetts, pt. 2, c. 59, § 6.

Mr. Justice WAYNE delivered the opinion of the Court.

This cause has been brought to this court from the Circuit Court of the United States for the District of Massachusetts, by a writ of error.

The action is a writ of right. The demandant declares that he has been deforced by the tenant, Fitz Henry Homer, of certain premises claimed by him as his right and inheritance, of which he was seised in fee within twenty years before the commencement of his suit, at the May term of the Circuit Court, A. D. 1851. A motion was made at a subsequent term to quash the writ, upon the ground that the remedy by a writ of right had been abolished by the Revised Statutes of Massachusetts, c. 101, § 51. The court denied the motion. Then the defendant, Fitz Henry Homer, who is tenant of a part of the land demanded, tendered the general issue on a joinder of the mise, on the mere right of the demandant, as to that of part of the land of which the defendant is tenant; with pleas of general non-tenure as to a part of the demanded premises, and of special non-tenure as to the residue. His tender was allowed, and such pleas were filed; upon which the counsel of the demandant joined issue. Subsequently, the defendant asked leave to amend his pleas, by striking out the pleas of the general issue and general non-tenure, as the same had been pleaded, which was permitted, and he filed a plea of joinder of the mise on the mere right, with pleas of non-tenure. The demandant joined issue on the first plea, and filed a replication averring that, from any thing alleged, he was not precluded from having his action against the defendant, because, at the time of suing out his writ, the tenant was tenant of the freehold, as has been supposed in the writ, of all the residue of the demanded premises; and he prayed that the same might be inquired of by the country. Issue having been taken upon the replication, the cause was tried. At the trial, the demandant put in evidence the will of William Brown, dated the 26th April, 1815, with a codicil dated 30th May, 1816, upon which he rested his title. The tenant produced the record of a judgment in a writ of entry, brought by the defendant in error against the plaintiff in error, in the Supreme Judicial Court of Massachusetts, embracing the premises here demanded, and which had been submitted to that court on an agreement of facts, in which a judgment of nonsuit was directed by the court; and this agreement of facts and judgment the tenant offered in evidence as a bar or estoppel to the demandant, so far as the premises were identical with those claimed in this writ of right, and moved the court so to instruct the jury. The tenant then put in the deeds of William Brown, Zebiah C. Tilden, Sally Brown, and Samuel Livermore Brown

dated May 5, 1824, who were the only children and sole heirs at law of William Brown, the testator, maintaining that the grantors were enabled, by virtue of the will and codicil, to pass all the title to the demanded premises which the testator had at the time of his death.

The tenant further moved the court to instruct the jury that the action could not be maintained, because writs of right to recover land in the State of Massachusetts had been abolished by its laws.

Also, to instruct the jury that the demandant took nothing under the will and codicil of William Brown, and that on the pleadings and facts in the case the demandant could not maintain this action. Another instruction was asked, namely, that the rights and title of the demandant, and those under whom he claims to the demanded premises, or any part thereof, have been barred by the Statute of Limitations of Massachusetts. But the counsel for the tenant, now the plaintiff in error in this court, stated in his argument that his other prayers for instruction were not relied upon. The court refused to give either of the instructions just recited, and instructed the jury that the demandant was entitled to a verdict for that part of the demanded premises as to which the tenant had pleaded the general issue; and as to that part of the demanded premises to which the tenant had put in pleas of non-tenure, that their verdict should be for the tenant. The counsel for the defendant excepted to the refusals and to the instructions which the court gave, and the jury returned a verdict for the demandant, "that on the first issue, being the general issue, the jury find that the said George L. Brown hath more mere right to have an undivided moiety of so much of the demanded premises as is thus described (northerly by Clinton street, sixteen feet; easterly by the centre of a brick-wall, dividing the premises from land formerly of D. Packer, deceased, fifteen feet eight inches; southwardly by land, formerly of Savage, now of Homer, the defendant, twenty-three feet, with the appurtenances to him and his heirs, as he hath above demanded the same) than the said Homer has to hold the same as he now holds it, as the said Brown by his aforesaid writ hath above supposed; and that the demandant was seised of the same, as by him in his writ alleged. On the second and third issues, being upon the pleas of general and special non-tenure, the jury find that the said Fitz Henry Homer was not at the date of the writ, has not been since, and is not now, seised as of freehold of any part of the land therein described, as the said Brown by his aforesaid writ hath above supposed."

We think that the remedy by a writ of right for the recovery

of corporeal hereditaments in fee simple, may still be resorted to in the Circuit Court of the United States for the District of Massachusetts, though the same has been abolished in the courts of that State, and that the court did not err in instructing the jury accordingly. Such a remedy existed in the courts of Massachusetts until the year 1840, and it became, by the Judiciary Acts of 1789 and 1792, a remedy in the Circuit Court for that district; any subsequent legislation of the State abolishing it in its courts does not extend to the courts of the United States, because it is a matter of process which is exclusively regulated by the acts of Congress. Wayman *v.* Southard, 10 Wheat. 1. It is as process alone, however, that it continues in the courts of the United States, subject to the limitation prescribed by the Revised Statutes of Massachusetts, as to the time within which such a remedy may be prosecuted in its courts.

The second instruction asked was also properly refused. A judgment of nonsuit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *nonpros'd*, and is liable to pay the costs. But as nothing positive can be implied from the plaintiff's error as to the subject-matter of his suit, he may reassert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not. Blackstone, 295; 1 Pick. 371; 2 Mass. 113.

It is not, however, only for a non-appearance, or for delays or defaults that a nonsuit may be entered. The plaintiff in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may concur to take it from the jury with the view to submit the law of the case to the court upon an agreed statement of facts with an agreement that the plaintiff shall be *nonpros'd*, if the facts stated are insufficient to maintain the right which he claims. The court in such a case will order a nonsuit, if it shall think the law of it against the plaintiff, but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same and no more than if he had been *nonpros'd* for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent. The Supreme Court of Massachusetts, in deciding the cause submitted to it, did so in conformity to an agreement between the parties, but its judgment cannot be pleaded as a bar to the suit, though in giving it an opinion was expressed upon the merit of the de-

mandant's claim under the will of his grandfather, William Brown.

The court was also asked to instruct the jury that the demandant was estopped from prosecuting this action by his agreement in his previous suit to submit it upon a statement of facts. In every view which can be taken of an estoppel, that agreement cannot be such here, because the demandant does not make in this case any denial of a fact admitted by him in that case. He rests his title here to the demanded premises upon the same proofs which were then agreed by him to be facts. This he has a right to do. His agreement only estopped him from denying that he had submitted himself to be nonsuited, or that he was not liable to its consequences.

We come now to the third prayer for an instruction which the court denied. It was that the demandant takes nothing under the will of William Brown, and that he has no title to the demanded premises or any part thereof. The land sued for is a part of what the the testator designates in his will, the estate bought from Mr. Stoddard. He bequeathes the rent or improvement of the store upon it, with the wharf privilege, to his son, Samuel L. Brown, during his natural life, "and the premises to descend to his heirs." It is here said that this bequest and devise was revoked by the testator in the codicil to his will. Care must be taken in the application of the codicil to the will, but in our opinion the testator's intention may be satisfactorily shown from the language which he uses in the codicil, and from its direct connection with one of the bequests in the will to Samuel. The latter will be more readily seen by a recital of all the testator's bequests to Samuel, before we make the application of the codicil to that to which we have referred. The first bequest is that already stated of the rent or improvement of the store and wharf privilege of the Stoddard property. He then directs his son William, as some consideration for the difference in the value of the devise to him over that of his bequest to Samuel, to vest one thousand dollars in stock, the interest of which is to be paid to Samuel during his life and the principal to descend to his heirs. The third bequest to Samuel is one fourth part of a mass of real and personal estate as it is mentioned in the will, and all of his other property not before or hereafter disposed of, as the same may be turned into money, with this direction to his executor, to vest one half of one fourth of it in stock or real estate, "the dividend or rent of which is to be paid to Samuel as it may arise, and the principal or premises to descend to his heirs." The testator then bequeathes to Samuel the other half of that fourth in money when collected to stock his farm or for other purposes. The

difference between this last and the other bequests to Samuel being that he had in all of the others only a life-interest, and in this an unqualified and absolute right. Now, the question is, what qualifications have been made by the testator's codicil of his bequests in the will to Samuel and his heirs, and whether the codicil does not relate exclusively to that bequest of money left to Samuel to stock his farm and for other purposes? That must be determined by the language of the codicil. If that is sufficient to indicate the testator's meaning, we are not permitted to search out of it for an inference of his intention. If it bears directly upon one of his bequests to Samuel in such a way as to change it from an absolute gift into a life-interest, in conformity with the prevalent intention of the testator manifested throughout the body of his will, to leave to Samuel only a life-interest in any part of his estate, except as to that bequest of the one half of one fourth already mentioned to stock his farm and for other purposes, no other application of the codicil can be made to any other bequest in the testator's will.

We learn from the codicil that Samuel had sold his farm between the date of the will and that of the codicil, for the stocking of which the testator had given to him a sum of money. And then the testator states his inducement for making the codicil to be Samuel's apparent relinquishment "of every intention to agricultural pursuits," and that being absent at sea to qualify himself for a seafaring life, he considers it to be more for his interest and happiness to repeal and revoke "the part of my will wherein any part of my estate, real or personal, is devised or bequeathed to my son Samuel therein named," and in lieu thereof to bequeathe to him only the income, interest, or rent of the real or personal estate during his life. Now, excepting the unqualified bequest of the money to stock his farm, the testator had not, in either of his other bequests, left to Samuel any more than the income, interest, or rent of any part of his real or personal estate; declaring that the property or stock from which such rent or income might arise, should go to his heirs. With such corresponding intentions, both in the will and in the codicil, in regard to Samuel, the codicil cannot be considered as a revocation of the former interest given to Samuel for his life, and afterwards to his heirs, unless the testator has used language showing an express intention to exclude Samuel's heirs from that which had been given to him for his life, and afterwards without any limitation to them. That the testator has not done. The only words in the codicil which have been urged in the argument to show that the testator meant to do so, is his uncertain declaration at the end of it, that it was his will that the real and personal estate out of which Samuel was

to have the income during his life, should at his death go to the legal heirs. It was said that these words — the legal heirs — in connection with those immediately preceding, "so that no more than the income, interest, or rent of any portion of his real or personal, and not the fee of said real, may come to the said Samuel," meant nothing, unless they related to the devise of the Stoddard estate, and to the testator's own heirs, because in that devise it had been provided already that the fee should go to the heirs of Samuel.

Without yielding to such a conclusion, it is sufficient for us to say, that the testator had provided that other real estate might be bought out of one half of one fourth of the proceeds of the property left to the executor, in trust to be sold for the benefit of his four children, the rent of which was given to Samuel with a devise of it after his death to his heirs, and that he had given to Samuel absolutely the other half of that fourth, which last he meant by his codicil to revoke and to place upon the same footing with the rest of his estate, the interest or rent of which he bequeathed to Samuel for his life. We have been brought to this conclusion by the language of the testator in his will and codicil. His recital of the causes which induced him to make the codicil, shows that he had a particular part of his will in view, (and not all those parts of it in which he had provided for Samuel,) singly in connection with Samuel, and that it was a consequence of those circumstances (the sale by Samuel of his farm and his intention to follow a seafaring life) which made him consider it to be more for his interest and happiness to revoke that bequest only in which he had given absolutely a sum of money to his son to stock his farm. The words of revocation are: "I do hereby repeal and revoke the part of my will wherein any part of my estate, real or personal, is bequeathed to my son, the said Samuel, and in lieu thereof do bequeathe to my son, the said Samuel, only the income, interest, or rent of said real or personal estate, as the case may be." It is only by changing the words "the part of my will" into the "parts" of my will, that the codicil can be made to bear upon all of those parts of the will in which Samuel had been made for his life the object of that arrangement for him of which his father speaks in that clause of the will which contains the Stoddard bequest. We think, from the language used by the testator, that he has bequeathed and devised to the heirs of Samuel all of the property in which their father was given a life-interest; that the codicil revokes only that clause of the will which contains a bequest of money absolutely to Samuel, and puts it upon the same footing with his other bequests to Samuel, both as respects Samuel and his heirs. The instruction asked by the tenant

was therefore, in our opinion, rightly refused by the court, and we shall direct its judgment in the suit 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 Massachusetts, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

THE PIQUA BRANCH OF THE STATE BANK OF OHIO, PLAINTIFF IN ERROR, *v.* JACOB KNOOP, TREASURER OF MIAMI COUNTY.

In 1845, the Legislature of Ohio passed a general banking law, the fifty-ninth section of which required the officers to make semi-annual dividends, and the sixtieth required them to set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject.

This was a contract fixing the amount of taxation, and not a law prescribing a rule of taxation until changed by the legislature.

In 1851, an act was passed entitled, "An act to tax banks, and bank and other stocks the same as property is now taxable by the laws of this State." The operation of this law being to increase the tax, the banks were not bound to pay that increase.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. But a bank, where the stock is owned by individuals, is a private corporation. Its charter is a legislative contract, and cannot be changed without its assent.

The preceding case upon this subject, examined, and the case of the Providence Bank *v.* Billing, 4 Peters, 561, explained.

THIS case was brought up from the Supreme Court of Ohio, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

In the record there was the following certificate from the Supreme Court of Ohio, which explains the nature of the case:

And thereupon, on motion of the defendant, it is hereby certified by the court, and ordered to be made a part of the record herein, that in the above entitled cause the petitioner claimed to collect, and prayed the aid of the court to enforce the payment of, the tax in the petition mentioned, under an act of the General Assembly of the State of Ohio, passed March 21st, 1851, entitled "An act to tax banks, and bank and other stocks,

the same as other property is now taxable by the laws of this State," a certified copy of which is filed as an exhibit in this cause, marked "A." The said defendant, by way of defence to the prayer of said petitioner, &c., set up an act, entitled "An act to incorporate the State Bank of Ohio, and other banking companies," enacted by the General Assembly of the State of Ohio, February 24th, 1845, a certified copy of which is filed as an exhibit in this cause, marked "B;" under which act the defendants organized, and became and was a branch of the State Bank of Ohio, exercising the franchises of such bank prior to and ever since the year 1847; and that the defendant claimed that, by virtue of the operation of said act last mentioned, the State of Ohio had entered into a binding contract and obligation, whereby the State of Ohio had agreed and bound herself not to impose any tax upon the defendant, and not to require the defendant to pay any tax for the year 1851, other or greater than six per cent. on its dividends or profits, as provided by the sixtieth section of the said act of February 24th, 1845. And it is further certified, that there was drawn in question in said cause the validity of the said statute of the State of Ohio, passed March 21st, 1851, herein before mentioned, the said defendant claiming that it was a violation of the said alleged agreement and contract between the State of Ohio and the said defendant, and on that account repugnant to the Constitution of the United States, and void; but the court here held and decided: 1st. That the sixtieth section of said act of February 24th, 1845, to incorporate the State Bank of Ohio, and other banking companies, contains no pledge or contract on the part of the State not to alter or change the mode or amount of taxation therein specified; but the taxing power of the General Assembly of the State of Ohio over the property of companies formed under that act is the same as over the property of individuals. And, 2d. That whether the franchises of such companies may be revoked, changed, or modified, or not, the act of March 21st, 1851, upon any construction, does not impair any right secured to them by the act of 1845, and is a constitutional and valid law. And it is further certified, that the decision of the question as to the validity of the said statute of 1851, was necessary to the decision of said cause, and the decision in the premises was in favor of the validity of said statute. The court do further certify, that this court is the highest court of law and equity of the State of Ohio in which a decision of this suit could be held. And it is ordered, that said exhibits A and B be made parts of the complete record in this cause.

The contents of exhibits A and B are stated in the opinion of the court.

The case was argued by *Mr. Stanberry* and *Mr. Veriton*, for the plaintiff in error, and by *Mr. Spalding* and *Mr. Pugh*, for the defendant in error.

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

1st. That the Piqua branch of the State Bank of Ohio is a private corporation.

The principle governing this point is, that if the whole interest of a corporation do not belong to the public, it is a private corporation. Angell & Ames on Corporations, §§ 31 to 36 inclusive; Dartmouth College *v.* Woodward, 4 Wheat. 636; Baily *v.* Mayor of New York, 3 Hill, 531; Bank United States *v.* Planters' Bank of Georgia, 9 Wheat. 907; Miners' Bank *v.* United States, 1 Greene, 553; Bonaparte *v.* Camden & Amboy R. R. Co. 1 Bald. 222.

2d. The act of the 24th of February, A. D. 1845, providing for the creation of this private corporation, became, by its acceptance, a contract between the State and the corporators, which contract is entitled to the protection of that clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts.

Angell & Ames on Corp. §§ 31, 469, 767; Dartmouth College *v.* Woodward, 4 Wheat. 636; Gordon *v.* Appeal Tax Court, 3 How. 145; West River Bridge *v.* Dix, 6 How. 531; Planters' Bank of Mississippi *v.* Sharp, 6 How. 326-7; East Hartford *v.* Hartford Bridge Company, 17 Conn. 93; New Jersey *v.* Wilson, 7 Cranch, 164; Fletcher *v.* Peck, 6 Cranch, 88; Terrett *v.* Taylor, 9 Cranch, 43; Town of Pawlett *v.* Clarke, 9 Cranch, 292; Wales *v.* Stetson, 2 Mass. 143; Enfield Toll Bridge *v.* Conn. River Co. 7 Conn. R. 53; McLoren *v.* Pennington, 1 Paige, Ch. R. 107; 2 Kent's Com. 305, 306; Greene *v.* Biddle, 8 Wheat. 1; University of Maryland *v.* Williams, 9 Gill. & Johns. 402; Bayne *v.* Baldwin, 3 Smedes & Marsh. (Miss.) R. 661; Aberdeen Academy *v.* Mayor of Aberdeen, 13 Smedes & Marsh. R. 645; Young *v.* Harrison, 6 Georgia R. 130; Coles *v.* Madison county, Breese (Ill.) Rep. 120; Bush *v.* Shipman, 4 Scam. (Ill.) R. 190; The People *v.* Marshall, 1 Gilman (Ill.) R. 672; State *v.* Hayward, 3 Richardson (S. C.) R. 389; Baily *v.* Railroad Co. 4 Harrington (Del.) R. 389; LeClercq *v.* Gallipolis, 7 Ohio, 217; State *v.* Com'l Bank of Cincinnati, 7 Ohio, 125; State *v.* Wash. Soc. Library, 9 Ohio, 96; Michigan Bank *v.* Hastings, 1 Doug. (Mich.) R. 225; Bank of Pennsylvania *v.* Commonwealth, 19 Pennsylvania Rep. 151; Hardy *v.* Waltham, 9 Pick. 108.

3d. The right of a State to tax the property of a private cor-

poration (such as a bank) or to tax any specified property of private persons may, by legislative contract, be wholly relinquished, commuted, or limited to an agreed amount, and no State law can impair the validity of such contract.

Angell & Ames on Corp. §§ 469–472 inclusive; Gordon *v.* Appeal Tax Court, 3 How. 133; Gordon's Ex'rs *v.* Baltimore, 5 Gill, 231; Bank of Cape Fear *v.* Edwards, 5 Iredell, 516; Bank of Cape Fear *v.* Deming, 7 Iredell, 516; Union Bank of Tennessee *v.* State, 9 Yerger, 490; State of New Jersey *v.* Bury, 2 Harris, 84; Gordon *v.* State, 1 Zabriskie, 527; Johnson *v.* Commonwealth, 7 Dana, 342; Bank of Illinois *v.* The People, 4 Scam. 304; Williams *v.* Union Bank of Tennessee, 2 Hump. 339; Atwater *v.* Woodbridge, 6 Conn. 223; Osborne *v.* Humphrey, 7 Conn. 335; East Hartford *v.* Hartford Bridge Company, 17 Conn. 93; State *v.* Com'l Bank of Cincinnati, 7 Ohio Rep. 125.

In the absence of adjudicated cases to establish the right of the legislature of a State thus to relinquish, commute, or limit the amount of taxation, it might and ought to be inferred from the uniformity and extent of its exercise by the States from their earliest history to the present time.

In the case of Briscoe *v.* Bank of Kentucky, 11 Pet. 318, the court say, "that a uniform course of action involving the right to the exercise of an important power by the State governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightly exercised. Cin., Wil. & Zanesville R. R. Co. *v.* Com'rs. Clinton Co. 21 Ohio Rep. 95.

In accomplishing the lawful purposes of legislation, the choice of means adapted to the end must be left exclusively to the discretion of the legislature, provided the means used are not prohibited by the Constitution. Cin., Wil. & Zanesville R. R. Co. *v.* Com'rs. Clinton Co., 21 Ohio Rep. 95.

4th. The plaintiff in error claims that by the sixtieth section of the act of 24th of February, 1845, the State, by contract, (and not by legislative command) fixed and agreed upon the time, manner, and amount of taxation to be imposed upon and paid by said bank, which contract is mutually binding on the parties, and cannot be changed or abrogated by either without the consent of the other.

This last proposition involves an into pretation of so much of said law as relates to the subject of taxation in two aspects:

1. Whether the sixtieth section be a contract on the subject of taxation, as claimed by the plaintiff in error, or a law dictating and commanding the amount of taxation, as claimed by the defendant in error.

2. If it be a contract, whether it was temporary and depending on the will of the legislature, or permanent, and to remain in force during the term of the charter.

The court lay down the doctrine in Charles River Bridge *v.* Warren Bridge, 11 Pet. 545, that in the construction of statutes creating corporations, the rules of the common law must govern in this country; and in the same opinion, at page 548, the court say, that the rules of construing a statute which surrenders the taxing power, are the same as those that apply to any other affecting the public interest.

In the case of the Sutton Hospital, Lord Coke lays down the rule of the common law in the construction of charters in the following terms, namely, "That the best exposition of the King's charter is upon the consideration of the whole charter to expound the charter by the charter itself, every material part thereof being explained according to the true and genuine sense, which is the best method." The rule of interpretation is laid down by the Supreme Court in Charles River Bridge *v.* Warren Bridge, 11 Pet. 549. Also, by Judge Story, in his dissenting opinion, at page 600. Also, in case of Richmond Railroad Co. *v.* Louisa Railroad Company, 13 How. 81.

Where a right is not given in express words by the charter, it may be deduced by interpretation, if it is clearly inferrible from some of its provisions. Stourbridge Canal *v.* Wheely, 2 Barn. & Adol. 792; Union Bank of Tennessee *v.* The State, 9 Yerg. 495.

In adopting the rule of expounding the charter by the charter itself, the court is referred to all that part of the act of incorporation which is subsequent to the forty-fifth section.

In construing statutes making grants for private enterprise, it is a settled principle,

1st. That all grants for purposes of this sort are to be construed as contracts between the government and the grantee, and not as mere laws. 11 Pet. 660. Judge Story's opinion.

2d. That they are to receive a reasonable construction. And if from the express words of the act, or just and plain inference from the terms used, the intent can be satisfactorily made out, it is to prevail and be carried into effect. But if the language be ambiguous, or the intent cannot be satisfactorily made out from the terms used, then the act is to be taken most strongly against the grantee and most beneficially to the public. 11 Pet. 600.

The following points made on behalf of the defendant in error, are copied from the brief of Mr. Spalding.

The first section of the "act to tax banks, and bank and other

stocks, the same as other property is now taxable by the laws of this State," passed March 21, 1851, reads as follows:

"That it shall be the duty of the president and cashier of each and every banking institution incorporated by the laws of this State, and having the right to issue bills or notes for circulation, at the time for listing personal property under the laws of this State, to list the capital stock of such banking institution, under oath, at its true value in money, and return the same, with the amount of surplus and contingent fund belonging to such banking institution, to the assessor of the township or ward in which such banking institution is located; and the amount so returned shall be placed on the grand duplicate of the proper county, (and upon the city duplicate for city taxes, in cases where such city tax does not go upon the grand duplicate, but is collected by the city officers,) and taxed for the same purposes and to the same extent that personal property is or may be required to be taxed in the place where such bank is located; and such tax shall be collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over: Provided, however, that the capital stock of any bank shall not be returned or taxed for a less amount than its capital stock paid in."

The single question presented in this case is the following:

Has the Legislature of Ohio, in the enactment last recited, impaired the obligation of a contract, within the meaning of the prohibition contained in the tenth section of the first article of the Constitution of the United States?

I maintain that it has not; and, in support of my position, respectfully advance, for the consideration of the court, the following propositions:

1st. The act of the General Assembly of the State of Ohio, entitled "An act to incorporate the State Bank of Ohio, and other banking companies," passed February 24, 1845, is not a contract in the sense in which that term is used in the Constitution.

It is a system of rules and regulations prescribed by the law-making power in the State for the government of all the citizens of Ohio who may choose, within certain limits, to embark in the business of banking. It is as mandatory in its character as any law upon the statute book, and some of its mandates are enforced under the severest penalties known to the law. See § 67.

It is susceptible of amendment, and it has been amended, without objection, in its most important features. 46 Ohio Laws, 92; 48 Ib. 35. At the time of its enactment, February 24, 1845, there was a general law in force in Ohio, providing that

all subsequent corporations, whether possessing banking powers or not, were to hold their charters subject to alteration, suspension, and repeal, in the discretion of the legislature. Ohio Laws, vol. 40, p. 70. The Bank of Toledo *v.* The City of Toledo, 1 Ohio State Reports, 622, 696.

2d. "With the sole exception of duties on imports and exports, the individual States possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants; and any attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of its Constitution." Alexander Hamilton, No. 32, Federalist, p. 140.

3d. The taxing power is of such vital importance, and is so essentially necessary to the very existence of a State government, that its relinquishment cannot be made the subject-matter of a binding contract between the legislature and individuals or corporations. It is a prerogative of sovereignty that must of necessity always be exerted according to present exigencies, and consequently must of necessity continue to be held by each succeeding legislature, undiminished and unimpaired. The Mechanics and Traders Bank *v.* Henry Debolt, 1 Ohio State Rep. 591; Brewster *v.* Hough, 10 New Hamp. Rep. 138; The Providence Bank *v.* Billings, 4 Pet. 514; The Proprietors of the Charles River Bridge *v.* The Proprietors of the Warren Bridge, 11 Pet. Rep. 420, and cases therein cited; The West River Bridge Company *v.* Dix, 6 How. Rep. 507; The Richmond Railroad Company *v.* The Louisa Railroad Company, 13 Howard, 71.

4th. The sixtieth section of the "Act to incorporate the State Bank of Ohio, and other banking companies," passed February 24, 1845, provides only a measure of taxation for the time being, and does not relinquish the right to increase the rate as the future exigencies of the State may require. Debolt *v.* The Ohio Life Insurance and Trust Company, 1 Ohio State Rep. 576; 10 Penn. State Rep. 442; 10 New Hamp. Rep. 138; 13 How. Rep. 71; 9 Georgia Rep. 517; 2 Barn. & Adol. 793; 3 Pet. Rep. 289; Ib. 168, 514; 11 Ib. 544.

5th. The Supreme Court of Ohio has done nothing more than give a construction to a statute law of the State, (the act of 1845,) that is, to say the least, somewhat ambiguous.

By this construction, the act of March 21, 1851, does no violence to the Constitution of the United States. This court is in the habit of adopting the interpretation given by the State courts to the statutes of their own State. Surely it will not, in this instance, undertake to give a construction counter to that of the

State court, when that counter construction will bring subsequent legislation of the State into conflict with the Federal Constitution. 10 Wheat. 159; 11 Ib. 361; 4 Pet. 137; 6 Ib. 291; 16 Ib. 18; 7 How. 40, 219, 818; 13 Ib. 271; 14 Ib. 78, 79.

Upon the 3d point the counsel cited these further authorities: 16 Pet. 281; 8 How. 584; 10 Ib. 402; 4 Comstock, 423; 2 Denio, 474; 5 Cow. 538; 7 Ib. 585; 1 El. & Black. 858.

And read the following extract from Local Laws of Ohio, vol. 43, p. 51:

An act to incorporate the Milan and Richland Plank Road Company, passed January 31, 1845:

Sec. 9. "That in consideration of the expenses which said company will necessarily incur in constructing said road, with the appurtenances thereof, and in keeping the same in repair, the said road and its appurtenances, together with all tolls and profits arising therefrom, are hereby vested in said corporation, and the same shall be forever exempt from any tax, imposition, or assessment whatever."

An act to incorporate the Huron Plank Road Company, passed February 19, 1845. Local Laws, vol. 43d, pp. 111, 114. The ninth section is copied exactly from the ninth section of the Milan and Richland charter.

On the 4th point: 8 How. 581; 9 Ib. 185; 19 Ohio Rep. 110; 1 Ohio State Rep. 313; 4 Wheat. 235; 4. Cranch, 397; 7 How. 279; 10 Ib. 396.

On the 5th point: 5 How. 342.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Ohio.

The proceeding was instituted to reverse a decree of that court, entered in behalf of Jacob Knoop, treasurer, against the Piqua Branch of the State Bank of Ohio, for a tax of twelve hundred and sixty-six dollars and sixty-three cents, assessed against the said branch bank for the year 1851.

By the act of 1845, under which this bank was incorporated, any number of individuals, not less than five, were authorized to form banking associations to carry on the business of banking in the State of Ohio, at a place designated; the aggregate amount of capital stock in all the companies not to exceed six millions one hundred and fifty thousand dollars.

In the fifty-first section it is provided that every banking company authorized under the act to carry on the business of banking, whether as a branch of the State Bank of Ohio, or as an independent banking association, "shall be held and adjudged to be a body corporate, with succession, until the 1st of May,

1866; and thereafter until its affairs shall be closed." It was made subject to the restrictions of the act.

The fifty-ninth section requires "the directors of each banking company, semiannually, on the first Mondays of May and November, to declare a dividend of so much of the net profits of the company as they shall judge expedient; and on each dividend day the cashier shall make out and verify by oath, a full, clear, and accurate statement of the condition of the company as it shall be on that day, after declaring the dividend, and similar statements shall also be made on the first Mondays of February and August in each year." This statement is required to be transmitted to the auditor of State.

The sixtieth section provides that each banking company under the act, or accepting thereof, and complying with its provisions, shall, semiannually, on the days designated for declaring dividends, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The sum so set off to be paid to the treasurer, on the order of the auditor of State.

The Piqua Branch Bank was organized in the year 1847, under the above act; and still continues to carry on the business of banking, and continued to set off and pay the semiannual amount as required; and on the first Mondays of May and November, in 1851, there was set off to the State six per cent. of the profits, deducting expenses and ascertained losses for the six months next preceding each of those days, and the cashier did, within ten days thereafter, inform the auditor of State of the amount so set off on the 15th of November, 1851, the same amounting to $862.50; which sum was paid to the treasurer of State, on the order of the auditor; which payment the bank claims was in lieu of all taxes to which the company or its stockholders were subject for the year 1851.

On the 21st of March, 1851, an act was passed entitled "An act to tax banks and bank and other stocks, the same as property is now taxable by the laws of the State."

This act provides that the capital stock of every banking company incorporated by the laws of the State, and having the right to issue bills or notes for circulation, shall be listed at its true value in money, with the amount of the surplus and contingent fund belonging to such bank; and that the amount of such capital stock, surplus, and contingent fund, should be taxed for the same purposes and to the same extent that personal property was or might be required to be taxed in the place

[illegible]

[illegible] 1851. [illegible]

[illegible]

[illegible] mode of taxation, [illegible]

The operative [illegible] semiannually on the first [illegible] section for declaring dividends, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which such company or the stockholders thereof, on account of stock owned therein, would otherwise be subject."

This sentence is so explicit that it would seem to be susceptible of but one construction. There is not one word of doubtful meaning when taken singly, or as it stands connected with the sentence in which it is used. Nothing is left to inference. The time the amount is to be set off, the means of ascertaining it, to whom it is to be paid, and the object of the payment, are so clearly stated that no one who reads the provision can fail to understand it. The payment was to be in lieu of all taxes to which the company or its stockholders would otherwise be subject. This is the full measure of taxation on the bank. It is in the place of any other tax which, had it not been for this stipulation, might have been imposed on the company or stockholders.

This construction, I can say, was given to the act by the executive authorities of Ohio, by those who were interested in the bank, and generally by the public, from the time the bank was organized down to the tax law of 1851.

In the case of Debolt v. The Ohio Insurance and Trust Company, 1 Ohio Rep. 563, new series, the Supreme Court, in con-
[illegible] the 60th section now before us, say: "It must be ad-
[illegible] section contains no language importing a surrender

of the right to alter the taxation prescribed, unless it is to be inferred from the words, 'shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject;' and it is frankly conceded that if these words had occurred in a general law they would not be open to such a construction. If the place where they are found is important, we have already seen this law is general in many of its provisions, and upon a general subject. Why may not this be classed with these provisions, especially in view of the fact, that in its nature it properly belongs there? We think it should be regarded as a law prescribing a rule of taxation, until changed, and not a contract stipulating against any change: a legislative command and not a legislative compact with these institutions." And the court further say, "the taxes required by this act are to be in lieu of other taxes — that is, to take the place of other taxes. What other taxes? The answer is, such as the banks or the stockholders 'would otherwise be subject to pay. The taxes to which they would be otherwise subject were prescribed by existing laws, and this, in effect, operated as a repeal of them, so far as these institutions were concerned.'"

With great respect, it may be suggested there was no general tax law existing, as supposed by the court, under which the banks chartered by the act of 1845 could have been taxed, and on which the above provision could, "in effect, operate to repeal."

The general tax law of the 12th of March, 1831, which raised the tax to five per cent. on dividends, and which operated on all the banks of Ohio, except the "Commercial Bank of Cincinnati," was repealed by the small note act of 1836, and that could operate only on banks doing business at the time of its passage.

The act of the 13th of March, 1838, repealed the act of 1836, so far "as it restricts or prohibits the issuing and circulation of small bills." The act of 1836 authorized the treasurer of State to draw upon the banks for the amount of twenty per cent. upon their dividends, as their proportion of the State tax; and provided that if any bank should relinquish its charter privilege of issuing bills of less denomination than three and five dollars, the tax should be reduced to five per cent. upon its dividends. As the prohibition of circulating small notes was repealed, the tax necessarily fell. Neither the twenty nor the five per cent. could be exacted. The five per cent. was a compromise for the twenty; as the twenty was repealed by the repeal of the prohibition of small notes, neither the one nor the other could be collected.

But if this were not so, the Bank Act of 1842, which imposed

a tax of one half per cent. on the capital stock of the bank, repealed, by its repugnancy, any part of the act of 1836 which, by construction or otherwise, could be considered in force. And the act of 1842 was repealed by the act of 1845. There is a general act in Ohio declaring that the repeal of an act shall not revive any act which had been previously repealed. Swan's Stat. 59.

If this statement be correct, as it is believed to be, the legislature could not have intended, by the special provision in the sixtieth section, to exempt the bank from tax by the existing law, as no such law existed, but to exempt from the operation of tax laws subsequently passed. This is the clear and fair import of the compact, which we think would not be rendered doubtful if a tax law had existed at the time the act of 1845 was passed.

The 60th section is not found in a general law, as is intimated by the Supreme Court of the State. The act of 1845 is general only in the sense, that all banking associations were permitted to organize under it; but the act is as special to each bank as if no other institution were incorporated by it. We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer.

Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. Such is a public corporation, used for public purposes. But a bank, where the stock is owned by individuals, is a private corporation. This was not denied or questioned by the counsel in argument, although it has been controverted in this case elsewhere. But this court and the courts of the different States, not excepting the Supreme Court of Ohio, have so universally held that banks, where the stock is owned by individuals, are private corporations, that no legal fact is susceptible of less doubt. Mr. Justice Story, in his learned and able remarks in the Dartmouth College case, says: "A bank created by the government for its own uses, where the stock is exclusively owned by the government is, in the strictest sense, a public corporation."

"a bank whose stock is owned by private persons is a

private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine, he says, may be affirmed of insurance, canal, bridge, and turnpike companies. There can be no doubt that these definitions are sound, and are sustained by the settled principles of law."

It by no means follows that because the action of a corporation may be beneficial to the public, therefore it is a public corporation. This may be said of all corporations whose objects are the administration of charities. But these are not public, though incorporated by the legislature, unless their funds belong to the government. Where the property of a corporation is private it gives the same character to the institution, and to this there is no exception. Men who are engaged in banking understand the distinction above stated, and also that privileges granted in private corporations are not a legislative command, but a legislative contract, not liable to be changed.

This fact is shown by the following circumstances: "An act to regulate banking in Ohio," passed the 7th of March, 1842. The 1st section provided. "that all companies or associations of persons desiring to engage in and carry on the business of banking within this State, which may hereafter be incorporated, shall be subject to the rules, regulations, limitations, conditions, and provisions contained in this act, and such other acts to regulate banking as are now in force, or may hereafter be enacted, in this State."

The 20th section of that act provided that a tax of one half per cent. per annum on its capital should be paid, and such other tax upon its capital or circulation as the general assembly may hereafter impose. An amendment to this act was passed the 21st February, 1843; but the act and the amendment remained a dead letter upon the statute book. No stock was subscribed under them, and they were both repealed by the act of 1845, under which nearly three fourths of the banks in Ohio were organized. This act contained the express stipulation that "six per cent. on the dividends, after deducting expenses and losses, should be paid in lieu of all taxes."

This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1851, I believe, the banks, the profession, and the bench, considered this as a contract, and binding upon the State and the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the State of Ohio. With few exceptions the banks were so taxed, where any tax on them was imposed. In the case of the State of Ohio *v.* The Commercial Bank of Cincinnati, 10 Ohio Rep. 535, the Supreme

Court of Ohio say, we take it to be well settled, that the charter of a private corporation is in the nature of a contract between the State and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the Supreme Court of the United States, in the case of Woodward *v.* Dartmouth College. And the court remark, "the general assembly say to such persons as may take the stock, you may enjoy the privileges of banking, if you will consent to pay to the State of Ohio, for this privilege, four per cent. on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays, or is willing to pay, the consideration stipulated, to wit, the four per cent." And the court say, "here is a contract, specific in its terms, and easy to be understood." "A contract between the State and individuals is as obligatory as any other contract. Until a State is lost to all sense of justice and propriety, she will scrupulously abide by her contracts more scrupulously than she will exact their fulfilment by the opposite contracting party."

This opinion commends itself to the judgment, both on account of its sound constitutional views and its elevated morality. It was pronounced at December term, 1835. That decision was calculated to give confidence to those who were desirous to make investments in banking operations, or otherwise, in the State of Ohio.

Ten years after this opinion, and after an ineffectual attempt had been made by the act of 1842, and its amendment in 1843, to organize banks in Ohio, without a compact as to taxation, the act of 1845 was passed, containing a compact much more specific than that which had been sustained by the Supreme Court of the State. Under such circumstances, can the intentions of the Legislature of Ohio, in passing the act of 1845, be doubted, or the inducements of the stockholders to vest their money under it. Could either have supposed that the 60th section proposed a temporary taxation? Such a supposition does great injustice to the legislature of 1845. It is against the clear language of the section, which must ever shield them from the imputation of having acted inconsiderately or in bad faith. They passed the charter of 1845, which they knew would be accepted, as it removed the objections to the act of 1842.

Can the compact in the 60th section be "regarded as a law prescribing a rule of taxation until changed, and not a contract stipulating against any change; a legislative command, and not a legislative compact with these institutions?" We cannot but treat with great respect the language of the highest judicial tribunal of a State, and we would say, that in our opinion it does

not import to be a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted. According to our views, no other construction can be given to the contract, than that the tax of six per cent. on the dividends is in lieu of all subsequent taxes which might otherwise be imposed; in other words, taxes to which the company or the stockholders would have been liable, had the specific tax on the dividends on the terms stated not been enacted.

In the opinion of the Supreme Court of the State, it is said, the 60th section, in effect, repealed the existing law under which the bank would have been taxed, and that this is the obvious application of the language used; and they add, "that the General Assembly intended only this, and did not intend it to operate upon the sovereign power of the State, or to tie up the hands of their successors, we feel fully assured. To suppose the contrary would be to impeach them of gross violation of public duty, if not usurpation of authority."

So far as regards the effect of the 60th section to repeal existing laws, if no such laws existed, it would follow that no such effect was produced, and we may presume that this was in the knowledge of the legislature of 1845; and in saying that the compact was intended to run with the charter, we only impute to the legislature a full knowledge of their own powers, and the highest regard for the public interest. The idea that a State, by exempting from taxation certain property, parts with a portion of its sovereignty, is of modern growth; and so is the argument that if a State may part with this in one instance it may in every other, so as to divest itself of the sovereign power of taxation. Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the tax-payer. The same may be said of every power where there is an exercise of judgment.

The Legislature of Ohio passes a statute of limitations to all civil and criminal actions. Is there no danger that in the exercise of this power it may not be abused? Suppose a year, a month, a week, or a day should be fixed as the time within which all actions shall be brought on existing demands, and if not so brought, the remedy should be barred. This is a supposition more probable under circumstances of great embarrassment, when the voice of the debtor is always potent, than that the legislature will inconsiderately exempt property from taxa-

Under a statute of limitation, as supposed, the remedy of the

creditor would be cut off, unless the courts should decide that a limitation to bar the right must be reasonable, but this power could not be exercised under any constitutional provision. It could rest only on the great and immutable principles of justice, unless the time was so short as manifestly to have been intended to impair or destroy the contract. To carry on a government, a more practical view of public duties must be taken.

When the State of Ohio was admitted into the Union by the act of the 30th of April, 1802, it was admitted under a compact that "the lands within the State sold by Congress shall remain exempt from any tax laid by or under the authority of the State, whether for State, county, township, or any other purpose whatever, for the term of five years from and after the day of sale." And yet by the same law the State "was admitted into the Union upon the same footing with the original States in all respects whatever."

Now, if this new doctrine of sovereignty be correct, Ohio was not admitted into the Union on the footing of the other sovereign States. Whatever may be considered of such a compact now, it was not held to be objectionable at the time it was made.

The assumption that a State, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the State. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the State, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the State and the bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America, and by all civilized States where the common or the civil law is established. In Fletcher *v.* Peck, 6 Cranch, 135, Chief Justice Marshall says, "The principle asserted is, that one legislature is competent to repeal any act

which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature."

"The correctness of this principle," he says, "so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

And in another part of the opinion he says, "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded on this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

"No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."

In this form he says, "the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligations of those contracts into which the State may enter."

The history of England affords melancholy instances where bills of attainder were prosecuted in parliament to the destruction of the lives and fortunes of some of its most eminent subjects. A knowledge of this caused a prohibition in the Constitution against such a procedure by the States.

In the case of the State of New Jersey *v.* Wilson, 7 Cranch, 164, it was held, "that a legislative act, declaring that certain lands, which should be purchased for the Indians, should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act. Such repealing act being void under that clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts."

In 1758 the government of New Jersey purchased the Indians'

title to lands in that State, in consideration of which the government bought a tract of land on which the Indians might reside, an act having previously been passed that "the lands to be purchased for them shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof in any wise notwithstanding." The Indians continued in possession of the lands purchased until 1801, when they applied for and obtained an act of the legislature, authorizing a sale of their lands. This act contained no provision in regard to taxation; under it the Indian lands were sold.

In October, 1804, the legislature repealed the act of August, 1758, which exempted these lands from taxes; the lands were then assessed, and the taxes demanded. The court held the repealing law was unconstitutional, as impairing the obligation of the contract, although the land was in the hands of the grantee of the Indians. This case shows that although a State government may make a contract to exempt property from taxation, yet the sovereignty cannot annul that contract.

In the case of Gordon *v.* The Appeal Tax, 3 How. 133, Mr. Justice Wayne, giving the opinion of the court, held, "that the charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the legislature accepted. But that the corporate property of the bank, being separable from the franchise, may be taxed, unless there is a special agreement to the contrary."

And the court say, the language of the eleventh section of the act of 1821 is, "And be it enacted, that upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." This, the court say, is the language of grave deliberation, pledging the faith of the State for some purpose, some effectual purpose. Was that purpose the protection of the banks from what that legislature and succeeding legislatures could not do, if the banks accepted the act, or from what they might do in the exercise of the taxing power. The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price of the prolongation of their franchise of banking. The power of the State to lay any further tax upon the franchise was exhausted. That is the contract between the State and the banks. It follows, then, as a matter of course, when the legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the act not to impose any further tax or burden upon them, that it must have meant by these words an exemption

from some other tax than a further tax upon the franchise of the banks. The latter was already provided against; and the court held that the exemption extended to the respective capital stocks of the banks as an aggregate, and to the stockholders, as persons on account of their stocks. The judgment of the Court of Appeals of Maryland, which sustained the act imposing an additional tax on the banks, was reversed.

It will be observed that the above compact was applied to the stocks of the bank and the interest of the stockholders by construction.

The Supreme Court of Ohio say in relation to this case, that "the power to tax and the right to limit the power were both admitted by counsel, and taken for granted in the consideration of the case; and that a very large consideration had been paid for the extension of the franchise and the exemption of the stock from taxation."

In relation to the admissions of the counsel it may be said that they were men not likely to admit any thing to the prejudice of their clients, which could be successfully opposed; nor would the court, on a constitutional question, rest their judgment on the admissions of counsel. Whether the consideration paid by the banks was large or small, we suppose was not a matter for the court, as the motives or consideration which induced a sovereign State to make a contract, cannot be inquired into as affecting the validity of the act.

In the argument, the case of the Providence Bank *v.* Billing, was referred to, 4 Peters, 561. This reference impresses me with the shortness and uncertainty of human life. Of all the judges on this bench, when that decision was given, I am the only survivor. From several circumstances the principles of that case were strongly impressed upon my memory; and I was surprised when it was cited in support of the doctrines maintained in the case before us. The principle held in that case was, that where there was no exemption from taxation in the charter, the bank might be taxed. This was the unanimous opinion of the judges, but no one of them doubted that the legislature had the power, in the charter or otherwise, from motives of public policy, to exempt the bank from taxation, or by compact to impose a specific tax on it. And this is clear from the language of the court.

The chief justice in that case says: "that the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be presumed. No one can controvert the correctness of these axioms."

The relinquishment of such a power is never to be presumed; but this implies it may be relinquished, or taxable objects may be exempted, if specially provided for in the charter. And this is still more clearly expressed, as follows: "We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist, that its abandonment ought not to be presumed, in a case in which the deliberate purpose of a State to abandon it does not appear."

Such a case was not then before the court. There was no provision in the Providence Bank charter which exempted it from taxation, and in that case the court could presume no such intention.

But suppose, in the language of that great man, "a consideration sufficiently valuable to induce a partial release of it, and such release had been contained in the charter; would not that have been held sufficient? And of the sufficiency of the consideration, whether it was a bonus paid by the bank, or in supplying a sound currency, the legislature would be the exclusive judges. This would constitute a contract which a legislature could not impair.

The above case is a strong authority against the defendants. The Chief Justice further says, "any privileges which may exempt the corporation from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist." But if so expressed, do they not exist?

A case is cited from the Stourbridge Canal *v.* Wheely, 2 Barn. & Adol. 793, to show that no implications in favor of chartered rights are admissible. Lord Tenterden says, "that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the act." In the same opinion his lordship said: "Now, it is quite certain that the company have no right expressly to receive any compensation, except the tonnage paid for goods carried through some of the canals or the locks on the canal, or the collateral cuts, and it is therefore incumbent upon them to show that they have a right clearly given by inference from some of the other clauses."

Neither this, the Rhode Island Bank case, nor the Charles River Bridge case, affords any aid to the doctrines maintained, with the single exception, that a right set up under a grant must clearly appear, and cannot be presumed; and this has not been controverted.

That a State has power to make a contract which shall bind it in future, is so universally held by the courts of the United States and of the States, that a general citation of authorities is unnecessary on the subject. Dartmouth College *v.* Woodward, 4 Wheat. 518; Terrett *v.* Taylor, 9 Cranch, 43; Town of Pawlett, 9 Cranch, 292.

Mr. Justice Blackstone says, 2 Bl. Com. 37, "that the same franchise that has before been granted to one, cannot be bestowed on another, because it would prejudice the former grant. In the King *v.* Pasmore, 3 Term, 246, Lord Kenyon says, that an existing corporation cannot have another charter obtruded upon it, or accept the whole or any part of the new charter. The reason of this, it is said, is obvious. A charter is a contract, to the validity of which the consent of both parties is essential, and therefere it cannot be altered or added to without consent."

There is no constitutional objection to the exercise of the power to make a binding contract by a State. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of State sovereignty. It takes from the State a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the State. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But it is said the State cannot barter away any part of its sovereignty. No one ever contended that it could.

A State, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away State sovereignty.

It must be admitted that the State has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the State, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any State in the Union, which did not contain some exemptions from general taxation. The act of Ohio of the 25th of March, 1851, in the fifty-eighth section, declared that "the provisions of that act shall not extend to any joint-stock company which now is, or may hereafter be organized, whose charter or act of incorporation shall have guaranteed to such company an exemption from taxation, or has prescribed any other as the exclusive mode of taxing the same." Here is a recognition of the principle now repudiated. In the same act, there are eighteen exemptions from taxation.

The federal government enters into an arrangement with a foreign State for reciprocal duties on imported merchandise, from the one country to the other. Does this affect the sovereign power of either State? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty, or by law, is immaterial. The compact is made, and it is binding on both countries.

The argument is, and must be, that a sovereign State may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it.

The Constitution of the Union, when first adopted, made States subject to the federal judicial power. Could a State, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect the Constitution was very properly changed, as no State should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the Supreme Court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual.

This is a matter which can have no influence in deciding the legal question. The State did not require a bonus, but other requisitions are found in the charter, which the legislature deemed sufficient, and this is not questionable by any other authority. The obligation is as strong on the State, from

the privileges granted and accepted, as if a bonus had been paid.

Another assumption is made, that the banks are taxed as property is taxed in the hands of individuals. No deduction, it appears, is made from banks on account of debts due to depositors or others, whilst debts due by an individual are deducted from his credits. If this be so, it places banks on a very different footing from individuals.

The power of taxation has been compared to that of eminent domain, and it is said, as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act.

We were not prepared for the position taken by the Supreme Court of Ohio, that "no control over the right of taxation by the States was intended to be conferred upon the General Government by the section referred to, or any other, except in relation to duties upon imports and exports." This has never been pretended by any one. The section referred to gives the federal government no power over taxation by a State. Such an idea does not belong to the case, and the argument used, we submit, is not legitimate. We have power only to deal with contracts under the tenth section of the first article of the Constitution, whether made by a State or an individual; if such contract be impaired by an act of the State such act is void, as the power is prohibited to the State. This is the extent of our jurisdiction. As well might it be contended under the above section that no power was given to the federal government to regulate the numberless internal concerns of a State which are the subjects of contracts. With those concerns we have nothing to do; but when contracts growing out of them are impaired by an act of the State, under the federal Constitution we inquire whether the act complained of is in violation of it.

The rule observed by this court to follow the construction of the statute of the State by its Supreme Court is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the

construction of a State court in such a case, would be to surrender one of the most important provisions in the federal Constitution.

There is no jurisdiction which we are called to exercise of higher importance, nor one of deeper interest to the people of the States. It is, in the emphatic language of Chief Justice Marshall, a bill of rights to the people of the States, incorporated into the fundamental law of the Union. And whilst we have all the respect for the learning and ability which the opinions of the judges of the Supreme Court of the State command, we are called upon to exercise our own judgments in the case.

In the discussion of the principles of this case, we have not felt ourselves at liberty to indulge in general remarks on the theory of our government. That is a subject which belongs to a convention for the formation of a constitution; and, in a limited view, to the law-making power. Theories depend so much on the qualities of the human mind, and these are so diversified by education and habit as to constitute an unsafe rule for judicial action. Our prosperity, individually and nationally, depends upon a close adherence to the settled rules of law, and especially to the great fundamental law of the Union.

Having considered this case in its legal aspects, as presented in the arguments of counsel, and in the views of the Supreme Court of the State, and especially as regards the rights of the bank under the charter, we are brought to the conclusion, that in the acceptance of the charter, on its terms, and the payment of the capital stock, under an agreement to pay six per cent. semi-annually on the dividends made, deducting expenses and ascertained losses, in lieu of all taxes, a contract was made binding on the State and on the bank; and that the tax law of 1851, under which a higher tax has been assessed on the bank than was stipulated in its charter, impairs the obligation of the contract, which is prohibited by the Constitution of the United States, and, consequently, that the act of 1851, as regards the tax thus imposed, is void. The judgment of the Supreme Court of Ohio, in giving effect to that law, is, therefore, reversed.

Mr. Justice CATRON, Mr. Justice DANIEL, and Mr. Justice CAMPBELL, dissented.

Mr. Chief Justice TANEY gave a separate opinion, as follows:

I concur in the judgment in this case. I think that by the sixtieth section of the act of 1845, the State bound itself by contract to levy no higher tax than the one therein mentioned, upon the banks or stocks in the banks which organized under that law during the continuance of their charters. In my judgment

the words used are too plain to admit of any other construction.

But I do not assent altogether to the principles or reasoning contained in the opinion just delivered. The grounds upon which I hold this contract to be obligatory on the State, will appear in my opinion in the case of the Ohio Life Insurance and Trust Company, also decided at the present term.

Mr. Justice CATRON.

This is a contest between the State of Ohio and a portion of her banking institutions, organized under a general banking law, passed in 1845. She was then a wealthy and prosperous community, and had numerous banks which employed a large capital, and were taxed by the general laws five per cent. on their dividends, being equal to thirty cents on each hundred dollars' worth of stock, supposing it to be at par value. But this was merely a State tax, payable into the State treasury. The old banks were liable to taxes for county purposes, besides; and when located in cities or towns, for corporation taxes also. These two items usually amounted to much more than the State tax.

Such was the condition of Ohio when the general banking law was passed in 1845. By this act, any number of persons not less than five might associate together, by articles, to carry on banking.

The State was laid off into districts, and the law prescribes the amount of stock that may be employed in each. Every county was entitled to one bank, and some to more. Commissioners were appointed to carry the law into effect. It was the duty of this Board of Control to judge of the articles of association, and other matters necessary to put the banks into operation. Any company might elect to become a branch of the State Bank, or to be a separate bank, disconnected with any other. Fifty thousand dollars was the minimum, and five hundred thousand the maximum, that could be employed in any one proposed institution.

By the fifty-first section, each of the banking companies authorized to carry on business was declared to be a body corporate with succession to the first day of May, 1866, with general banking powers; with the privilege to issue notes of one dollar and upwards, to one hundred dollars; and each bank was required to have "on hand in gold and silver coin, or their equivalent, one half at least of which shall be in gold and silver coin in its vault, an amount equal to thirty per cent. of its outstanding notes of circulation;" and whenever the specie on hand, or its equivalent, shall fall below twenty per cent. of the outstand-

ing notes, then no more notes shall be circulated." The equivalent to specie, meant deposites that might be drawn against in the hands of eastern banks, or bankers of good credit. In this provision constituted the great value of the franchise.

The 59th section declares that semiannual dividends shall be made by each bank of its profits, after deducting expenses; and the 60th section provides, that six per cent. per annum of these profits shall be set off to the State, "which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof on account of stock owned therein, would otherwise be subject." This was equal to thirty-six cents per annum on each hundred dollars of stock subscribed, supposing it to yield six per cent. interest.

By an act of 1851, it was declared that bank stock should be assessed at its true value, and that it should be taxed for State, county, and city purposes, to the same extent that personal property was required to be taxed at the place where the bank was located. As this rate was much more than that prescribed by the 60th section of the act of 1845, the bank before us refused to pay the excess, and suffered herself to be sued by the tax collector, relying on the 60th section, above recited, as an irrepealable contract, which stood protected by the Constitution of the United States.

It is proper to say that the trifling sum in dispute in this cause is the mere ground of raising the question between the State of Ohio and some fifty of her banks, claiming exemption under the act of 1845.

The taxable property of these banks is about eighteen millions of dollars, according to the auditor's report of last year, and which was used on the argument of this cause, by both sides. Of course, the State officers, and other tax payers, assailed the corporations claiming the exemption, and various cases were brought before the Supreme Court of Ohio, drawing in question the validity of the act of 1851 in so far as it increased the taxe of the banks beyond the amount imposed by the 60th section of the act of 1845. The State court sustained the act of 1851, from which decision a writ of error was prosecuted, and the cause brought to this court.

The opinions of the State court have been laid before us, for our consideration; and on our assent or dissent to them, the case depends.

The first question made and decided in the Supreme Court of Ohio was, whether the 60th section of the act of 1845, purported to be in its terms, a contract not further to tax the banks organized under it during the entire term of their existence? The court held that it imported no such contract; and with this opinion I concur.

The question was examined by the judge who delivered the unanimous opinion of the court, in the case of Debolt *v.* The Ohio Life Insurance and Trust Company, 1 Ohio State Reports, 564, with a fairness, ability, and learning, calculated to command the respect of all those who have his opinion to review; and which opinion has, as I think, construed the 60th section truly. But, as my brother Campbell has rested his opinion on this section without going beyond it, and as I concur in his views, I will not further examine that question, but adopt his opinion in regard to it.

The next question, decided by the State court is of most grave importance; I give it in the language of the State court: "Had the general assembly power, under the constitution then in force, permanently to surrender, by contract, within the meaning and under the protection of the Constitution of the United States, the right of taxation over any portion of the property of individuals, otherwise subject to it?" On which proposition the court proceeds to remark:

"Our observations and conclusions upon this question, must be taken with reference to the unquestionable facts, that the act of 1851 was a *bonâ fide* attempt to raise revenue by an equal and uniform tax upon property, and contained no covert attack upon the franchises of these institutions. That the surrender did not relate to property granted by the State, so as to make it a part of the grant for which a consideration was paid; the State having granted nothing but the franchise, and the tax being upon nothing but the money of individuals invested in the stock; and that no bonus or gross sum was paid in hand for the surrender, so as to leave it open to controversy, that reasonable taxes, to accrue in future, were paid in advance of their becoming due. What effect a different state of facts might have, we do not stop to inquire. Indeed, if the attempt has here been made, it is a naked release of sovereign power without any consideration or attendant circumstance to give it strength or color; and, so far as we are advised, is the first instance where the rights and interests of the public have been entirely overlooked."

"Under these circumstances, we feel no hesitation in saying the general assembly was incompetent to such a task. This conclusion is drawn from a consideration of the limited authority of that body, and the nature of the power claimed to be abridged.

"That political sovereignty, in its true sense, exists only with the people, and that government is "founded on their sole authority," and subject to be altered, reformed, or abolished only by them, is a political axiom upon which all the American

governments have been based, and is expressly asserted in the bill of rights. Such of the sovereign powers with which they were invested, as they deem necessary for protecting their rights and liberties, and securing their independence, they have delegated to governments created by themselves, to be exercised in such manner and for such purposes as were contemplated in the delegation. That these powers can neither be enlarged or diminished by these repositories of delegated authority, would seem to result, inevitably, from the fundamental maxim referred to, and to be too plain to need argument or illustration.

"If they could be enlarged, government might become absolute; if they could be diminished or abridged, it might be stripped of the attributes indispensable to enable it to accomplish the great purposes for which it was instituted. And, in either event, the constitution would be made, either more or less, than it was when it came from the hands of its authors; being changed and subverted without their action or consent. In the one event its power for evil might be indefinitely enlarged; while in the other its capacity for good might be entirely destroyed; and thus become either an engine of oppression, or an instrument of weakness and pusillanimity.

"The government created by the constitution of this State, (Ohio,) although not of enumerated, is yet one of limited powers. It is true, the grant to the general assembly of "legislative authority" is general; but its exercise within that limit is necessarily restrained by the previous grant of certain powers to the federal government, and by the express limitations to be found in other parts of the instrument. Outside of that boundary, it needed no express limitations, for nothing was granted. Hence this court held, in Cincinnati, Wilmington, &c. R. R. *v.* Clinton Co. 1 Ohio State Rep. 77, that any act passed by the general assembly not falling fairly within the scope of "legislative authority," was as clearly void as though expressly prohibited. So careful was the convention to enforce this principle, and to prevent the enlargement of the granted powers by construction or otherwise, that they expressly declared in art. 8, § 28—"To guard against the transgression of the high powers we have delegated, we declare that all powers, not hereby delegated, remain with the people." When, therefore, the exercise of any power by that body is questioned, its validity must be determined from the nature of the power, connected with the manner and purpose of its exercise. What, then, is the taxing power? And to what extent, and for what purposes has it been conferred upon the legislature? That it is a power incident to sovereignty —"a power of vital importance to the very existence of every government"—has been as often declared as it has been spoken

of. Its importance is not too strongly represented by Alexander Hamilton, in the 30th number of the Federalist, when he says: "Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most important functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish."

"This power is not to be distinguished, in any particular material to the present inquiry, from the power of eminent domain. Both rest upon the same foundation — both involve the taking of private property — and both, to a limited extent, interfere with the natural right guaranteed by the constitution, of acquiring and enjoying it. But, as this court has already said, in the case referred to, "neither can be classed amongst the independent powers of government, or included in its objects and ends." No government was ever created for the purpose of taking, taxing, or otherwise interfering with the private property of its citizens. "But charged with the accomplishment of great objects necessary to the safety and prosperity of the people, these rights attach as incidents to those objects, and become indispensable means to the attainment of those ends." They can only be called into being to attend the independent powers, and can never be exercised without an existing necessity.

"To sustain this power in the general assembly, would be to violate all the great principles to which I have alluded. It would affirm its right to deal in, and barter away the sovereign right of the State, and thereby, in effect, to change the constitution. When the general assembly of 1845 convened, it found the State in the unquestionable possession of the sovereign right of taxation, for the accomplishment of its lawful objects, extending to 'all the persons and property belonging to the body politic.'"

When its successor convened, in 1846, under the same constitution, and to legislate for the same people, if this defence is available, it found the State shorn of this power over fifteen or twenty millions of property, still within its jurisdiction and protected by its laws. This and each succeeding legislature had the same power to surrender the right, as to any and all other property; until at length the government, deprived of every thing upon which it could operate, to raise the means to attain

its necessary ends, by the exercise of its granted powers, would have worked its own inevitable distruction, beyond all power of remedy, either by the legislature or the people. It is no answer to this to say that confidence must be reposed in the legislative body, that it will not thus abuse the power.

"But, in the language of the court, in McCulloch *v.* Maryland, 4 Wheat. 316, 'is this a case of confidence?'"

"For every surrender of the right to tax particular property not only tends to paralyze the government, but involves a direct invasion of the rights of property, of the balance of the community; since the deficiency thus created must be made up by larger contributions from them, to meet the public demand."

The foregoing are some of the reasonings of the State court on the consideration here involved. With these views I concur, and will add some of my own. The first is, "That acts of parliament derogatory from the power of subsequent legislatures, are not binding. Because, (as Blackstone says,) the legislature being in truth the sovereign power, is always equal, always absolute; and it acknowledges no superior on earth, which the prior legislature must have been if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. When you repeal the law itself, says he, you at the same time repeal the prohibitory clause which guards against repeal."

If this is so under the British government, how is it in Ohio? Her Supreme Court holds that the State constitution of 1802 expressly prohibited one legislature from restraining its successors by the indirect means of contracts exempting certain property, from taxation. The court says, — Power to exempt property, was reserved to the people; they alone could exempt, by an organic law. That is to say, by an amended constitution. The clause mainly relied on declares, "that all powers not delegated, remain with the people." Now it must be admitted that this clause has a meaning; and it must also be conceded (as I think,) that the Supreme Court of Ohio, has the uncontrollable right to declare what that meaning is; and that this court has just as little right to question that construction as the Supreme Court of Ohio has to question our construction of the Constitution of United States.

In my judgment the construction of the court of Ohio is proper; but if I believed otherwise I should at once acquiesce. Let us look at the matter fairly and truly as it is, and see what a different course on part of this court would lead to; nay, what Ohio is bound to do in self-defence and for self-preservation, under the circumstances.

In 1845 a general banking law is sought at the hands of the legislature, where five dollars in paper can be circulated for every dollar in specie in the bank, or on deposit, in eastern banks or with brokers. One dollar notes are authorized; every county in the State is entitled to a bank, and the large ones to several; the tempting lure is held out of six per cent. interest on five hundred dollars for every hundred dollars paid in as stock: thus obtaining a profit of twenty-four dollars on each hundred dollars actually paid in. That such a bill would have advocates enough to pass it through the legislature, all experience attests; and that the slight tax of thirty-six cents on each hundred dollars' worth of stock, subscribed and paid, was deemed a privilege, when the existing banks and other property were taxed much higher, is plainly manifest. As was obvious, when the law passed, banks sprang up at once — some fifty in number having a taxable basis last year of about eighteen millions. The elder and safer banks were, of course, driven out, and new organizations sought under the general law, by the stockholders. From having constructed large public works, and made great expenditures, Ohio has become indebted so as to require a very burdensome tax on every species of property; this was imposed by the act of 1851, and on demanding from these institutions their equal share, the State is told that they were protected by a contract made with the legislature of 1845, to be exempt from further taxation, and were not bound by the late law, and, of course, they were sued in their own courts. The Supreme Court holds that by the express terms of the State constitution no such contract could be made by the legislature of 1845, to tie up the hands of the legislature of 1851. And then the banks come here and ask our protection against this decision, which declares the true meaning of the State constitution. It expressly guarantees to the people of Ohio the right to assemble, consult, "and instruct their representatives for their common good;" and then "to apply to the legislature for a redress of grievances." It further declares, that all powers not conferred by that constitution on the legislature are reserved to the people. Now, of what consequence or practical value will these attempted securities be if one legislature can restrain all subsequent ones by contracting away the sovereign power to which instructions could apply?

The question, whether the people have reserved this right so as to hold it in their own hands, and thereby be enabled to regulate it by instructions to a subsequent legislature, (or by a new constitution,) is a question that has been directly raised only once, in any State of the Union, so far as I know. In the case of Brewster *v.* Hough, 10 New Hampshire Reports, 139, it

was raised, and Chief Justice Parker, in delivering the opinion of the court in a case in all respects like the one before us, says, "That it is as essential that the public faith should be preserved inviolate as it is that individual grants and contracts should be maintained and enforced. But there is a material difference between the right of a legislature to grant lands, or corporate powers, or money, and a right to grant away the essential attributes of sovereignty or rights of eminent domain. These do not seem to furnish the subject-matter of a contract."

This court sustained the principle announced by the Supreme Court of New Hampshire, in the West River Bridge case. A charter for one hundred years, incorporating a bridge company, had been granted; the bridge was built and enjoyed by the company. Then another law was passed authorizing public roads to be laid out, and free bridges to be erected; the commissioners appropriated the West River Bridge and made it free; the Supreme Court of Vermont sustained the proceeding on a review of that decision. And this court held that the first charter was a contract securing the franchises and property in the bridge to the company; but that the first legislature could not cede away the sovereign right of eminent domain, and that the franchises and property could be taken for the uses of free roads and bridges, on compensation being made.

Where the distinction lies, involving a principle, between that case and this, I cannot perceive, as every tax-payer is compensated by the security and comfort government affords. The political necessities for money are constant and more stringent in favor of the right of taxation; its exercise is required daily to sustain the government. But in the essential attributes of sovereignty the right of eminent domain and the right of taxation are not distinguishable.

If the West River Bridge case be sound constitutional law (as I think it is) then it must be true that the Supreme Court of Ohio is right in holding that the legislature of 1845 could not deprive the legislature of 1851 of its sovereign powers or of any part of them.

It is insisted, that the case of the State of Ohio *v.* The Commercial Bank of Cincinnati, 7 Ohio Rep. 125, has held otherwise. This is clearly a mistake. The State in that case raised no question as to the right of one legislature to cede the sovereign power to a corporation, and tie up the hands of all subsequent legislatures: no such constitutional question entered into the decision; nor is any allusion made to it in the opinion of the court. It merely construed the acts of assembly, and held that a contract did exist on the ground that by the charter the bank was taxed four per cent.; and therefore the charter must

be enforced, as this rate of taxation adhered to the charter, and excluded a higher imposition.

It would be most unfortunate for any court, and especially for this one, to hold that a decision affecting a great constitutional consideration, involving the harmony of the Union, (as this case obviously does,) should be concluded by a decision in a case where the constitutional question was not raised by counsel; and so far from being considered by the court, was never thought of: such a doctrine is altogether inadmissible. And in this connection I will say, that there are two cases decided by this court, (and relied on by the plaintiff in error,) in regard to which similar remarks apply. The first one is that of New Jersey *v.* Wilson, 7 Cranch, 164. An exchange of lands took place in 1758 between the British colony of New Jersey and a small tribe of Indians residing there. The Indians had the land granted to them by an act of the colonial legislature, which exempted it from taxes. They afterwards sold it, and removed. In 1804, the State legislature taxed these lands in the hands of the purchasers; they were proceeded against for the taxes, and a judgment rendered, declaring the act of 1804 valid. In 1812, the judgment was brought before this court, and the case submitted on the part of the plaintiff in error without argument; no one appearing for New Jersey. This court held the British contract with the Indians binding; and, secondly, that it run with the land which was exempt from taxation in the hands of the purchasers.

No question was raised in the Supreme Court of New Jersey, nor decided there, or in this court, as to the constitutional question of one legislature having authority to deprive a succeeding one of sovereign power. The question was not considered, nor does it seem to have been thought of in the State court or here.

The next case is Gordon's case, 3 Howard, 144. What questions were there presented on the part of the State of Maryland, does not appear in the report of the case, but I have turned to them in the record, to see how they were made in the State courts. They are as follows:

"1st. That at the time of passing the general assessment law of 1841, there was no contract existing between the State and the banks, or any of them, or the stockholders therein or any of them, by which any of the banks or stockholders can claim an exemption from the taxation imposed upon them by the said act of 1841."

"2d. That the contract between the State and the old banks, if there be any contract, extends only to an exemption from further 'taxes or burdens,' of the corporate privileges of bank-

ing; and does not exempt the property, either real or personal, of said banks, or the individual stockholders therein."

"3d. That even if the contract should be construed to exempt the real and personal property of the old banks, and the property of the stockholders therein, yet such exemption does not extend to the new banks, or those chartered since 1830, and, moreover that the power of revocation, in certain cases in these charters, reserves to the State the power of passing the general assessment law."

"4th. That the imposition of a tax of 20 cents upon every one hundred dollars' worth of property, upon both the old and new banks, under the said assessment law, is neither unequal nor oppressive, nor in violation of the bill of rights."

"5th. That taxation upon property within the State, wherever the owners may reside, is not against the bill of rights."

On these legal propositions the opinion here given sets out by declaring that, "The question, however, which this court is called on to decide, and to which our decision will be confined, is — Are the shareholders in the old and new banks, liable to be taxed under the act of 1841, on account of the stock which they own in the banks."

The following paragraph is the one relied on as adjudging the question, that the taxing power may be embodied in a charter and contracted away as private property, to wit: "Such a contract is a limitation on the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax on the franchise."

"But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the State, was repeatedly asked in the course of the argument. The reason is, that every one buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price."

As the case came up from the Supreme Court of Maryland, this court had power merely to reëxamine the questions raised in the court below, and decided there. All that is asserted in the opinion beyond this is outside of the case of which this court had jurisdiction, and is only so far to be respected as it is sustained by sound reasoning; but its dicta are not binding as authority; and so the Supreme Court of Maryland held in the case of the Mayor, &c. of Baltimore *v.* The Baltimore and Ohio Railroad Company, 6 Gill, 288.

The State of Maryland merely asked to have her statutes

construed, and if, by their true terms, she had promised to exempt the stockholders of her banks from taxation, then she claimed no tax of them. She took no shelter under constitutional objections, but guardedly avoided doing so.

If an expression of opinion is authority that binds, regardless of the case presented, then we are as well bound the other way, by another quite equal authority. In the case of East Hartford *v.* Hartford Bridge Co. 10 Howard, 535, Mr. Justice Woodbury, delivering the opinion of the court, says: The case of Goszler *v.* The Corporation of Georgetown, 6 Wheat. 596, 598, "appears to settle the principle that a legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them. It can, and should, exercise them again and again, as often as the public interests require." . . . .

"Its members are made, by the people, agents or trustees for them, on this subject, and can possess no authority to sell or grant their power over the trust to others."

The Hartford case was brought here from the Supreme Court of Connecticut, by writ of error, on the ground that East Hartford held a ferry right secured by a legislative act that was a private contract. But this court held, among other things that, by a true construction of the State laws, no such contract existed; so that this case cannot be relied on as binding authority more than Gordon's case. If fair reasoning and clearness of statement are to give any advantage, then the Hartford case has that advantage over Gordon's case.

It is next insisted that the State legislatures have in many instances, and constantly, discriminated among the objects of taxation; and have taxed and exempted according to their discretion. This is most true. But the matter under discussion is aside from the exercise of this undeniable power in the legislature. The question is whether one legislature can, by contract, vest the sovereign power of a right to tax, in a corporation as a franchise, and withhold the same power that legislature had to tax, from all future ones? Can it pass an irrepealable law of exemption?

General principles, however, have little application to the real question before us, which is this: Has the constitution of Ohio withheld from the legislature the authority to grant, by contract with individuals, the sovereign power; and are we bound to hold her constitution to mean as her Supreme Court has construed it to mean? If the decisions in Ohio have settled the question in the affirmative that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conform-

ity that I suppose could exist with any one is, that the construction is not settled. How is the fact?

The refusal of some fifty banks to pay their assessed portion of the revenue for the year 1851, raised the question for the first time in the State of Ohio; since then the doctrine has been maintained in various cases, supported unanimously by all the judges of the Supreme Court of that State, in opinions deeply considered, and manifesting a high degree of ability in the judges, as the extract from one of them, above set forth, abundantly shows. If the construction of the State constitution is not settled, it must be owing to the recent date of the decisions. An opinion proceeding on this hypothesis will, as I think, involve our judgment now given in great peril hereafter; for if the courts of Ohio do not recede, but firmly adhere to their construction until the decisions, now existing, gain maturity and strength by time, and the support of other adjudications conforming to them, then it must of necessity occur that this court will be eventually compelled to hold that the construction is settled in Ohio; when it must be followed to avoid conflict between the judicial powers of that State and the Union, an evil that prudence forbids.

1. The result of the foregoing opinion is, that the sixtieth section of the general banking law of 1845 is, in its terms, no contract professing to bind the Legislature of Ohio not to change the mode and amount of taxation on the banks organized under this law; and for this conclusion I rely on the reasons stated by my brother Campbell, in his opinion, with which I concur.

2. That, according to the constitutions of all the States of this Union, and even of the British Parliament, the sovereign political power is not the subject of contract so as to be vested in an irrepealable charter of incorporation, and taken away from, and placed beyond the reach of, future legislatures; that the taxing power is a political power of the highest class, and each successive legislature having vested in it, unimpaired, all the political powers previous legislatures had, is authorized to impose taxes on all property in the State that its constitution does not exempt.

It is undeniably true that one legislature may by a charter of incorporation exempt from taxation the property of the corporation in part, or in whole, and with or without consideration; but this exemption will only last until the necessities of the State require its modification or repeal.

3. But if I am mistaken in both these conclusions, then, I am of opinion that, by the express provisions of the constitution of Ohio, of 1802, the legislature of that State had withheld

from its powers the authority to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and this opinion rests on judicial authority that this court is bound to follow; the Supreme Court of Ohio having held by various solemn and unanimous decisions, that the political power of taxation was one of those reserved rights intended to be delegated by the people to each successive legislature, and to be exercised alike by every legislature according to the instructions of the people. This being the true meaning of the nineteenth and twenty-eighth sections of the bill of rights, forming part of the constitution of 1802; one section securing the right of instructing representatives, and the other protecting reserved rights held by the people.

Whether this construction given to the State constitution is the proper one, is not a subject of inquiry in this court; it belongs exclusively to the State courts, and can no more be questioned by us than State courts and judges can question our construction of the Constitution of the United States. For these reasons I am of opinion that the judgment of the Supreme Court of Ohio should be affirmed.

Mr. Justice DANIEL.

In the views so clearly taken by my brother Campbell of the character of the legislation of Ohio, impeached by the decision of the court, I entirely coincide. I will add to the objections he has so well urged to the jurisdiction of this court, another, which to my mind at least is satisfactory; it is this, that one of the parties to this controversy being a corporation created by a State, this court can take no cognizance, by the constitution, of the acts, or rights, or pretensions of that corporation.

Mr. Justice CAMPBELL.

I dissent from the opinion of the court.

The question disclosed by the record, is contained in the sixtieth section of an act of the General Assembly of Ohio, "to incorporate the State Bank of Ohio and other banking companies of that State," adopted February, 1845.

The section provides, that every banking company organized by the act, or complying with its provisions, shall semiannually, at designated days, set off to the State, six per cent. of the net profits for the six months next preceding, "which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject;" and the cashier was required to report the amount to the auditor and to pay it to the treasurer; but in computing the profits of the company for the purposes

aforesaid, the interest received on the certificates of the funded debt held by the company, or deposited with and transferred to the treasurer of the State, or to the board of control by such company, shall not be taken into the account." I have extracted the last clause merely because it forms a part of the section.

It is not usual for governments to levy taxes upon the certificates of their funded debt, and Ohio had, in an early statute, forbidden taxation of hers. This clause was a cumulative precaution, wholly unnecessary.. Swan Stat. 747, § 5.

The case lies in the solution of the question whether the clause directing the banks to set apart semiannually, upon the profits for the six months preceding, six per cent. in lieu of all other taxes to which the company or the stockholders would otherwise be subject on account of the stock, institutes an unalterable rule of taxation for the whole time of the corporate existence of these banks? The General Assembly of Ohio thinks otherwise, and has imposed a tax upon the stock of the banks, corresponding with the taxes levied upon other personal property held in the State. The payment of this tax has been resisted by the banks. The Supreme Court of Ohio, by its judgment, affirms the validity of the act of the general assembly, and has condemned the bank to the payment. This judgment is the matter of consideration.

The section of the act above cited furnishes a rule of taxation, and while it remains in force a compliance with it relieves the banks from all other taxes to which they would otherwise be subject. Such is the letter of the section.

The question is, has the State of Ohio inhibited herself from adopting any other rule of taxation either for amount or mode of collection, while these banks continue in existence? It is not asserted that such a prohibition has been imposed by the express language of the section. The term for which this rule of taxation is to continue is not plainly declared. The amounts paid according to it discharge the taxes for the antecedent six months. Protection is given in advance of exaction.

The clause in the section, that this "sum or amount, so set off, shall be in lieu of all taxes to which such company or the stockholders thereof would otherwise be subject," requires an addition to ascertain the duration of the rule. It may be completed in adding, "by the existing laws for the taxation of banks," or "till otherwise provided by law," or at "the date of such apportionment or dividend." Or, following the argument of the banks, in adding, "during the existence of the banks." Whether we shall select from the one series of expressions, leading to one result, or the expression leading to another altogether different, depends upon the rules of interpretation applicable to the subject.

The first inquiries are of the relations of the parties to the supposed contract to its subject-matter, and the form in which it has been concluded. The sixtieth section of the act of 1845, was adopted by the General Assembly of Ohio in the exercise of legislative powers, as a part its public law. The powers of that assembly in general, and that of taxation especially, are trust powers, held by them as magistrates, in deposite, to be returned, after a short period, to their constituents without abuse or diminution.

The nature of the legislative authority is inconsistent with an inflexible stationary system of administration. Its office is one of vigilance over the varying wants and changing elements of the association, to the end of ameliorating its condition. Every general assembly is organized with the charge of the legislative powers of the State; each is placed under the same guidance, experience, and observation; and all are forbidden to impress finally and irrevocably their ideas or policy upon the political body. Each, with the aid of an experience, liberal and enlightened, is bound to maintain the State in the command of all the resources and faculties necessary to a full and unshackled self-government. No implication can be favored which convicts a legislature of a departure from this law of its being.

The subject-matter of this section is the contributive share of an important element of the productive capital of the State to the support of its government. The duty of all to make such a contribution in the form of an equal and apportioned taxation, is a consequence of the social organization. The right to enforce it is a sovereign right, stronger than any proprietary claim to property. The amount to be taken, the mode of collection, and the duration of any particular assessment or form of collection, are questions of administration submitted to the discretion of the legislative authority; and variations must frequently occur, according to the mutable conditions, circumstances, or policy of the State. These conditions are regulated for the time, in the sixtieth section of this act. That section comes from the law maker, who ordains that the officers of certain banking corporations, at stated periods, shall set apart from their property a designated sum as their share of the public burden, in lieu of other sums or modes of payment to which they would be subject; but there is no promise that the same authority may not, as it clearly had a right to do, apportion a different rate of contribution. I will not say that a contract may not be contained in a law, but the practice is not to be encouraged, and courts discourage the interpretation which discovers them. A common informer sues for a penalty, or a revenue officer makes a seizure under a promise that on conviction the recovery shall be shared, and yet the State

discharges the forfeiture, or prevents the recovery by a repeal of the law, violating thereby no vested right nor impairing the obligation of any contract. 5 Cranch, 281; 10 Wheat. 246; 6 Pet. 404.

A captor may be deprived of his share of prize-money, pensioners of their promised bounty, at any time before their payment. 2 Russ. & M. 35.

Salaries may be reduced, offices having a definite tenure, though filled, may be abolished, faculties may be withdrawn, the inducements to vest capital impaired and defeated by the varying legislation of a State, without impairing constitutional obligation. 8 How. 163; 10 Ib. 395; 3 Ib. 534; 8 Pet. 88; 2 Sanf. S. C. R. 355. The whole society is under the dominion of law, and acts, which seem independent of its authority, rest upon its toleration. The multifarious interests of a civilized State must be continually subject to the legislative control. General regulations, affecting the public order, or extending to the administrative arrangements of the State, must overrule individual hopes and calculations, though they may have originated in its legislation. It is only when rights have vested under laws that the citizen can claim a protection to them as property. Rights do not vest until all the conditions of the law have been fulfilled with exactitude during its continuance, or a direct engagement has been made, limiting legislative power over and producing an obligation. In this case it may be conceded that at the end of every six months the payment then taken is a discharge for all antecedent liabilities for taxes. That there could be no retrospective legislation. But beyond this the concessions of the section do not extend.

A plain distinction exists between the statutes which create hopes, expectations, faculties, conditions, and those which form contracts. These banks might fairly hope that without a change in the necessities of the State, their quota of taxes would not be increased; and that while payment was punctually made the form of collection would not be altered. But the general assembly represents a sovereign, and as such designated this rule of taxation upon existing considerations of policy, without annexing restraints on its will, or abdicating its prerogative, and consequently was free to modify, alter, or repeal the entire disposition.

I have thus far considered the sixtieth section of the act as a distinct act, embodying a State regulation with the view of ascertaining its precise limitatations.

I shall, however, examine the general scheme and object of the act, of which it forms a part, to ascertain whether a different signification can be given to it. Before doing so, it is a matter of consequence to ascertain on what principles the inquiry must be conducted.

Three cases occurred in this court, before either of the members who now compose it belonged to it, in which taxation acts of the States or its municipal authorities, involving questions of great feeling and interest, were pronounced invalid. In the last of these the court said, "that in a society like ours, with one supreme government for national purposes, and numerous State governments for other purposes, in many respects independent and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land, in its application to individuals." The court in each of these cases affirm, "that the sovereignty of the State extends to every thing which exists by its authority, or is introduced by its permission, and all on subjects of taxation." 2 Pet. 449; 9 Wheat. 738; 4 Ib. 316.

The limitations imposed by the court in these cases excited a deep and pervading discontent, and must have directed the court to a profound consideration of the question in its various relations. The case of the Providence Bank *v.* Billings, 4 Pet. 514, enabled the court to give a practical illustration of sincerity with which the principle I have quoted was declared. A bank, existing by the authority of a State legislature, claimed an immunity from taxation against the authority of its creator.

The court then said "however absolute the right of an individual (to property) may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion is determined by the legislature." The court declared that the relinquishment of the power of taxation is never to be assumed. "The community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not plainly appear."

These principles were reaffirmed, their sphere enlarged, and their authority placed upon broad and solid foundations of constitutional law and general policy, in the opinion of this court, in the case of the Charles River Bridge, 11 Pet. 420. No opinion of the court more fully satisfied the legal judgment of the country, and consequently none has exercised more influence upon its legislation. The Supreme Court of Pennsylvania, speaking of these cases, says, "they are binding on the State courts not merely as precedents, and therefore proving what the law is, but as the deliberate judgment of that tribunal

with whom the final decision of all such questions rests. The State courts have almost universally followed them. But no tribunal of the Union has acceded to the rule they lay down with a more earnest appreciation of its justice than did this court." 7 Har. 144; 10 Barr, 142.

The Supreme Court of Georgia says, "the decision, based as it is upon a suoject particularly within the cognizance and jurisdiction of the Supreme Court of the United States, is entitled to the highest deference." And the eminent Chief Justice of that court adds, "that the proposition it establishes commands my entire assent and approbation." 9 Georgia Rep. 517; 10 N. H. 138; 17 Conn. 454; 21 Verm. 590; 21 Ohio, (McCook's Rep.) 564; 9 Ala. 235; 9 Rob. 324; 4 Coms. 419; 6 Gill, 288.

The chief justice, delivering the opinion of this court in that case, quotes with approbation the principle, that the abandonment of the power of taxation ought not to be presumed in a case in which the deliberate purpose to do so did not appear, and says, "The continued existence of a govern ment would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished the power in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

The court only declared those principles for which the commons of England had struggled for centuries, and which were only established by magnanimous and heroic efforts. The rules that public grants convey nothing by implication, are construed strictly in favor of the sovereign, do not pass any thing not described nor referred to, and when the thing granted is described nothing else passes; that general words shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, were not the inventions of the craft of crown lawyers, but were established in contests with crown favorites and impressed upon the administration, executive and judicial as checks for the people. The invention of crown lawyers was employed about such phrases, as *ex speciali gratia, certa scientia mero motu*, and *non obstante*, to undermine the strength of such rules, and to enervate the force of wholesome statutes. A writer of the seventeenth century says, "from the time of William

Rufus, our kings have thought they might alienate and dispose of the crown lands at will and pleasure; and in all ages, not only charters of liberty, but likewise letters-patent for lands and manors, have actually passed in every reign. Nor would it have been convenient that the prince's hands should have been absolutely bound up by any law, or that what had once got into the crown should have been forever separated from private possession. For then by forfeitures and attaintures he must have become lord of the whole soil in a long course of time. The constitution, therefore, seems to have left him free in this matter; but upon this tacit trust, (as he has all his other power,) that he shall do nothing which may tend to the destruction of his subjects. However, though he be thus trusted, it is only as head of the commonwealth; and the people of England have in no age been wanting to put in their claim to that to which they conceived themselves to have a remaining interest; which claims are the acts of resumption that from time to time have been made in parliament, when such gifts and grants were made as become burdensome and hurtful to the people. Nor can any government or State divest itself of the means of its own preservation; and if our kings should have had an unlimited power of giving away their whole revenue, and if no authority could have revoked such gifts, every profuse prince, of which we have had many in this kingdom, would have ruined his successor, and the people must have been destroyed with new and repeated taxes; for by our duty we are likewise to support the next prince. So that if no authority could look into this, a nation must be utterly undone without any way of redressing itself, which is against the nature and essence of any free establishment.

Our constitution, therefore, seems to have been, that the king always might make grants, and that these grants, if passed according to the forms prescribed by the law, were valid and pleadable, against not only him, but his successors. However, it is likewise manifest that the legislative power has had an uncontested right to look into those grants, and to make them void whenever they were thought exorbitant."

Nor were they careless or indifferent to precautionary measures for the preservation of the revenues of the State from spoliation or waste. Official responsibility was established, and the Lords High Treasurer and Chancellor, through whose offices the grants were to pass, were severally sworn "that they would neither know nor suffer the king's hurt, nor his disheriting, nor that the rights of his crown be distressed by any means as far forth as ye may let; and if ye may not let it, ye shall make knowledge thereof clearly and explicitly to the king with your true advice and counsel."

The responsibility of these high officers, as the history of England abundantly shows, was something more than nominal; nor did the frequent enforcement of that rule of responsibility, nor the adoption by the judges of the stringent rules I have cited, protect the revenues of the State from spoliation. "The wickedness of men," continues this writer, "was either too cunning or too powerful for the wisdom of laws in being. And from time to time great men, ministers, minions, favorites, have broken down the fences contrived and settled in our constitution. They have made a prey of the commonwealth, plumed the prince, and converted to their own use what was intended for the service and preservation of the State. That to obviate this mischief, the legislative authority has interposed with inquiries, accusations, and impeachments, till at last such dangerous heads were reached." Davenant's Dis. passim.

Nor let it be said that this history contains no lessons nor instructions suitable to our condition. The discussions before this court in the Indiana Railroad and the Baltimore Railroad cases exposed to us the sly and stealthy arts to which State legislatures are exposed, and the greedy appetites of adventurers, for monopolies and immunities from the State right of government. We cannot close our eyes to their insidious efforts to ignore the fundamental laws and institutions of the States, and to subject the highest popular interests to their central boards of control and directors' management.

This is not the time for the relaxation of those time-honored maxims, under the rule of which free institutions have acquired their reality, and liberty and property their most stable guaranties. The Supreme Court of Pennsylvania says, with great force, "that if acts of incorporation are to be so construed as to make them imply grants of privileges, immunities, and exemptions, which are not expressly given, every company of adventurers may carry what they wish, without letting the legislature know their designs. Charters would be framed in doubtful or ambiguous language, on purpose to deceive those who grant them; and laws, which seem perfectly harmless on their face, and which plain men would suppose to mean no more than what they say, might be converted into engines of infinite mischief. There is no safety to the public interest except in the rule which declares that the privileges not expressly granted are withheld." 7 Harris, 144.

The principles of interpretation, contained in these cases, control the decision of this, if applied to this act. Indeed, the argument of the plaintiff rests upon rules created for, and adapted to, a class of statutes entirely dissimilar. We were invited to consider the antecedent legislation of Ohio, in reference to its

banks, the discouraging effects of that legislation, and then to deal with this act, as a medicinal and curative measure; as an act recognizing past error, and correcting for the future the consequences. It is proper to employ this argument to its just limit. The legislation of Ohio since 1825 certainly manifests a distinct purpose of the State to maintain its powers over these corporations, in the matter of taxation, unimpaired. With a very few exceptions this appears in all the statutes. It is seen in the act of 1825, in the charters granted in 1834, in the acts of 1841–2–3, the two last being acts embracing the whole subject-matter of banking. It is said this austerity was the source of great mischief, depreciated the paper currency of the State, and occasioned distress to the people, and that the change apparent in the act of 1845 was the consequence.

The existence of a consistent and uniform purpose for a long period is admitted. The abandonment of such a purpose, and one so in harmony with sound principles of legislation, cannot be presumed. If the application of these principles in Ohio was productive of mischief, we should have looked for an explicit and unequivocal disclaimer. We have seen that the act contains no renunciation of this important power. And it may be fairly questioned whether the people of Ohio would have sanctioned such a measure. I know of no principle which enables me to treat the sixtieth section of this act as a remedial statute. Even the dissenting opinions in the Charles River and Louisa Railroad cases, which have formed the repertory from which the arguments of the plaintiffs have been derived, do not in terms declare such a rule, and the opinions delivered by the authority of the court repel such a conclusion. Nor can I consider the decision in 7 Ohio R. 125 of consequence in this discussion. That case was decided upon a form of doctrine which after the judgments of this court, before cited, had no title to any place in the legal judgment of the country. The case was decided in advance of the most important and authoritative of those decisions. It is not surprising to hear that the judges who gave the judgment, afterwards renounced its principle, or that another State court has disapproved it, (7 Harris, 144,) or that it has not been followed in kindred cases, 11 Ohio, 12, 393; 19 Ib. 110; 21 Ib. (McCook,) 563, 604, 626; and at the first time when it came up for revision it was overruled.

It remains for me to consider the act of 1845, its purpose and details, in connection with the sixtieth section of the act, to ascertain whether it is proper to assume that the State has relinquished its rights of taxation over the banking capital of the State.

The act of 1845 was designed to enable any number, not

fewer than five persons, to form associations to carry on the business of banking.

The legislature determined the whole amount of the capital which should be employed under the act — that it should be distributed over the State, according to a specified measure of apportionment; that the bills to circulate as currency should have certain marks of uniformity, and be in a certain proportion to capital and specie on hand, and that a collateral security should be given for their redemption. The act contains measures for organization, relating to subscriptions for stock, the appointment of officers and boards of management; sections, of a general interest, referring to the frauds of officers, the insolvency of the corporations, their misdirection and forfeiture; sections containing explicit and clear statements of corporate right and privilege, the capacities they can exercise, the functions they are to perform, and the term of their existence.

The act initiates a system of banking of which any five of its citizens may avail, and which provides for the confederacy of these associations under the general title of the State Bank of Ohio, and its branches, and their subjection to a board of control, appointed by them.

More than fifty banks have been formed under this act, and thirty-nine belong to the confederacy. Some of the banks over whose charters the State has reserved a plenary control, are by the act permitted to join it. It is said "that the whole of this act is to be taken; the purpose of the act and the time of the act. It is a unit." It will not be contended that the fifty-first section of this act, by which this multitude of banking companies are adjudged to be corporations, with succession for twenty years, places every other relation established by the act, beyond the legislative domain for the same period of time. For there are in the act measures designed for organization and arrangement for the convenience and benefit of the corporators only; there are concessions creating hopes and expectations out of which rights may grow by subsequent events; there are sections which convey present rights, or from which rights may possibly arise in the form of a contract; there are others which enter into the general system of administration, affect the public order, and tend to promote the common security. Some of these provisions may be dispensed with by those for whose exclusive benefit they were made. Some may be altered, modified, or repealed, to meet other conditions of the public interest, and some perhaps may not be alterable except with the consent of the corporators themselves. To determine the class to which one enactment or another belongs, we are referred to those general principles I have already considered. In this act,

of seventy-five sections, which organizes a vast machinery for private banking, which directs the delicate and complex arrangements for the supply of a paper currency to the State, and determines the investment of millions of capital, we find this sixtieth section. The act is enabling and permissive. It makes it lawful for persons to combine and to conduct business in a particular manner. It forms no partnership for the State, compels no one to embrace or to continue the application of industry and capital according to its scheme. It grants licenses under certain conditions and reservations, but is nowhere coercive. Among the general regulations is the one which directs the banks at the end of every six months to ascertain their net profits for the six months next preceding and to set apart six per cent. for the State in the place of the other taxes or contributions to which they would be liable. But the legislature imposes no limit to its power, nor term to the exercise of its will, nor binds itself to adhere to this or any other rule of taxation.

The subject affects the public order and general administration. It is not properly a matter for bargain or barter; but the enactment is in the exercise of a sovereign power, comprehending within its scope every individual interest in the State. It is a power which every department of government knows that the community is interested in retaining unimpaired, and that every corporator understood its abandonment ought not to be presumed in a case in which the deliberate purpose to abandon it does not appear."

I have sought in vain in the sixtieth section of the act, in the act itself, and in the legislation and jurisprudence of Ohio, for the expression of such a deliberate purpose.

My opinion is that the Supreme Court of Ohio has faithfully applied the lessons inculcated by this court, and that its judgment should be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court of Ohio 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 of Ohio for further proceedings to be had therein in conformity to the opinion of this court.

THE OHIO LIFE INSURANCE AND TRUST COMPANY, PLAINTIFF IN ERROR, *v.* HENRY DEBOLT, TREASURER OF HAMILTON COUNTY, DEFENDANT IN ERROR.

There being no opinion of the court, as such, in this case, the reporter can only state the laws of Ohio which were drawn into question.

In 1834, the Legislature of Ohio passed an act incorporating the Ohio Life Insurance and Trust Company, with power, amongst other things, to issue bills or notes until the year 1843. One section of the charter provided that no higher taxes should be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State.

In 1836, the legislature passed an act to prohibit the circulation of small bills. This act provided, that if any bank should surrender the right to issue small notes, the treasurer should collect a tax from such bank of five per cent. upon its dividends; if not, he should collect twenty per cent. The Life Insurance and Trust Company surrendered the right.

In 1838, this law was repealed.

In 1845, an act was passed to incorporate the State Bank of Ohio and other banking companies. The 60th section provided that each company should pay, annually, six per cent. upon its profits, in lieu of all taxes to which such company or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

In 1851, an act was passed to tax banks and bank and other stocks, the same as other property was taxable by the laws of the State.

There was nothing in previous legislation to exempt the Life Insurance and Trust Company from the operation of this act.

THIS case was brought up from the District Court of the State of Ohio, in and for the county of Hamilton, by a writ of error issued under the 25th section of the Judiciary Act. The court was held by the Honorable John A. Corwin, Chief Justice of the Supreme Court of the State of Ohio, presiding, and the Honorable Alfred G. W. Carter, and the Honorable Edward Woodruff, and the Honorable John B. Stalle, Judges of the Court of Common Pleas, in and for the county of Hamilton, associates.

The following certificate, which was a part of the record, explains the nature of the case:

And thereupon, on motion of the counsel for the said The Ohio Life Insurance and Trust Company, defendants, it is ordered to be certified and made a part of the record that the said company did set up, by way of defence to the prayer of the bill of complainants, a certain act of the general assembly of this State, entitled An act to incorporate the Ohio Life Insurance and Trust Company, passed the twelfth day of February, in the year eighteen hundred and thirty-four; and also a certain other act of the general assembly, entitled An act to prohibit the circulation of small bills, passed the fourteenth day of March, in the year eighteen hundred and thirty-six; and thereupon

claimed, that in virtue of the said acts, and of the instrument of writing, "Exhibit B," attached to its answer, the general assembly of this State had entered into a contract with the said company never to impose upon the property of the said company a greater or different burden of taxation than five per cent. upon its dividends of net profits, and that therefore the act of the general assembly, entitled An act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this State, passed the twenty-first day of March, in the year eighteen hundred and fifty-one, impaired the obligation of a contract, and therein was repugnant to the Constitution of the United States; but the court decided that there was no conflict between the said several acts, for the reason that the said act passed the fourteenth day of March, in the year eighteen hundred and thirty-six, expired, and ceased to have any effect or operation as respects The Ohio Life Insurance and Trust Company, on the first day of January, in the year eighteen hundred and forty-three, when the power of the said company to issue bills or notes for circulation expired and ceased by the terms of the said act passed the twelfth day of February, in the year eighteen hundred and thirty-four; and that there was, therefore, at the date of the said act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, no such contract, agreement, pledge, or understanding as the said company claimed; and that the said act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, was, in that respect, constitutional and valid; and it was ordered to be further certified on the same motion, that the said company did likewise set up by way of defence to the prayer of said bill a certain act of the general assembly of this State, entitled An act to incorporate the State Bank of Ohio and other banking companies, passed the twenty-fourth day of February, in the year eighteen hundred and forty-five, and thereupon claimed that in virtue of the said last-mentioned act, and of the said act passed the twelfth day of February, in the year eighteen hundred and thirty-four, the general assembly of this State had entered into a contract with the said company not to impose upon the property of the said company a greater or different burden of taxation than six per cent. upon its dividends of net profit, until after the first day of May, in the year eighteen hundred and sixty-six, and that therefore the act of the said general assembly, entitled An act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this State, passed the twenty-first day of March, in the year eighteen hundred and fifty-one, impaired the obligation of a contract, and therein was repugnant to the Constitution of the United States;

but the court decided that the said act passed the twenty-fourth day of February, in the year eighteen hundred and forty-five, contained no pledge on the part of the State not to alter the amount, or the mode of taxation therein specified, but that the taxing power of the general assembly of this State over the property of companies formed under that act, was and is the same as over the property of individuals, and that there was, consequently, no such contract, agreement, pledge, or understanding as the said company claimed; and that whether the franchises of companies organized under the said last-mentioned act, could not be revoked, changed, or modified, the said act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, did not, upon any construction, impair any right secured to such companies, by the said act passed the twenty-fourth day of February, in the year eighteen hundred and forty-five, and that the said act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, was therefore a constitutional and valid law. And it is ordered to be certified, also, that the question of the validity of the said act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, was material and necessary to the decision of this cause, and that the validity of the said act was drawn in question (in the manner and to the intent herein before specified) as being repugnant to the Constitution of the United States, and that the decision of the court was in favor of the validity of the said law. And it is further certified that this court is the highest court of law and in equity in the State of Ohio, in which a decision in this suit can be had.

The several acts mentioned in the above certificate, are stated in the opinions delivered by the judges of this cc rt, and it is not necessary to set them forth *in extenso*.

The case was argued by *Mr. Worthington* and *Mr. Stanberry*, for the plaintiff in error, and by *Mr. Spalding* and *Mr. Pugh*, for the defendant in error.

The following points, on behalf of the plaintiff in error, are taken from the brief of Mr. Worthington, filed for himself and Mr. Mathews.

Points for Plaintiff.—I. Our first point involves the taxing power, the objects and subjects of taxation, and the manner and extent of its exercise. This power, under the Constitution of Ohio, of 1802, is legislative, and placed under the control of the general assembly, subject only to the few limitations put upon it by the instrument of its creation, and by the Constitution of the United States. Constitution of Ohio, of 29th of Nov. 1802, Art. 1, § 1; Ib. Art. 8, § 23; McCulloch *v.* State

of Maryland, 4 Cond. Pet. Rep. 475, 486; Nathan v. Louisiana, 8 How. Rep. 82; Mager v. Grima et al. 8 Ib. 490; The People v. Mayor, &c. of Brooklyn, 4 Coms. Rep. 419, 423; Loring et al. v. The State of Ohio, 16 Ohio Rep. 590; Gazlay v. The State of Ohio, 5 Ib. 14; State of Ohio v. Hibbard, 3 Ib. 63; License Cases, 5 How. Rep. 516, 593; Loughborough v. Blake, 4 Cond. Pet. Rep. 660; Prov. Bank v. Billings, 4 Pet. Rep. 563; 1 Ohio State Rep. 102.

II. The only limitation placed upon the exercise of the taxing power is by the 23d section of the 8th article of the constitution of Ohio, which declares, "That the levying taxes by the poll is grievous and oppressive; wherefore the legislature shall never levy a poll-tax for county or state purposes." This being the only limit, the power can be exercised to any and every extent, for any and every purpose, and upon any and every object or thing, at discretion, subject only to the limitation given. Constitution of Ohio of 29th of November, 1802, Art. 8, § 23; McCulloch v. State of Maryland, 4 Cond. Pet. Rep. 475, 488; Osborne v. Bank United States, 5 Ib. 771; Nathan v. Louisiana, 8 How. Rep. 82; Mayer v. Grima et al. 8 Ib. 490; The License Cases, 5 Ib. 593; Gazlay v. State of Ohio, 5 Ohio Rep. 21; Loring et al. v. The State of Ohio, 16 Ib. 590; People v. Mayor, &c. of Brooklyn, 4 Coms. Rep. 426; 1 Ohio State Rep. 77, 102.

III. The taxing power comes to the legislature from the people, and is measured by the authority the people possess and can confer upon their government, and have actually conferred. Their authority being unlimited, as to themselves and their resources, and their exigencies without bounds, they can exercise this power at will and at discretion, without limit or measure, as to themselves and their property. And if they confer the authority they have upon their general assembly or legislative department of their government with or without limit, it can be exercised within the grant, just as the people themselves could have exercised it. McCulloch v. State of Maryland, 4 Cond. Pet. Rep. 484; Loughborough v. Blake, 4 Ib. 660; Osborne v. Bank United States, 5 Ib. 771; Weston et al. v. City of Charleston, 2 Ib. 465; Providence Bank v. Billings et al. 4 Ib. 559; Charles River Bridge v. Warren Bridge, 11 Pet. Rep. 546, 567; Vaughn v. Northup et al. 15 Ib. 4; Dobbins v. Com. of Erie County, 16 Ib. 447; License Cases, 5 How. Rep. 575, 588, 592, 627; West River Bridge v. Dix et al. 6 Ib. 523, 539; Passenger Cases, 8 Ib. 407, 421, 447, 530, 531; Nathan v. Louisiana, 8 Ib. 80, 82; Mayer v. Grima et al. 8 Ib. 490; The People v. Mayor, &c. Brooklyn, 4 Coms. Rep. 419; 1 Ohio State Rep. 10.

IV. The legislative power of a State, as given by its constitution, can be exercised only upon what belongs to the State in actual or constructive right, and can never extend to what belongs to another government. The same person or thing cannot at the same time be under the power of both. Vaughn *v.* Northup et al. 15 Pet. Rep. 1; McCulloch *v.* Rodrick, 2 Ohio Rep. 234; Rogers et al. *v.* Allen, 3 Ib. 488; Mager *v.* Grima et al. 8 How. Rep. 490; Holmes *v.* Remsen, 20 Johns. Rep. 254; Gordon *v.* Appeal Tax, 3 How. Rep. 150.

V. The charter of The Ohio Life Insurance and Trust Company, and the charter of the State Bank of Ohio, and other banking companies, are contracts obligatory upon the State of Ohio, in all their parts, and as such, protected by the Constitution of the United States, from violation or invasion, upon the part of the State of Ohio. Constitution of the United States, Art. 1, § 10; Fletcher *v.* Peck, 2 Con. Pet. Rep. 321; New Jersey *v.* Wilson, 2 Ib. 457; Terett et al. *v.* Taylor et al. 3 Ib. 256; Town of Pawlet *v.* Clark et al. 3 Ib. 408; Sturgis *v.* Crowninshield, 4 Ib. 415; Dartmouth College *v.* Woodward, 4 Ib. 538; McCulloch *v.* State of Maryland, 4 Ib. 470; Providence Bank *v.* Billings, 4 Pet. Rep. 559; Charles River Bridge *v.* Warren Bridge, 11 Ib. 540, 611; Gordon *v.* Appeal Tax, 3 How. Rep. 133; Planters Bank *v.* Sharp et al. 6 Ib. 318; West River Bridge *v.* Dix, 6 Ib. 531, 536, 539, 542; Paup et al. *v.* Drew, 10 Ib. 218; Woodruff *v.* Trapnall, 10 Ib. 204, 208, 214; Baltimore and Susquehanna Railroad Company *v.* Nesbit, 10 Ib. 395; East Hartford *v.* Hartford Bridge, 10 Ib. 535.

VI. The 25th section of the charter of The Ohio Life Insurance and Trust Company, and the 60th section of the charter of the State Bank of Ohio, and other Banking companies, are contracts, limiting the exercise of taxation upon the part of the State, and, as such, are protected by the Constitution of the United States from invasion. Constitution of the United States, Art. 1, § 10; Fletcher *v.* Peck, 2 Con. Pet. Rep. 231; New Jersey *v.* Wilson, 2 Ib. 457; Providence Bank *v.* Billings et. al. 4 Ib. 559; Charles R. Bridge *v.* Warren Bridge, 11 Ib. 540; Gordon *v.* Appeal Tax, 3 How. Rep. 133, 146; West Bridge *v.* Dix et al. 6 Ib. 531, 544; Woodruff *v.* Trapnell, 10 Ib. 207, 208; Mills *v.* St. Clair Co. 8 Ib. 580.

VII. The 25th section of the charter of The Ohio Life Insurance and Trust Company, being a contract prohibiting higher taxes upon the property or dividends of the Company, other than were, or might be levied on the property or dividends of incorporated banking institutions of the State, no higher tax could be levied upon the property, or dividends

of the company than could be levied upon the property or dividends of incorporated banks of the State. A question arises as to the banking institutions here referred to. The reference must be to incorporated banks, existing at the time the charter was enacted, or that may exist at the time of the levy. In either case, no higher tax could be levied against the company than could be levied against such incorporated banks. If such banks be subject to different rates of taxation, then the prevailing rates of the greater proportion of such institutions, would control the rates of taxation against the company. If the former rule prevail, then the rate of taxation against the old banks in Ohio furnishes the rule against the company; but if the latter rule prevail, then the rate of taxation against the State Bank of Ohio, and other banking companies, under the 60th section of their charter of the 24th of February, 1845, furnishes the rule of taxation against the company. The act to authorize free banking, of 21st March, 1851, (49 Gen. Laws of Ohio, 41,) has no application to the present tax, because, aside from other considerations, no banks were organized under it when the tax against the company was authorized to be assessed, under the act of 21st March, 1851, to tax banks, &c. 49 Gen. Laws of Ohio, 56; 44 Ib. 108, 121, sec. 60; 48 Ib. 88.

VIII. All the banking institutions in operation in Ohio, at the time The Ohio Life Insurance and Trust Company was chartered, except the Commercial Bank of Cincinnati, which paid four per cent. on her dividends, — and the Franklin Bank of Cincinnati, which paid five per cent. upon her dividends — were, by their charters, not exempt from general taxation under a general law. And all the banks incorporated at the same session of the general assembly in which The Ohio Life Insurance and Trust Company was incorporated, were by their charters made subject to the tax imposed by the act of 12th March, 1831, to tax banks, &c., (Swan's Statutes, 916,) and such taxes as might be imposed by law. The Ohio Life Insurance and Trust Company prior to July, 1836, that is, in 1835, was taxed under the act of 12th March, 1831, if taxed at all, five per cent. upon her dividends. 3 Chase Stat. 2010 to 2083, c. 100–133, inclusive; 2 Ib. 913–924, c. 351, § 42, 1463, c. 655; 32 Local Laws of Ohio 76, § 21, Bank of Wooster; 32 Ib. 197, § 21, Bank of Massillon; 32 Ib. 283, § 6, Bank of Xenia; 32 Ib. 293, § 17, Bank of New Lisbon; 32 Ib. 299, § 6, Lafayette Bank of Cincinnati; 32 Ib. 407, § 22 Bank of Cleveland; 32 Ib. 412, § 6, Bank of Sandusky, 32 Ib. 419, § 6, Clinton Bank of Columbus.

IX. The Ohio Life Insurance and Trust Company must de-

clare dividends on the first Mondays in January and July, annually, from the profits of said company, so as not to impair, or in anywise lessen the capital stock. These dividends are upon the entire profits of the company, and are not divisible, or declared separately from any special business of the company. Charter of The Ohio Life Insurance & Trust Co. § 27.

X. The Ohio Life Insurance and Trust Company, and all the banks in Ohio, except the Commercial Bank of Cincinnati, and the Franklin Bank of Cincinnati, being bound to report to the Auditor of State, under the act of 12th March, 1831, to tax banks, &c., were embraced in the act of 14th March, 1836, "To prohibit the circulation of small bills," as that act, in express terms, included all banks that made returns to the auditor of State under said act of 12th March, 1831, to tax banks, &c. 34 Gen. Laws of Ohio, 42, § 1, of the act to prohibit the circulation of small bills.

XI. All banks, including The Ohio Life Insurance and Trust Company, coming under the act of 14th March, 1836, "to prohibit the circulation of small bills," were, by the terms of the act and their charters, subject to a tax of twenty per cent. upon their dividends, unless they surrendered by the 4th July, 1836, as therein directed, their rights to issue or circulate notes or bills, less than $3, after 4th July, 1836, and $5, after 4th July, 1837; and "then and in that case, the Auditor of State shall thereafter draw on such banks only for the amount of five per cent. upon their dividends, declared after such surrender." The act of 14th March, 1836, repealed so much of the act of 12th March, 1831, to tax banks, &c. as was inconsistent with it. 32 General Laws of Ohio, 42; Mills *v.* St. Clair County, 8 How. Rep. 581.

XII. The Ohio Life Insurance and Trust Company having accepted the provisions of the act of 14th March, 1836, "to prohibit the circulation of small bills," and made the surrender in due form required by said act, is entitled to the benefit or consideration tendered by said act to obtain said surrender, and can be taxed only five per cent. upon her dividends declared after such surrender. This surrender upon her part, under said act, constitutes a valid contract between her and the State, and its invasion is prohibited by the Constitution of the United States. Gordon *v.* Appeal Tax, 3 How. Rep. 133; Woodruff *v.* Trapnall, 10 Ib. 204; Rich. R. R. Co. *v.* Lou. R. R. Co. 13 Ib. 81, 86, 90; Searight *v.* Stokes, 3 Ib. 167; Neil, Moore & Co. *v.* Ohio, 3 Ib. 742; Achison *v.* Huddleson, 12 Ib. 296; Huidekeper *v.* Douglas, 1 Con. Pet. Rep. 452; U. States *v.* Fisher, 1 Ib. 423; Sturgis *v.* Crowninshield, 4 Ib. 418, 481.

XIII. The Supreme Court of the United States, as a general

rule, in the construction of the statutes and constitutions of the States, follows the construction of their courts, but when the construction of a statute in conflict with the Constitution of the United States is involved, then the rule is reversed, and the State courts must follow the construction given to the statute by the Supreme Court of the United States. Luther *v.* Bowen, 7 Howard's Rep. 1, 40, 219, 818; East Hartford *v.* Hartford Bridge Co. 10 Ib. 539; Strader et al. *v.* Graham, 10 Ib. 94; Elmendorf *v.* Taylor, 6 Con. Pet. Rep. 50; Swift *v.* Lyson, 16 Pet. Rep. 1; 2 Ib. 378.

XIV. The repeal of the act of 14th March, 1836, "to prohibit the circulation of small bills," by the act of 13th March, 1838, (36 General Laws of Ohio, 55,) does not annul or abrogate the contract of surrender of 22d June, 1836, made by The Ohio Life Insurance and Trust Company, by which she lost the right to issue and circulate small notes, and the State lost the right thereafter to tax her beyond five per cent. on her dividends. Woodruff *v.* Trapnell, 10 How. Rep. 204, 206, 207; East Hartford *v.* Hartford Bridge Co. 10 Ib. 535; Briscoe *v.* Bank of Com. of Ky. 11 Pet. Rep. 257; Charles R. Bridge *v.* War. Bridge, 11 Ib. 420; Balt. & Susq. R. R. *v.* Nesbitt, 10 How. Rep. 395; Satterlee *v.* Matthewson, 2 Pet. Rep. 412; Bronson *v.* Kinzie et al. 1 How. Rep. 311; Watson et al. *v.* Mercer, 8 Pet. Rep. 110; Fletcher *v.* Peck, 2 Con. Pet. Rep. 321; Neil, Moore & Co. *v.* Ohio, 3 Howard's Rep. 742; Acheson *v.* Huddleson, 12 Ib. 296; 10 Ib. 395, 402.

For the defendant in error, the points will be given as stated by *Mr. Spalding*, and also the third and fourth points of *Mr. Pugh.*

Mr. Spalding's points for defendant in error.

First. The taxing power is of such vital importance, and is so essentially necessary to the very existence of a State government, that its relinquishment or diminution for a fixed period, cannot be made the subject-matter of a binding contract between the legislature of a State, and individuals or private corporations. It is one of the highest attributes of sovereignty, and under our form of government, belongs to the people. They have lodged it in the hands of the law-making power, to be exerted for their benefit, not to be impaired or destroyed. It must of necessity always be exerted according to present exigencies, and therefore must necessarily continue to be held by each succeeding legislature undiminished and unimpaired.

Second. The act of the general assembly of the State of Ohio, entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed February 24, 1845, is not

a contract in the sense in which that term is used in the Constitution of the United States, Art. 1, § 10. It is a general law upon the subject of banking; it prescribes rules for the government of all the citizens of the State who may choose, within certain limits, to embark in the business of banking, and is as mandatory in its character as any law upon the statute book. These mandates are some of them enforced under the severest penalties known to the law.

Third. This act was made subject to alteration, suspension, and repeal, for, at the time of its enactment, February 24, 1845, there was a general law in full force in Ohio, which was passed March 7, 1842, entitled "An act instituting proceedings against corporations not possessing banking powers and the visatorial powers of courts, and to provide for the regulation of corporations generally," that provided in section nine as follows: "That the charter of every corporation of every description, 'whether possessing banking powers or not,' that shall hereafter be granted by the legislature, shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." Ohio Laws, vol. 40, page 70.

Fourth. The 60th section of the act of February 24th, 1845, provides only a measure of taxation for the time being, and does not relinquish the right to increase the rate as the future exigencies of the State may require.

Fifth. The record shows (pages 24, 25) that the Supreme Court of the State decided nothing more than that the proviso to the act of March 14, 1836, ceased to affect the plaintiff when the power to issue bills for circulation ceased in January, 1843; and that the act of February 24, 1845, contained no pledge on the part of the State not to alter the amount and mode of taxation therein specified. And in so doing, said court has done no more than to give a construction to the statutes of Ohio. With such a construction, this court has always manifested a reluctance to interfere. But more especially will it feel that reluctance when such interference may bring the acts of the State legislature in conflict with the Constitution of the United States.

Mr. Pugh's third and fourth points.

III. The Supreme Court of Ohio rightly construes the statutes.

1. The proviso to the first section of the act "to prohibit the circulation of small bills," passed March 14th, 1836, does not contain any stipulation or promise. It merely exempted such banks as complied with its terms, before a certain day, from the operation of the principal clause. Minis *v.* The United States, 15 Pet. Rep. 445; The Commissioners of Kensington *v.* Keith,

2 Penn. State Rep. 220; The Treasurer of Vermont *v.* Clark, 19 Vermont Rep. 129.

2. The proviso does not operate as a contract, or stipulation, merely because the consent of the banks is invoked. The Cincinnati, Wilmington, and Zanesville Railroad Company *v.* The Commissioners of Clinton County, 21 Ohio Rep. 77; The Cargo of the Brig Aurora *v.* The United States, 7 Cranch, 382.

3. The benefit of the proviso (if construed as a contract) only applied to the plaintiff in error, whilst it was authorized, by its charter, to issue bills or notes for circulation. Hildebrand *v.* Fogle, 20 Ohio Rep. 147; Bradley *v.* The Washington, Alexandria, and Georgetown Steam Packet Company, 13 Pet. Rep. 97; Synder *v.* Leibengood, 4 Penn. State Rep. 308; Washburn *v.* Gould, 3 Story, 162; Case *v.* Cushman, 3 Watts & S. 544; The Commercial Bank *v.* Pleasants, 6 Wharton, 375; Loring *v.* The City of Boston, 7 Metcalf, 409; Robinson *v.* Fiske, 25 Maine Rep. 405; Brown *v.* Slater, 16 Conn. Rep. 192; Porter *v.* Breckenridge, Hardin, 26; Sayre *v.* Peck, 1 Barbour's S. C. Rep, 468, 469. And see 5 Cruise's Digest, 44, 45; Bozoun's Case, 4 Rep. 35; Case of the Abbot of Strata Mercella, 9 Rep. 30; Ford and Sheldon's Case, 12 Rep. 2; The Earle of Shrewsbury's Case, 9 Rep. 46.

4. The sixtieth section of the act "to incorporate the State Bank of Ohio and other banking companies," passed February 24th 1845, provides only a present measure and system of taxation, and does not relinquish, expressly or impliedly, the power of the State to alter the measure, as well as the system, at any future period. The Commonwealth *v.* The Easton Bank, 10 Penn. State Rep. 442; Bank of Pennsylvania *v.* The Commonwealth, 19 Penn. State Rep. 144; Brewster *v.* Hough, 10 New Hampshire Rep. 138; The Richmond Railroad Company *v.* The Louisa Railroad Company, 13 How. Rep. 71; Shorter *v.* Smith, 9 Georgia Rep. 517; Armstrong *v.* The Treasurer of Athens County, 16 Pet. Rep. 281; The Providence Bank *v.* Billings, 4 Ib. 514.

The following cases are distinguishable: Gordon *v.* The Appeal Tax Court, 3 Howard, 133; The Union Bank *v.* The State, 9 Yerger, 490; Johnson *v.* The Commonwealth, 7 Dana, 338; The State *v.* Berry, 2 Harrison, 80; Municipality Number One *v.* The Louisiana State Bank, 5 Louis. Annual Rep. 394; The Mayor of Baltimore *v.* The Baltimore and Ohio Railroad Company, 6 Gill, 288.

Statutes of Ohio, *in pari materia*, to be examined: Act "To tax bank, insurance and bridge companies," passed March 12th, 1831, section 1st, Swan's Statutes, 916, 917. Act "For levying taxes on all property in this State according to its true

value," passed March 2d, 1846, sect. 10th, 44 General Laws, 90, 91. Act "To exempt revolutionary soldiers from taxation," passed February 8th, 1847, 45 General Laws, 51. Act "To exempt from taxation a branch of the New York Methodist Episcopal Church Book Concern in Cincinnati and for other purposes," passed February 17th, 1834, 32 Local Laws, 91. Act "To incorporate The Milan and Richland Plank Road Company," passed January 31st, 1845, section 9th, 43 Local Laws, 51. See, also, The Constitution of Ohio, adopted June 17th, 1851, article first and section second; article twelfth and sections second and third; article thirteenth and section fourth. Constitution of Ohio, adopted November 29th, 1802, article eighth and sections first, eighteenth, nineteenth, twenty-fourth, twenty-seventh, and twenty-eighth. As to the effect of these provisions in construing both the act of March 14th, 1836, and the act of February 24th, 1845, see Rex *v.* Loxdale, 1 Burrow, 447.

5. It does not follow, because the provision was made part of an act to incorporate the State Bank of Ohio and other banking companies, that the design was to create a permanent measure or system of taxation. The Preble County Bank *v.* Russell, 21 Ohio Reports, 313; The Bank of Columbia *v.* Okely, 4 Wheaton, 235; Young *v.* The Bank of Alexandria, 4 Cranch, 397; Crawford *v.* The Bank of Mobile, 7 Howard, 279; The Baltimore and Susquehanna Railroad Company *v.* Nesbit, 10 How. 396.

6. All grants in derogation of common right (including all exemptions from the payment of taxes) must be strictly construed. The Proprietors of the Charles River Bridge *v.* The Proprietors of the Warren Bridge, 11 Peters, 545, 546; The Providence Bank *v.* Billings, 4 Peters, 561; The United States *v.* Arredondo, 6 Peters, 738; Mills *v.* St. Clair County, 8 How. 581; Perrine *v.* The Chesapeake and Delaware Canal Company, 9 How. 185; The Cincinnati College *v.* The State, 19 Ohio Reports, 110; The Richmond Railroad *v.* The Louisa Railroad, 13 How. 81.

IV. The right of taxation is a preeminent and indispensable right, and cannot be so aliened by a mere statute or by any grant (other than a treaty or compact between sovereigns) as to prevent its resumption, by the legislature, whenever the public necessities require. And the legislature is the judge of public necessity in such cases. The West River Bridge Company *v.* Dix, 6 How. 507; Mills *v.* St. Clair County, 8 How. 584, 585; Butler *v.* The State of Pennsylvania, 10 How. 402; The People *v.* The Mayor of Brooklyn, 4 Comstock, 423; The Providence Bank *v.* Billings, 4 Peters, 563; Brewster *v.* Hough, 10 N. Hamp. R. 138; Mack *v.* Jones, 1 Foster, 393; Russell *v.* The

Mayor of New York, 2 Denio, 474; Maleverer *v.* Spinke, 1 Dyer, 36, b; Coates *v.* The Mayor of New York, 7 Cowen, 585; The Brick Presbyterian Church *v.* The City of New York, 5 Cow. 538; Vanderbilt *v.* Adams, 7 Cow. 351, 352. Cases to be examined: The State of New Jersey *v.* Wilson, 7 Cranch, 164; Armstrong *v.* The Treasurer of Athens, 16 Peters, 290; Fletcher *v.* Peck, 6 Cranch, 87; The York and North Midland Railway Co. *v.* The Queen, 1 Ell. & B. 858.

Mr. Chief Justice TANEY. In this case the judgment of the Supreme Court of the State of Ohio is affirmed. But the majority of the court who give this judgment, do not altogether agree in the principles upon which it ought to be maintained. I proceed, therefore, to state my own opinion, in which I am authorized to say my brother Grier entirely concurs.

In 1851, the Legislature of Ohio passed an act "to tax banks and bank and other stocks, the same as other property." The act makes it the duty of the president and cashier of every banking institution having the right to issue bills or notes for circulation annually to list and return to the assessor in the township or ward where the bank is located, the amount of capital and stock at its true value in money, together with the amount of surplus and contingent fund belonging to such institution, upon which the same amount of tax is to be levied and paid as upon the property of individuals. And by the third section of this act the Ohio Life Insurance and Trust Company (the plaintiff in error) was brought within its provisions, and subjected to the payment of a like tax in all the several counties where its capital stock was loaned, according to the amount loaned and the average rate of taxation in each.

The payment of this tax was resisted by the plaintiff in error, upon the ground that the law imposing it impaired the obligation of certain contracts previously made between the State and the corporation.

On the other hand, it was insisted on behalf of the State that the right of taxation cannot be so aliened by mere statute as to prevent its resumption by the legislature whenever the public necessities require; and that the legislature was the judge of the public necessity in such cases.

And further, if it should be held that the Legislature of Ohio had the power to aliene its right of taxation, yet it had not exercised it in this instance; and when the tax in question was levied, there was no previous contract between the State and the corporation by which the State had relinquished the right to impose it.

The company having refused to pay the tax upon the ground

above stated, the defendant in error, who is the treasurer of Hamilton county, in which the corporation is located, instituted proceedings to enforce its collection. And upon final hearing of the parties, the Supreme Court of Ohio decided in favor of the State, and directed the tax to be paid, together with the penalty which the law inflicted for its detention. It is to revise this decree of the State court that the present writ of error is brought.

This brief statement will show that the questions which arise on this record are very grave ones. They are the more important, because, from the multitude of corporations chartered in the different States, and the privileges and exemptions granted to them, questions of a like character are continually arising, and ultimately brought here for final decision. These controversies between a State and its own corporations necessarily embarrass the legislation of the State, and are injurious to the individuals who have an interest in the company. And as the principles upon which this case is decided, will, for the most part, equally apply to all of them, it is proper that they should be clearly and distinctly stated. I proceed to express my own opinion on the subject.

It will be admitted on all hands, that with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories. It follows that they may impose what taxes they think proper upon persons or things within their dominion, and may apportion them according to their discretion and judgment. They may, if they deem it advisable to do so, exempt certain descriptions of property from taxation, and lay the burden of supporting the government elsewhere. And they may do this in the ordinary forms of legislation or by contract, as may seem best to the people of the State. There is nothing in the Constitution of the United States to forbid it, nor any authority given to this court to question the right of a State to bind itself by such contracts, whenever it may think proper to make them.

There are, undoubtedly, fixed and immutable principles of justice, sound policy, and public duty, which no State can disregard without serious injury to the community, and to the individual citizens who compose it. And contracts are sometimes incautiously made by States as well as individuals; and franchises, immunities, and exemptions from public burdens improvidently granted. But whether such contracts should be made or not, is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the Constitution of the

United States, and over which this court has no control. For it can never be maintained in any tribunal in this country, that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than those fixed by the Constitution of the United States, upon the ground that they may make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest, is the foundation of our political institutions.

It is equally clear, upon the same principle, that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the powers and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest. They may confer on them the power to charter banks or other companies, and to exempt the property vested in them from taxation by the State for a limited time during the continuance of their charters, or accept a specified amount less than its fair share of the public burdens. This power may be indiscreetly and injudiciously exercised. Banks and other companies may be exempted, by contract, from their equal share of the taxes, under the belief that the corporation will prove to be a public benefit. Experience may prove that it is a public injury. Yet, if the contract was within the scope of the authority conferred by the constitution of the State, it is like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made, the Constitution of the United States acts upon it, and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed.

This doctrine was recognized in the case of Billings *v.* The Providence Bank, and again in the case of the Charles River Bridge Company. In both of these cases the court, in the clearest terms, recognized the power of a State legislature to bind the State by contract; and the cases were decided against the corporations, because, according to the rule of construction in such cases, the privilege or exemption claimed had not been granted. But the power to make the contract was not questioned. And I am not aware of any decision in this court calling into question any of the principles maintained in either of these two leading cases. On the contrary, they have since, in the case of Gordon *v.* Appeal Tax Court, 3 Howard, 133, been directly reaffirmed.

The question in that case was precisely the same with the present one; that is to say — whether the State had relinquished

its right of taxation to a certain extent, in its charter to a bank? The court held that it had, and reversed the judgment of the State court, which had decided to the contrary. And this opinion appears to have been unanimous — for no dissent is entered.

Again, in the case of the Richmond Railroad Company *v.* The Louisa Railroad Company, 13 Howard, 71 — the question was, whether the State had not, by its charter to the former, contracted not to authorize a road like the latter, which would tend to diminish the number of passengers travelling upon the former between Richmond and Washington. The case therefore in principle was the same with that of the Charles River Bridge *v.* The Warren Bridge; and it was decided on the same ground: that is — that the contract, according to the rule of construction laid down in the Charles River Bridge case, did not extend to such a road as was authorized by the charter to the Louisa Railroad Company. But the opinion of the majority of the court is founded expressly upon the assumption that the legislature might bind the State by such a contract; and the three judges who dissented were of opinion not only that the legislature might bind it, but that it had bound it; and that the charter to the Louisa Railroad Company violated the contract and impaired its obligation. They adopted a rule of construction more favorable to the corporation than the one sanctioned in the Charles River Bridge *v.* The Warren Bridge.

It seemed proper on this occasion to remark more particularly upon this case, and the case of Gordon *v.* The Appeal Tax Court, because the last mentioned case was a restriction upon the taxing power of the State; and the other a restriction upon its power to authorize useful internal improvements — the two together illustrating and confirming the principles upon which the Providence Bank *v.* Billings, and the Charles River Bridge case, were decided.

There are other cases upon the same subject, but it is not necessary to extend this opinion by referring to them. It is sufficient to say, that they will all be found to maintain the same principles with the cases above mentioned, and that there is no one case in which this court has sanctioned a contrary doctrine.

I have dwelt upon this point more at length, because, while I concur in affirming the judgment of the Supreme Court of the State of Ohio, I desire that the grounds upon which I give that opinion should not be misunderstood; for I dissent most decidedly, as will appear by this opinion, from many of the doctrines contained in the opinions of some of my brethren, who concur with me in affirming this judgment. I speak of the opinions they have expressed in the case of the Piqua Bank, as well as in this.

The powers of sovereignty confided to the legislative body of a State are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected. They cannot, therefore, by contract, deprive a future legislature of the power of imposing any tax it may deem necessary for the public service — or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the State. And in every controversy on this subject, the question must depend on the constitution of the State, and the extent of the power thereby conferred on the legislative body.

This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens during the continuance of its charter? The Supreme Court of Ohio, in the case before us, has decided that it did not. But this charter was granted while the constitution of 1802 was in force; and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears, from the acts of the legislature, that the power was repeatedly exercised while that constitution was in force, and acquiesced in by the people of the State. I was directly and distinctly sanctioned by the Supreme Court of the State in the case of the State *v.* The Commercial Bank of Cincinnati, 7 Ohio Rep. 125.

And when the constitution of a State, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive, and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the State courts in the construction of their own constitution and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the State authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the State authorities at the time the contract was made.

It was upon this ground, that the court sustained contracts

made in good faith in the State of Mississippi, under an existing construction of its constitution, although a subsequent and contrary construction given by the courts of the State, would have made such contracts illegal and void. The point arose in the case of Rowan and others *v.* Runnels, 5 How. 134. And the court then said, that it would always feel itself bound to respect the decisions of the State courts, and, from time to time as they were made, would regard them as conclusive in all cases upon the construction of their own constitution and laws; but that it 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 lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other States, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction.

Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a State court would be no protection to a contract, if we were bound to follow the judgment which the State court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law.

It remains to inquire whether the act of 1851 impaired the obligation of any existing contract or contracts with the plaintiff in error.

Before, however, I speak more particularly of the acts of the Legislature of Ohio, which the company rely on as contracts, it is proper to state the principles upon which acts of that description are always expounded by this court.

It has been contended, on behalf of the defendant in error, (the treasurer of the State,) that the construction given to these acts of assembly by the State courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this court always follows the construction given by the State courts to their own constitution and laws.

But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State,

although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature, or of a covenant or agreement by one of its agents acting under the authority of the State.

It is very true that, if there was any controversy about the construction and meaning of the act of 1851, this court would adopt the construction given by the State court. And if that construction did not impair the obligation of the contract as interpreted by this court, there would be no ground for interfering with the judgment. For then the contract, as expounded here, would not be impaired by the State law. But if we were bound to follow not only the interpretation given to the law, but also to the instrument claimed to be a contract, and alleged to be violated, there would be nothing left for the judgment and decision of this court. There would be nothing open which a writ of error or appeal could bring here for consideration and judgment; and the duty imposed upon this court under this clause of the Constitution would, in effect, be abandoned.

I proceed, therefore, to examine whether there is any contract in the acts of the legislature relied on by the plaintiff in error, which deprives the State of the power of levying upon the stock and property of the company its equal share of the taxes deemed necessary for the support of the government.

The company was chartered by the Legislature of Ohio on the 12th of February, 1834.

The purposes for which it was incorporated, and the character of the business it was authorized to transact, are defined in the 2d section. It confers upon the company the power — 1. To make insurance on lives. 2. To grant and purchase annuities. 3. To make any other contracts involving the interest or use of money and the duration of life. 4. To receive money in trust, and to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description as may be committed to them by any person or persons whatsoever, or may be transferred to them by order of any court of record whatever. 6. To receive and hold lands under

grants with general or special covenants, so far as may be necessary for the transaction of their business, or where the same may be taken in payment of their debts, or purchased upon sales made under any law of the State, so far as the same may be necessary to protect the rights of said company, and the same again to sell, convey, and dispose of. 7. To buy and sell drafts and bills of exchange.

In addition to these powers, it was authorized by the 23d section of the charter to issue bills or notes until the year 1843 — subject to certain restrictions and limitations therein specified.

And the 25th section provides that no higher taxes shall be levied on the capital stock or dividends of the company, than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State.

The last section of the charter reserved the right to the State to repeal, amend, or alter it after the year 1870.

These are the only provisions material to the question before us.

At the time this charter was granted the act of March 31, 1831, was in force, which imposed a tax of five per cent. on the dividends declared by any banks, insurance, or bridge companies.

Subsequently, on the 14th of March, 1836, after this company was incorporated, another law was passed to prohibit the circulation of small bills; and by this law a tax of twenty per cent. was imposed upon dividends, with a proviso, "That should any bank, prior to the 4th of July next following, with the consent of its stockholders, by an instrument of writing under its corporate seal, addressed to the auditor of the State, surrender the right conferred by its charter to issue or circulate notes or bills of a less denomination than three dollars, after the 4th of July, 1836; and any notes or bills of a less denomination than five dollars after the 4th of July, 1837; then the auditor of the State should be authorized to draw on such banks only for the amount of five per cent. upon its dividends declared after the surrender.

As the plaintiff in error had the usual banking power of issuing notes and bills for circulation until 1843, it justly considered itself within the provisions of this law, and filed the surrender required; and ever since, until 1851, has paid the tax of five per cent., and no more, upon the dividends it declared. The act of 1836 was repealed in 1838, and permission again given to the banks to issue small notes and bills; but it does not appear that the Life Insurance and Trust Company ever availed itself of the privilege. Afterwards, in 1845, another law was passed incorporating the State Bank of Ohio, and such banking com-

panies as might afterwards organize themselves under and according to the provisions of that act. And the 60th section of this law provided that each banking company organized under that act should pay, semiannually, six per cent. on its profits, which should be in lieu of all taxes to which such companies, or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

Upon these acts of assembly the plaintiff in error defends itself against the tax imposed by the act of 1851, upon two grounds:

1. That by the act of 1836 the State agreed to relinquish the right to impose a higher tax than five per cent. upon the dividends declared by the corporation, during the continuance of its charter, upon the surrender of its right to issue small bills or notes.

2. That if this proposition is decided against it, yet, as the act of 1845 established a general banking system, by which the State agreed to receive from each bank organized under it, six per cent. upon its profits, in lieu of all taxes to which it would otherwise be subject, the State could not impose a higher tax upon this company under the contract contained in the 25th section of its charter hereinbefore mentioned.

The rule of construction, in cases of this kind, has been well settled by this court. The grant of privileges and exemptions to a corporation are strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken. This is the rule laid down in the case of Billings *v.* The Providence Bank, and reaffirmed in the case of the Charles River Bridge Company.

Nor does the rule rest merely on the authority of adjudged cases. It is founded in principles of justice, and necessary for the safety and well-being of every State in the Union. For it is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provison in every bill upon which he is called on to act.

On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money. And if they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see that the right or exemption they intend to claim is granted in clear and unambiguous language. The authority which this court is bound under the Constitution of the United States to exercise, in cases of this kind, is one of its most delicate and important duties. And if individuals choose to accept a charter in which the words used are susceptible of different meanings — or might have been considered by the representatives of the State as words of legislation only, and subject to future revision and repeal, and not as words of contract — the parties who accept it have no just right to call upon this court to exercise its high power over a State upon doubtful or ambiguous words, nor upon any supposed equitable construction, or inferences made from other provisions in the act of incorporation. If there are equitable considerations in their favor, the application should be made to the State and not to this court. If they come here to claim an exemption from their equal share of the public burdens, or any peculiar exemption or privilege, they must show their title to it — and that title must be shown by plain and unequivocal language.

Applying this rule of construction to the laws hereinbefore referred to, it is evident that the first ground of defence cannot be maintained.

When the act of 1836 was passed the State had an undoubted right, if it deemed proper, to impose the tax of twenty per cent. upon the incorporated companies therein mentioned, and to include the Life Insurance and Trust Company among them. Indeed the right of the State in this respect is not disputed, and the argument on behalf of the plaintiff in error upon this point necessarily admits it. And we see nothing in the proviso which can fairly be construed as a contract on the part of the State that it would not afterwards change the policy which that law was intended to carry into operation; nor any thing like a pledge that the State would not thereafter impose a tax of more than five per cent. upon the dividends of such banks as complied with the specified condition. The law is not a proposition addressed to the banks, but an ordinary act of legislation addressed to its own officer, and prescribing his duty in levying and collecting taxes from the corporations it mentions. It was the policy of the State, at that time, to infuse more gold and silver in the circulating currency, and to put an end to the circulation of small notes. The act of 1836 was manifestly intended to accomplish that object And the tax is accordingly so regulated as to make

it the interest of the banks to abstain from issuing them. But the insolvency of the Bank of the United States, and many of the State banks, and the general stoppage of specie payments, which happened soon afterwards, made it impossible to carry out the policy which the State deemed best for the public interests. The prohibition to issue small notes was therefore repealed in 1838, and the privilege of issuing them again restored to the banks. Now, without resorting to the established rule of construction, above stated, no fair interpretation of the words of these laws can make them other than ordinary acts of legislation, which the State might modify or change according to the necessities of the public service. It would be straining the words beyond their just import and meaning to construe the reduced taxes levied, while the banks were prohibited from issuing small notes, as a perpetual contract not to levy more, although the privilege for which the reduction was intended, as an equitable compensation, should be restored. If it could be regarded as a contract, it evidently meant nothing more than that the tax should not be raised while the banks were prohibited from issuing small notes.

But the subject-matter of these laws shows that no contract could have been intended. Every contract of this kind presupposes that some consideration is given, or supposed to be given, by the corporation — that the community is to receive from it some public benefit, which it could not obtain without the aid of the company. But in this instance the consent or coöperation of this company was not necessary to enable the State to carry out the policy indicated by the act of 1836. It had indeed at that time the power to issue notes and bills for circulation. But the grant of this right to the corporation, in general terms, was not a surrender of the right of the State to prescribe by law, the lowest denomination for which notes or bills should be allowed to circulate. No such surrender is expressed, and none such therefore can be implied or presumed. For it is not only the right, but the duty of the State to secure to its citizens, as far as it is able, a safe and sound currency, and to prevent the circulation of small notes when they become depreciated, and are a public evil. And the community have as deep an interest in preserving this right undiminished, as they have in the taxing power. And like the taxing power it will not be construed to be relinquished, unless the intention to do so is clearly expressed. The general power to issue notes and bills, without any express grant as to small notes, is subordinate to the power of the State to regulate the amount for which they may be issued.

Moreover, the power of the Life Insurance and Trust Company to issue notes or bills, of any description, terminated by the

express provision in its charter in 1843. And if the acceptance of the condition contained in the proviso in the act of 1836 made that law a contract on the part of the State, the reduced tax was the consideration for the surrender of the privilege. It surrendered the privilege until 1843. It had nothing to surrender after that time. And of course there was nothing for which the State was to give an equivalent, or for which the company had even an equitable claim to require compensation. It would be a most unreasonable construction of such an agreement to say, that in consideration that the company would abstain from embarrassing the community with a small note circulation for seven years, the State contracted not only to exempt it from its equal share of taxation during the time it abstained, but also for twenty-seven years afterwards, during which period the corporation would be exercising every privilege originally conferred on it by its charter, and giving no equivalent for the exemption. Before such a conclusion can be arrived at, the rule hereinbefore stated must be reversed, and every intendment made in favor of the exclusive privileges of the corporation, and against the community; and that intendment, too, must be pushed beyond the fair and just construction of the language used, or the subject-matter and object of the agreement.

In every view of the subject, therefore, the defence taken under the act of 1836 cannot be maintained.

The second proposition of the plaintiff in error is equally untenable.

The contract with this company in relation to taxation is contained in the 25th section of the charter hereinbefore set forth. Its obvious meaning is, that the tax upon this company should be regulated by the taxes which the policy or the wants of the State might induce it to impose by its general laws upon banking institutions. And in the legislation of Ohio, the words "banking institutions" or "banks" appear always to be confined to corporations which were authorized to issue bills or notes for circulation as currency. This company, therefore, was to be subject to the taxes then levied, or which its policy or necessities might afterwards induce it to levy, on banking institutions. The tax is not to be regulated by any special contract that the State had made, or might afterwards make, with a particular bank or banks. Nor is there any pledge on the part of the State that it will not afterwards enter into such contracts, and reserve in them a higher or lower rate of interest than that prescribed by its general laws. There is no provision in relation to such contracts contained in its charter. Its taxes are to be raised or lessened as the legislature may from time to time prescribe in cases of banks where no special contract in-

tervenes to forbid it. This, in my opinion, is the true interpretation of the words used.

At the time the charter was granted, the act of March 12, 1831, was in force, which imposed a tax of five per cent. on the dividends of banks, insurance, and bridge companies. Of course, the plaintiffs in error were subject to that tax, and no more, while the law of 1831 continued in force; and it was not affected by any special contracts which the State had previously made. And it would have been liable to the tax of twenty per cent. imposed by the general act of 1836, if it had not complied with the condition in the proviso. But having complied, it remained, like other banking institutions which had no special contract, subject to the tax of five per cent.

Then came the act of 1845, which incorporated the State Bank, and authorized individuals to form banking companies in the manner and upon the terms therein specified. The 60th section provided that the banking companies organized under it should each pay, semiannually, six per cent. on its profits, which sum should be in lieu of all taxes to which the company or stockholders would otherwise be subject. It will be observed that this provision does not extend to all the banks in the State, but is, in express terms, confined to those which should be organized under that act of assembly; that is to say, to such banks only as should be organized in the manner authorized by that law, and become liable to all the restrictions, provisions, and duties prescribed in it.

The court has already decided at the present term that the State has, by this section, relinquished the right to impose a higher tax than the one therein mentioned, upon any bank organized under that law. But that decision does not affect this case. For this company was not organized under the act of 1845, and is not therefore embraced by the 60th section. It remained under the regulation of the general law, and was still subject to a tax of five per cent. on its dividends, and nothing more. It was not liable to the increased tax of six per cent. upon profits levied upon these banks. For that tax was the result of a special agreement, and not of the repeal of former laws. And so it appears to have been understood and construed by the parties interested. The plaintiff in error continued to pay five per cent. on its dividends; while the banks organized under the act of 1845, paid the increased tax of six per cent. on their profits. Neither was the duration of its charter shortened. It still was to continue until 1870, while the corporate existence of these banks was to terminate in 1866. Nor was it subject to the restrictions, limitations, or duties imposed upon them, when they differed from those of its own charter.

This being the case, there is no reason why the tax to be paid by the plaintiff in error should not be regulated by the general rule prescribed by the act of 1851. It was regulated by the general act of 1836, until this law was passed. Its tax was then lower than that levied on the banking companies organized under the act of 1845. And, as the special contract on which these banks were chartered did not apply to this corporation before the act of 1851, we do not see upon what ground it can be applied afterwards. As the tax levied on the Life Insurance and Trust Company was regulated by the general rule before, it would seem to follow that it should continue to be so regulated, as there is nothing in that law to alter its original charter. The increased amount of the tax can make no difference.

It is said, however, that when the act of 1851 was passed, there was no solvent bank in the State except those brought into existence by the act of 1845; that those previously established had all failed, and consequently there was no banking institution upon which the increased tax could operate. There is some difference, as to this fact, between the counsel. But I do not deem it material to institute a particular inquiry upon the subject. The provisions of the act of 1851 are general, and expressly apply to all banks then in existence, if any, or which have since been established, unless they were exempted from its operation by contract with the State. And it is by this general rule or policy that this company is bound by its charter to abide.

Besides, it has been stated in the argument, and seems to have been admitted, that in 1845 there was no banking institution in the State upon which a tax was levied. They had all, it is said, stopped payment and made no dividends, and consequently no tax was paid. And this fact was strongly urged in the case of the Piqua Branch of the State Bank of Ohio against Jacob Knoop, Treasurer, in order to support the construction of the contract which has been sanctioned by the court. Yet the fact that there was no bank then in existence paying the tax, did not withdraw the Life Insurance and Trust Company from the operation of the general law, nor subject it to the increased taxation of the act of 1845.

Again it is said, that forty or fifty banks were organized under the act of 1845, and that that act formed the general banking system of the State; and the rule of taxation then prescribed ought, therefore, to be applied to this corporation, under the terms of its charter. But, as I have already said, the charter to the Life Insurance and Trust Company does not prohibit the State from granting charters, under any special limitation as to

taxation, which it may deem advisable and for the public interest. And if it may grant one, it may grant as many as it may suppose the public interest requires, upon the same or upon different conditions from each other. The State has not contracted that this company shall have the benefit of all or any of such agreements, or shall pay only the lowest tax levied on a bank, or the tax levied on the greater number of them. It has agreed that it shall have the benefit of its general regulations and laws in this respect, but not of its special contracts. And when the owners of property, vested in the stocks of a corporation, come here to claim a privilege or franchise, which exempts them from their equal share of the public burdens borne by the rest of the community, they are entitled to receive what is expressly or plainly granted to them, and nothing more.

Upon the whole, I am of opinion that the act of 1851 does not impair the obligation of any contract with the plaintiff in error, and the judgment of the Supreme Court of Ohio ought therefore to be affirmed.

Mr. Justice CATRON.

I stated my views as to the character and effect of the sixtieth section of the act of 1845, in the case of The Piqua Bank *v.* Knoop; there I came to the conclusion that no restraint was intended to be imposed on a future legislature to impose different and additional taxes on the banks to which the act applies, if that was deemed necessary for the public welfare.

2d. My conclusion, also, was in the above case, that if such restraint had been attempted, it was inoperative for want of authority in a legislature to vest in a corporation by contract, to be held as a franchise and as corporate property, a general political power of legislation, so that it could not be resumed and exercised by each future legislature. That a different doctrine would tend to sap and eventually might destroy the State constitutions and governments; as every grant of the kind, to corporations or individuals would expunge so much of the legislative power from the State constitution as the contract embraced; and if the same process was applied to objects of taxation, first one and then another might be exempted, until all were covered, and subject to the same immunity, when the government must cease to exist for want of revenue.

3d. That the constitution of Ohio, of 1802, forbid such tying up of the hands of future legislatures acting under its authority, it being so construed by her own courts, whose decisions we were bound to follow. Nor has any law or decision of a court in Ohio construed its late constitution of 1802 in this regard, until the decisions, lately made on the tax laws here in controversy, settled its true meaning.

These principles will equally apply in this case as they did in that of The Piqua Bank *v.* Knoop; even admitting that the sixtieth section of the act of 1845 is in effect and fact a general provision applicable to the existing banks of Ohio, and embraces the Insurance and Trust Company.

It is proper that I should say, my object here is not to express an opinion in this case further than to guard myself against being committed in any degree to the doctrine that the sovereign political power is the subject-matter of a private contract that cannot be impaired or altered by a subsequent legislature; that such act of incorporation is superior to subsequent State laws affecting the corporators injuriously; and that the corporation holds its granted franchises under the Constitution of the United States, in effect, and holds and maintains the portion of sovereign power vested in it by force of the authority of this court: thus standing off from and above the local State authorities, political and judicial, and setting them at defiance, as has been most signally done in one instance, brought to our consideration from Ohio at this term, in the case of Deshler *v.* Dodge. There the tax collector distrained nearly forty thousand dollars' worth of property from four of these banks claiming exemption. On the same day an assignment was made by the four banks of the property in the collector's hands to Deshler, a citizen of New York. He sued out a writ of replevin in the Circuit Court of the United States, founded on these assignments. The marshal of that court, by its process, retook the property from the tax-collector's hands, and delivered it to the non-resident assignee, as the legal and true owner, who now holds it.

No other or further step is required to secure our protection to corporations setting up claims to exemption from State laws. I have become entirely convinced that the protection of State legislation and independence, supposed to be found in a liberal construction of State laws in favor of the public and against monopolies, as asserted in the Charles River Bridge case, is illusory and nearly useless, as almost any beneficial privilege, property, or exemption, claimed by corporations or individuals in virtue of State laws, may be construed into a contract, presenting itself as unambiguous and manifestly plain to one mind, whereas to another it may seem obscure, and not amounting to a contract. No better example can be found than is here furnished.

When I take into consideration this fact, and, in connection with it, the unparalleled increase of corporations throughout the Union within the last few years; the ease with which charters, containing exclusive privileges and exemptions are obtained; the vast amount of property, power, and exclusive benefits, prejudicial to other classes of society that are vested in and held

by these numerous bodies of associated wealth, I cannot but feel the grave importance of being called on to sanction the conclusion that they hold their rights of franchise and property under the Constitution of the United States, and practically under this court, and stand above the State government creating them.

My opinion is, that the judgment of the State court should be affirmed for the reasons here suggested, and stated by me at large in the case of the Piqua Bank *v.* Knoop.

Mr. Justice DANIEL.

In the conclusion adopted by the opinion of the court, that the judgment of the Supreme Court of Ohio should be affirmed, I entirely concur, but from the reasoning by which the court has reached its conclusion I am constrained to dissent. I never can believe in that, to my mind suicidal doctrine, which confers upon one legislature, the creatures and limited agents of the sovereign people, the power, by a breach of duty and by transcending the commission with which they are clothed, to bind forever and irrevocably their creator, for whose benefit and by whose authority alone they are delegated to act, to consequences however mischievous or destructive. The argument of the court in this case leading, in my apprehension, to the justification of abuses like those just referred to, I must repudiate that argument, whilst I concur in the conclusion that the decision of the Supreme Court of the State of Ohio should be affirmed, both for the reasons assigned in support of their judgment by that court, and for the further reason that this court cannot rightfully take cognizance of the parties to this controversy.

Mr. Justice CAMPBELL.

My opinion is, that the act of the general assembly of Ohio, entitled "An act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this State, of March, 1851," does not impair the obligation of any contract contained in the act of incorporation of the plaintiff, or in any other act of the general assembly of the State with which the plaintiff is concerned.

I concur in the opinion of the chief justice concerning the interpretation of the statutes of Ohio involved in this case, and the doctrines of interpretation applicable to these and statutes of a similar description, and in the conclusions to which th conduct.

In the decision of the cases which have been brought to this court from the Supreme Court of Ohio, I have not found it necessary to declare an opinion upon the powers of the general

assembly to modify or to repeal an act of incorporation like the one held by these banking institutions; nor of the limitations upon the general assembly in administering the power of taxation — much less to consider the powers of the people of Ohio, to reform all the proceedings and acts of their government, or whether those powers of the people can be controlled in their exercise by any jurisdiction or authority lodged in this court.

The questions pressing upon us involve interests of such a magnitude, and consequences so important, that I feel constrained to stop at the precise limit at which I find myself unable to decide the case at law or equity before me — that being the limit of my constitutional power and duty.

I file this opinion merely to say, that I do not concur in the opinion which has been delivered on the points wherein any of these questions are directly or indirectly considered.

Mr. Justice McLEAN.

The language of the 25th section of the charter of the Ohio Life Insurance and Trust Company, is, "No higher taxes shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in this State."

This charter was passed the 12th of February, 1834. It was accepted by the company, a large amount of stock was subscribed and paid, and the bank was organized and went into operation.

The 2d section gave power to the company, 1. To make insurances on lives. 2. To grant and purchase annuities. 3. To make any other contracts involving the interest or use of money, and the duration of life. 4. To receive money in trust, and to accumulate the same at such a rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description, as may be committed to them by any person or persons whatsoever, or may be transferred to them by order of any court of record whatever. 6. To receive and hold lands under grants, with general or special covenants, so far as the same may be necessary for the transaction of their business, or where the same may be taken in payment of their debts, or purchased upon sales made under any law of this State, so far as the same may be necessary to protect the rights of the said company, and the same again to sell, convey, and dispose of. 7. To buy and sell drafts and bills of exchange.

The capital stock of the corporation was fixed at two millions of dollars, the whole of which was required to be invested in bonds or notes drawing interest, not exceeding seven per

cent. per annum, secured by unencumbered real estate within the State of Ohio, of at least double the value in each case, of the sum so secured.

By the 23d section it is declared that, "the company shall have power until the year 1843, to issue bills or notes to an amount not exceeding twice the amount of the funds deposited with said company, for a time not less than one year, other than capital; but shall not, at any time, have in circulation an amount greater than one half the capital actually paid in and invested in bonds or notes secured by an unencumbered real estate, agreeably to the 7th section of this act, nor a greater amount than twice the amount of deposits, &c.

The section under which the claim to a limited taxation is maintained, is only made certain by reference to the taxes levied on the capital stock or dividends of other incorporated banking institutions. And more satisfactorily to arrive at this result, it may be proper to see what construction has been given to the section by the officers of State, whose duty it was to assess the tax and collect it.

The act of the 12th of March, 1831, imposed a tax on banks of five per cent. upon the amount of their dividends. This tax was paid by the Trust Company until the act of the 14th of March, 1836, called the act to prohibit the circulation of small bills. Under this act the auditor was authorized to draw in favor of the Treasurer of State for twenty per cent. on the dividends of the banks, provided, if they should agree in the form required to relinquish the right under their charters to issue five dollar bills, and three dollars, the auditor should draw only for five per cent.

The Trust Company acceded to the proposal, and filed the necessary papers relinquishing the right to issue the small bills as required. But this made no difference in the amount of the tax paid by the bank.

The tax continued the same rate of five per cent. on the dividends of banks until the act of 1845 was passed, containing the following compact: "Each banking company, organized under this act, or accepting thereof, and complying with its provisions, shall semiannually, on the days designated in the fifty-ninth section, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding; which sum or amount, so set off, shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject," &c.

As the power of the State to exempt property from taxation, under a compact which binds it, has been discussed somewhat

at large in the case of the Piqua Branch Bank *v.* Knoop, at this term, nothing farther need now be said on the subjects there examined; but the point, whether there is a contract which should exempt the Trust Company Bank from general taxation, must be considered. There are two grounds under which this bank claims an exemption.

1. Under its original charter.

2. Under the small note act of 1836. The second I shall not consider.

The twenty-fifth section in the charter guarantees that "no higher taxes shall be levied on the Trust Company than on the capital or dividends of incorporated banking institutions in the State." Now, to make this provision specific as to the amount of the tax, the other banking institutions of the State to which the section refers, must be ascertained.

Some doubt may arise, whether the institutions referred to were such as were existing at the time the charter was granted, or to banks subsequently taxed. As the words in the section, in relation to taxation of the bank, are, "than are or may be levied," it would seem to embrace the future law of taxation, as well as the one in force at the date of the charter. Taking this as the true construction, the tax of five per cent. on the dividends was properly assessed under the act of 1831 and 1836.

At the time the charter of this company went into operation, some of the banks were taxed four per cent. on their dividends; but as the greater number were taxed five per cent. on their dividends, the Auditor of State drew for five. This seemed to be a reasonable construction of the twenty-fifth section, as it refers to a general rule of taxation, and not to a particular one. The tax shall not be higher than that on the incorporated banks of the State.

After the act of 1845, the Trust Company was chargeable with six per cent. on the dividends, deducting expenses and ascertained losses, on the ground that a very large proportion of the banks of the State were so taxed; and that would seem to come within the intention of the Trust Company charter. Without doing violence to the language of the twenty-fifth section, it cannot be said to embrace the highest rate of taxation nor the lowest; that rate which would include the greater number of banks, would seem to be just. And that was the construction given by the auditor before the tax law of 1851.

The act of the 12th of March, 1851, imposed a much higher tax on banks, by assessing it on all the property of the banks, instead of the six per cent. on the dividends. This embraced the banks chartered under the act of 1845, as well as all others. And if this law had been held to be constitutional, it would, undoubtedly, apply to the Trust Company.

On the 21st of March, 1851, the same day the above tax law was passed, an act to authorize free banking was enacted, which continued in force until it was repealed by the adoption of the constitution. Under this law it is ascertained, from the report of the auditor, that thirteen banks, or about that number, were organized. There were about fifty banks organized under the act of 1845. Four of the old banks were not included in this organization. Now, all the banks organized under the act of 1845, as we have held in the Piqua Branch Bank case, were not subject to a higher tax than six per cent. on their dividends.

At the time the tax law of 1851 was made to operate on the Trust Company, there does not appear to have been a bank in the State on which such tax could be assessed. There were, it is believed from the report of the Auditor of State, thirteen banks organized under the Bank Act of 1851, passed on the same day as the Tax Act; but not one of those banks was in operation until some time after the tax took effect on the Trust Company. This Bank Act was repealed by the new constitution so as to arrest the further organization of banks under it. Now, from these facts the question arises, whether the twenty-fifth section shall be held to apply to the fifty banks in operation under the act of 1845, or to the thirteen banks which were afterwards organized under the act of 1851. It is true that the act of 1851, imposing the tax, was intended to affect all the banks, and especially the Trust Company, but that act being held to be unconstitutional, cannot be considered as governing the twenty-fifth section of the Trust Company charter. The provision in that section, that "no higher duties shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State," must refer to a legal taxation; and if this be the correct interpretation, then, at the time this tax law was passed, there was not a bank in the State on which the tax could take effect. The twenty-fifth section referred to incorporated institutions and not to contemplated incorporated banks. Such a construction must be given to the section, if it have any effect. This reference, embracing the taxation under the act of 1845, gives to the Trust Company charter the same effect as if the sixtieth section of the act of 1845 had been embodied in it. By reference it constitutes a part of the Trust Company charter, and it would seem to me that nothing short of this gives to the twenty-fifth section the effect it was intended to have.

That section has been relied on by the bank as a pledge or compact, not complete within itself as to the amount of the tax; but by reference to existing incorporated banks, embracing

the tax imposed upon them as the tax intended to be applied to the Trust Company.

In this view this section is made certain, and contains all the requisites of a contract. The same certainty would make good a grant for land. And this is sufficient. The restriction of the power of the Legislature of Maryland, in regard to taxing the banks of that State, was made out by construction as clearly and as satisfactorily as if it had been expressed in words.

Would any one contend that the Legislature of Ohio could tax the Trust Company under its charter, without any reference to existing incorporated banks? This was done by the tax law of 1851. But the legislature may have supposed that law would operate upon all banks in the State. As that law cannot so operate, this tax on the Trust Company then should be considered as taxing the Trust Company without reference to any existing banks, but to those which might or might not be organized under the act of 1851. This, it seems to me, is in violation of all sound rules of construing the twenty-fifth section.

The Supreme Court of the State considered this charter of the Trust Company as resting on the same footing as the other banks. In the discussion of the subject the sixtieth section of the act of 1845 was examined. They rightly considered that section as applying, by reference, to that company; and, in this respect, I entirely agree with them. I think the Trust Company stands upon the same basis, and should have the same judgment applied to it, as was applied to the banks under the act of 1845.

In the argument of the counsel against the Trust Company Bank, it was insisted that the rule which is to determine the amount of taxation, is found in the banking companies under the act of 1851, and not under the act of 1845. And this is founded chiefly on the fact that the act of 1851 was a general law, and imposed a tax upon all the banks of Ohio. This argument would be unanswerable, if the existing banks were subject to the tax law of 1851. But, under our decision, that law has no operation on the existing banks; and this fact was not considered by the counsel. The decision in the Piqua Bank case has taken this ground from the counsel. For they did not, in any part of their argument, contend that the tax could apply to the Trust Company as "incorporated banks," when no such banks were incorporated. This would seem to be in violation, not only of the words of the 25th section, but of the clear import of that section.

Neither the supreme court of the State nor the counsel relied upon such an argument. The court of the State and the counsel in the Trust Company case, discussed the 60th section

of the act of 1845, as by reference, constituting a part of its charter. And this is the true question in the case.

The privilege of issuing bills of circulation, which terminated in 1843, can have no effect upon the question of taxation. That company still exercised, under its charter, its banking powers as a bank of deposit, and did a much larger business than any bank of the State. After 1843, as before that period, its dividends were taxed as the other banks. It was in fact a bank, and discounted, and was the principal bank in the State. These facts appear from the taxes paid to the auditor, which constitute a part of the record.

In the argument it is assumed that this bank is taxed at the rate only at which individuals are taxed. From the facts before us, I think there is a mistake in this statement.

The capital of this bank is stated in the charter to be two millions of dollars. From the record it appears that eight per cent. is the average dividend declared. This would give one hundred and sixty thousand dollars, as dividend, per annum. From the report of the auditor of Ohio I observe the taxes charged against the Trust Company, including the penalties incurred for that year, amounts to the sum of $108,477.85. This sum, deducted from the dividends for the year, will leave only the sum of $51,523 to be distributed among the stockholders. This would give to them little more than two and a half per cent. on their capital. But if the bank had paid the tax, without incurring any penalty, it would have amounted to a sum not much below seventy thousand dollars. This would take nearly one half of the profits of the year. This result must convince any one that there must be some error in the statement, that this bank is taxed no more than property is taxed in the hands of individuals. No free people would pay nearly one half the profit of a large concern, in taxes. But I think this result may be accounted for.

The capital of this bank is loaned at seven per cent., and distributed among the counties of the State. Funds are received on deposits for which four per cent. per annum, or a higher rate of interest is paid. The bank having the general confidence of business men, its deposits are large, the notes payable to the bank, bills of exchange, &c., are all assessed at their face, as capital, and also, it is supposed, all moneys on deposit. From these no deduction is made on account of debts due to depositors or to other persons, as the law requires, in assessing the personal property of an individual. No trust company, organized as this company is organized, can do business under such a pressure of taxation.

This bank was organized when the currency of Ohio was

deranged, and embarrassments were general throughout the country. The general bankrupt act followed, after the lapse of some years. The agency of the Trust Company Bank, in distributing its capital in every county in the State, as required by its charter, conduced to correct the evils of a vitiated currency in the State; and, in that respect, has continued to exercise a salutary influence over its circulation. These considerations, I am aware, have nothing to do with the constitutional question in the case, and I only advert to them in answer to the argument that this bank has no ground of complaint, as it is taxed on its property as if the property were in the hands of an individual.

Mr. Justice WAYNE dissented from the judgment of the court.

Mr. Justice CURTIS.

I dissent from the judgment of the majority of the court in this case. I consider the twenty-fifth section of the charter of the company to be a contract by the State with the corporation, that the rate of taxation of this company shall not at any time be higher than the rate of taxation actually and legitimately imposed on banking institutions; that this contract is not complied with by passing an act to tax banks, which could not, and did not operate, in point of fact, to tax the banking institutions of the State; that what was bargained for and granted was not conformity to an inoperative general law, but conformity to the actual and legal rate of taxation of banks for the time being; and consequently, as when the tax in question was levied, the banking institutions existing in the State were not subject to the law under which the Life and Trust Company was taxed, and were not liable to pay the rate of taxation imposed on that company, the obligation of the contract of the State to impose on the Life and Trust Company no higher taxes than are or may be imposed on banking institutions, has been impaired; because when this tax was imposed it was a higher tax than was or could be legitimately imposed on the then existing banking institutions of the State. I do not go into an extended examination of this subject, because it involves only a construction of this particular contract, and though important to the parties, is not of general interest. Upon the other questions involved in the case, namely, as to the power of the legislature of Ohio to make a contract fixing the rate of taxation of certain property for a term of years, — as to the duty of this court to expound the contract whose obligation is alleged to be impaired — and the propriety of accepting the construction of the

constitution of the State which had been practised on by all the branches of its government, and acquiesced in by the people for many years, when the contract in question was made, I fully concur in the views of the chief justice, as expressed in his opinion.

Mr. Justice NELSON concurs with Mr. Justice CURTIS.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the State of Ohio, for Hamilton county, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the judgment and decree of the Supreme Court of Ohio, in this cause as remitted to the District Court of the State of Ohio for Hamilton county, and contained in the transcript of the record filed in this cause, be and the same is hereby affirmed, with costs, and interest at the same rate per annum that similar judgments or decrees bear in the courts of the State of Ohio.

LOUIS D. GAMACHE, SAMUEL AND LEONORE GAMACHE, BY GUARDIAN, WILSON PRIMM, LOUIS PRIMM, JOHN CAVENDEN, AND ABBY P. TRUE, PLAINTIFFS IN ERROR, *v.* FRANCOIS X. PIQUIGNOT, AND THE INHABITANTS OF THE TOWN OF CARONDELET.

In 1812, Congress passed an act (2 Stat. at L. 748) entitled "An act making further provision for settling the claims to land in the territory of Missouri." It confirmed the titles to town or village lots, out lots, &c., in several towns and villages, and amongst them the town of Carondelet, where they had been inhabited, cultivated, or possessed, prior to the twentieth day of December, 1803.

In 1824, Congress passed another act, (4 Stat. at L. 65,) supplementary to the above, the first section of which made it the duty of the individual owners or claimants, whose lots were confirmed by the act of 1812, to proceed within 18 months to designate their lots by proving cultivation, boundaries, &c., before the recorder of land titles. The third section made it the duty of this officer to issue a certificate of confirmation for each claim confirmed, and furnish the surveyor-general with a list of the lots so confirmed.

This list was furnished in 1827.

Afterwards, in 1839, another recorder gave a certificate of confirmation; an extract from the registry showing that this second recorder entered the certificate in 1839; and an extract from the additional list of claims, which addition was that of a single claim, being the same as above.

These three papers were not admissible as evidence in an ejectment brought by the owners of this claim. The time had elapsed within which the recorder could confirm a claim.

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

It was an action in the nature of an ejectment brought by the plaintiffs in error, for the recovery of a tract of land described in the declaration as survey No. 120 of the out lots and common field lots of the village of Carondelet.

The substance of the two acts of Congress of 1812 and 1824 is given in the caption of this report, and need not be repeated.

Upon the trial, the plaintiff offered the three following pieces of evidence, all of which were rejected by the court. There was much other evidence offered both by the plaintiffs and defendants; but as the opinion of this court turned chiefly upon the propriety of this rejection, the other pieces of evidence, and instructions of the court founded thereon, will be omitted. It will be perceived that each one of the three purports to derive its efficacy from the certificate of Mr. Conway, in 1839.

The plaintiffs then offered in evidence the following certificate of confirmation of the recorder of land titles of Missouri, as follows, to wit: (Indorsed on the outside "Jno. Bte. Gamache, sen., 6 by 40 arpens, field of Carondelet. Fees $1, paid.") John Baptiste De Gamache, sen., or his legal representatives, claims an out lot, adjoining the village of Carondelet, containing six arpens in front by forty in depth, bounded, northerly, by the common fields; eastwardly, by the Mississippi River (leaving a tow between it and the river); south, by an out lot claimed by the legal representatives of Gabriel Constant, (lalmond,) sen., an[d] west by the land formerly the property of Antoine Riehl.

John Baptiste Maurice Chatillon, being duly sworn, says he knows the land claimed, and that he is about sixty-six years of age, and that he was born in Kaskaskia, and A. D. seventeen hundred and eighty-eight he removed from Ste. Genevieve to Carondelet, where he has resided ever since; that A. D. seventeen hundred and ninety-seven or ninety-eight he was employed by John Baptiste Gamache, sen., to fence in a field which said Gamache had been clearing, and working for about two years within this field lot; and he, this respondent, says, he did fence in about three arpens of this land, and did build a cabin on the same at this time; and this deponent further says that Gamache did cultivate this same field for five or six years until his death;

and this deponent further says he always understood this land was owned by said John Baptiste Gamache.

his
JOHN BAPTISTE MAURICE ⋈ CHATILLON.
mark.

Sworn to before me, July 6th, 1825.

THEODORE HUNT, *Recorder L. T.*

Translated to witness. J. V. GARNIER.

RECORDER'S OFFICE,
ST. LOUIS, Missouri, *22d January*, 1839.

I certify the foregoing within to be truly copied from book No. 2, page 46, of the minutes of the proceedings of the recorder of land titles in the State of Missouri, under the act of Congress of the 26th May, 1824, entitled "An act supplementary of an act passed on the 13th day of June, 1812," entitled "An act making further provisions for settling the claims to land in the territory of Missouri," all of record in this office, and confirmed by the act of 13th June, 1812, above cited.

F. R. CONWAY,
U. S. Recorder of Land Titles in the State of Missouri.

To DANIEL DUNKLIN, Esq.,
U. S. Surveyor of Public Lands, St. Louis, Mo.

Together with a certified extract from the registry of certificates from the office of the recorder of land titles as follows, to wit:

Registry of Certificates of confirmation on town lots, out lots, and common field lots, issued by the Recorder of Land Titles.

In whose name issued.	Date.	Situation.	Remarks.	Quantity.
The following claim was omitted by Mr. Hunt, late recorder, in furnishing the list of claims proven up before him, to wit: John Baptiste de Gamache.	6th July, 1825.	Carondelet fields.	Bounded north by the common fields, eastwardly by the Mississippi, (leaving a tow [path] between it and the river,) south by an out lot claimed by the legal representatives of Gabriel Constant, (lalmond,) sen., and westwardly by the land formerly the property of Antoine Rheil.	

The above claim entered by me in the book, 12th March, 1839, having this day furnished the surveyor-general with a description thereof.

F. R. CONWAY, *Recorder.*

RECORDER'S OFFICE,
ST. LOUIS, *January 23d*, 1851.

The above is correctly copied from the registry on file in this office.

ADOLPH RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

And also a certified extract from the list of claims proved before the recorder of land titles, under the act of 26th of May, 1824, (in which is contained the Gamache claim to which particular reference was made at this stage of the case,) transmitted by the recorder of land titles to the surveyor-general of the United States in Illinois and Missouri, certified from the office of the surveyor-general as follows, to wit:

(This was a list of cases transmitted by Mr. Hunt to the surveyor-general, as a supplemental report. The cases bear various dates, the last being 12th April, 1830. They were 16 in number. Then came the following, transmitted by Mr. Conway, accompanied by a certificate by him, dated 12th March, 1839, stating that it had been omitted to be furnished by his predecessor, Mr. Hunt.)

No. 17 — *Not in list.*

John Baptiste de Gamache, senior, or his legal representatives, claim an out lot adjoining the village of Carondelet, containing six arpens in front by forty in depth, bounded northerly by the common, eastwardly by the Mississippi, (leaving a tow between it and the river,) south by an out lot claimed by the legal representatives of Gabriel Constant, (Lalamand) senior, and west by the land formerly the property of Antoine Rheil.

John Baptiste Maurice Chatillon, being duly sworn, says he knows the land claimed, and that he is about sixty-six years of age, and that he was born in Kaskaskia, and A. D. 1788, he removed from St. Genevieve to Carondelet, where he has resided ever since; that A. D. seventeen hundred ninety-seven or ninety (8) eight he was employed by John Baptiste Gamache, senior, to fence in a field — which said Gamache had been clearing and working in for about two years within this field lot — and he, this deponent, says he did fence about three arpens of this land, and build a cabin on the same, at this time. And this deponent further says, that Gamache did cultivate this same field for five or six years until his death. And this deponent

further says, he always understood this land was owned by said John Baptiste Gamache.

(Signed) JOHN BAPTISTE MAURICE his ⋈ mark CHATILLON.

Sworn to before me, July 6th, 1825.

(Signed) THEODORE HUNT, *Rec'r L. T.*

Translated to witness by J. V. Garnier.

The plaintiff also offered in evidence a certified extract from Hunt's minutes, containing the entry of Gamache's claim, with a description of the lot; and also the evidence therein recorded, but the court refused to receive it; and also testimony to prove the inhabitation and cultivation of the lot prior to December, 1803, and until his death in 1805. There was also much other evidence which need not be stated in this report.

The defendants offered evidence

1. To show a title under the act of Congress, of 1812, as commons of Carondelet.

2. An adverse possession for twenty years.

3. Rebutting evidence.

After the evidence was closed various instructions were asked for both, by the counsel for plaintiff and defendant, some of each of which were given and some refused by the court, as the verdict was for the defendants, and the case was brought up by the plaintiffs, only those instructions and refusals to which they excepted, will be here stated.

Instructions for plaintiffs refused. 3. The jury are instructed that, as against such a claim and cultivation, or possession, as that mentioned in said second instructions, no adverse user as commons as a ground of title, under the act of Congress of 13th June, 1812, can prevail, unless such user existed in fact by an actual occupation and use as commons of the same ground, visible and continued, notorious, hostile, and exclusive, [and then] only to the extent that such actual occupation and use as commons existed in fact, and to the exclusion of such claim and cultivation, or possession, by Gamache, of the same land as an out lot, or cultivated field lot, of the village, prior to the 20th day of December, 1803; provided the jury also believe, from the evidence, that the tract of land in the declaration described was claimed and inhabited, cultivated or possessed, by John B. Gamache, senior, prior to the 20th day of December, 1803, as an out lot or cultivated field lot of said village, with such a cultivation or possession as that mentioned in the said second instructions for the plaintiffs.

4. If the jury believe, from the evidence, that the claim of the village of Carondelet to commons, prior to the 20th day of De-

cember, 1803, was bounded north (in part) [by] the cultivated lands of the village, and that, prior to said date, the lot of land in said declaration described as having been claimed by Gamache was one of the cultivated lands of the village, then there is no conflict of title in this case, and the defendants have shown no title to the land in controversy.

5. The jury are instructed that, on the evidence given in this case, the statute of limitations is no bar to this action, unless they shall believe, from the evidence, that the town of Carondelet, or those holding under said town, have had an adverse possession in fact of the land in controversy in this case by an actual occupation on the ground, visible and continued, notorious, hostile, and exclusive, for at least twenty years next preceding the commencement of this suit.

7. The jury are instructed that the survey No. 120, and the plats and field notes thereof given in evidence by the plaintiffs, are evidence of the true location, extent, and boundary of the out lot of the village of Carondelet, claimed under John B. Gamache, senior, by his legal representatives.

8. The certified extract from the minutes of Recorder Hunt, taken under the act of Congress of 26th of May, 1824, [is] evidence that the tract of land therein mentioned and described was claimed and inhabited, cultivated or possessed, by John B. Gamache, senior, prior to the 20th day of December, 1803, and evidence that the same was confirmed to John B. Gamache, senior, or his legal representatives, by the act of Congress of 13th June, 1812.

9. The certified extract from [the] registry of certificates from the recorder's office, offered in evidence [by the plaintiffs, is evidence] that the out lot therein mentioned was confirmed to John B. Gamache, senior, or his legal representatives, by the act of 13th June, 1812.

10. The certified extract from the list of claims transmitted by the recorder of land titles to the surveyor-general, and certified from the office of the surveyor-general, relating to the claims of the legal representatives of John B. Gamache, senior, is evidence of said claim and the extent and boundary thereof, and that the same was confirmed by the act of Congress of 13th June, 1812.

11. The certificate of confirmation of the recorder of land titles in Missouri, given in evidence by the plaintiffs, shows a *primâ facie* title from the United States, in the legal representatives of John B. Gamache, senior, to the land therein described.

To which decision of the court, refusing said instructions, the plaintiffs by their counsel excepted.

The defendants then asked the following instructions, which were given by the court, as follows, to wit:

Instructions given to defendants. 5. If the jury find that the land spoken of by the witnesses as actually cultivated and possessed by Gamache did not embrace the land now in dispute, they ought to find for the defendants.

17. The survey No. 120, read by the plaintiffs, is no evidence of title, nor of the extent and boundaries of Gamache's claim.

18. The testimony taken before Hunt, and read in evidence by the plaintiff, is not to be regarded by the jury in the present case, the defendant insisting that the claim had been abandoned.

To the giving of which instructions the [plaintiffs] by their counsel excepted.

The verdict being for the defendants, the case was carried by the plaintiffs to the Supreme Court of Missouri, where the judgment of the court below was affirmed. It was then brought to this court by the plaintiffs, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

It was argued by *Mr. Holmes*, for the plaintiffs in error, and *Mr. Picot*, for the defendants.

Only those points will be noted which are connected with the decision of the court. The counsel for the plaintiffs in error made the following:

III. The certificate of the recorder of land titles, offered in evidence in this case, dated the 22d of January, 1839, was competent and admissible evidence of the facts necessary to give title under and by virtue of the act of 13th June, 1812, and showed a *primâ facie* title in the legal representatives of Gamache, of the date of that act, to the lot therein described. Macklot *v.* Dubreuil, 9 Mo. 489, a certificate issued in 1842 held good, and evidence of title; Boyce *v.* Papin, 11 Mo. 16; Hunter *v.* Hemphill, 6 Mo. 106; and Sarpy *v.* Papin, 7 Mo. 503, one in possession, merely, not showing a title, cannot question the certificate, or survey; Soulard *v.* Allen, (Sup. Court of Mo., Oct. term, 1853,) a certificate issued by Conway, since 1839, held good. The objection of the Supreme Court of Missouri to this case of Camache *v.* Piquignot is based on the omission of this claim in the first list sent to the surveyor-general. No limit of time was fixed by the terms, or spirit of the act, within which the certificate must be issued, after proof made within the eighteen months prescribed, or when the power of the recorder to issue it was to cease.

IV. The certified extract from the registry of certificates was competent evidence, that the certificate, authorized by the act

of 26th May, 1824, had been duly issued by the recorder of land titles, for the claim therein mentioned and described, and that the same had been confirmed by the act of 13th June, 1812. McGill *v.* Somers, 15 Mo. 80; Biehler *v.* Coonce, 9 Mo. 351, an extract from this same registry of certificates held admissible evidence; Roussin *v.* Parks, 8 Mo. 544.

V. The certified extract from the surveyor-general's list of claims proved was competent evidence that this claim had been officially reported to him by the recorder of land titles, as a claim that had been duly proved before him within the eighteen months, and that the surveyor-general had authority by law to survey it, as such. McGill *v.* Somers, and other cases cited: the act of Congress of the 29th April, 1816, 3 Stat. at Large, 324, authorized the survey to be made.

VI. The certified extract from the books of Hunt's minutes of testimony, was competent and admissible evidence, for the purpose of showing, that whatever title the government had in this out lot, at the date of the act of 13th of June, 1812, as between the government and the claimants, had passed to the claimants; a matter in which the defendants, as third persons, had no interest and no concern, at least until they should show some prior or superior title to this land. McGill *v.* Somers, 15 Mo. R. 80–86, extracts from these same "recorder's (Hunt's) minutes," and from the surveyor-general's list, held admissible evidence as good as the certificate itself. Biehler *v.* Coonce, 9 Mo. 351; Roussin *v.* Parks, 8 Mo. 544.

1. On the same principle as a deed that constitutes a link in a plaintiff's chain of title, and to which the defendant may be no party nor privy; and

2. On the principle of a deposition taken to perpetuate testimony, the government and the claimants being the only parties concerned in the effect of it, and both being present at the taking of it, by authority of the act of Congress.

3. Like a deposition, it is evidence tending to prove the existence of the facts prior to 1803, necessary to bring this out lot within the operation of the act of 1812, as a grant of title.

4. The Supreme Court of Missouri, (Gamble, J., delivering the opinion of the court in this case,) affected to treat this testimony of witnesses as if it had been some mere volunteer "affidavits" of the parties themselves, made extrajudicially, and without authority of law. In McGill *v.* Somers, the same judge (delivering the opinion of the court) held an extract from these same "minutes," to be evidence as good as the certificate. In Soulard *v.* Allen, October term, 1853, Scott, J., delivering the opinion of the court, (Gamble, J., not sitting,) held a certificate of Conway (recorder) issued upon these "minutes" of testimony to be good evidence.

All the certificates that have been issued by Hunt or Conway, since the eighteen months expired, were necessarily based on these "minutes" of the proof made. Memory of three large volumes of proof was out of the question; and the surveyor-general s list was not a record of the recorder's office, otherwise than as Hunt's books of minutes were the original from which that list was drawn off as an abstract, in 1827.

5. Nothing had been done by any officer of the government at the date of the taking of this testimony, in relation to the claim of commons, that recognized any right or title of the inhabitants of the town of Carondelet to the land included in this outlet as commons.

The survey of the commons, No. 3102, and the outline survey of the common field, No. 3103, were made in 1834.

VII. The fact that this claim had been omitted in the first list furnished by recorder Hunt to the surveyor-general, and that it was not reported till the 12th of March, 1839, has no legal effect whatever on the title or any right of the claimant under the act of the 26th of May, 1824, nor upon the validity or admissibility of the above documents as evidence; for,

1. The entry of the claim in the books of Hunt's minutes as a claim proved and the certificate issued upon it, as such, are the proper legal evidence of the decision of the recorder of land titles upon the sufficiency of the proof made. Macklot *v.* Dubreuil, 9 Mo. 490: the recorder passed upon the facts referred to him when he issued the certificate; the point was made in Mr. Gamble's brief, that the recorder had no authority to issue a certificate in 1842, but it was not specially noticed in the opinion of the court, which held the certificate good.

2. The powers conferred and the duties imposed by the act were conferred and imposed on the recorder of land titles, (a perpetual officer,) and not upon Theodore Hunt, merely; he was expressly required, by the third section of the act, to issue such a certificate, and no limit of time was fixed by the act within which he was to make his decision on the proof taken within the eighteen months, or report the claims to the surveyor, or issue the certificate, nor in which his power to do so was to cease, otherwise than by a complete performance of the duties imposed on him. Act of the 26th of May, 1824, 4 Stat. at Large, 65.

3. The second clause of the third section of that act, requiring a list of claims proved to be furnished the surveyor-general, was merely directory, and imposed a ministerial duty only on the recorder of land titles, touching the internal administration of the land-office, and it was not intended by the act to be a condition precedent to the issuing of a certificate, nor even

to the right of the claimant to have a survey made of his claim, according to law, as a confirmed lot. Lytle *v.* State of Arkansas, 9 How. 314—333. Perry *v.* O'Hanlon, 11 Mo. 589–595: parties are not to be prejudiced by delays and omissions of merely ministerial officers and government agents. Taylor *v.* Brown, 5 Cranch, 234: a law requiring an officer to record surveys within two months, and return a list, is merely directory, and the validity of the survey is not affected, if not done. In point by principle and analogy.

4. The certificate containing an accurate description of the lot, so that any surveyor could find it, was all the evidence of title the claimants needed; and no public survey was necessary for them, though a convenience to them, as well as to the government.

Ott *v.* Soulard, 9 Mo. 603–4, where the calls are ascertained by the grant, the construction is then matter of law for the court. Menard's Heirs *v.* Massey, 8 How. 293, as to certainty of description, "*Id certum est*," &c. Smith *v.* U. States, 10 Pet. 338: a grant is good if capable of definite location by its description, without a survey. Chouteau *v.* Eckhart, 2 How. 344: an act gives title, if the land can be identified as confirmed without resort to a survey. United States *v.* Lawton, 5 How. 10: the identity of the land granted may be established by the face of the grant, or by survey.

The proof made ascertains, (for the certificate,) designates, and proves the tract, which was granted by the act of 1812.

5. The list of claims proved was not required to be sent to the surveyor-general for the purpose of being the only and conclusive evidence for or against the claimants, nor was it made so by the terms or nature of the act, either of the fact that a claim had been proved and a certificate issued, or of the recorder's decision on the proof; nor was it of any importance to the claimant whether the claims were all reported at once or not; but the first list was sufficient information and good evidence for the surveyor-general of what it contained, and the supplementary lists were likewise good evidence, and sufficient to authorize a survey to be made of the claims reported, when reported.

6. No limit of time was fixed within which, if claims proved were not reported, they should never be reported at all. One object of the act was to get information for the surveyor-general, and obviously, the sooner he got it, and the whole of it, the better.

7. When the first list had been furnished to the surveyor-general, nearly two years after the expiration of the 18 months prescribed for the taking of the proof, (then supposed by the

recorder to contain all,) and when, by supplementary lists, the omissions had been supplied, and the errors corrected, the act of Congress had then only, and not before, been fully and substantially complied with, in this repect.

8. Any merely extra-legal inference to be drawn from the fact of the omission is rebutted by the fact, that there were other omissions and errors, certified by Hunt himself to have been errors in transcribing the former list from the books in his office, (Hunt's minutes,) and conclusively rebutted, by the fact that a certificate was issued; for if the recorder's opinion had been against the claim, at first, the issuing of a certificate shows that he had changed that opinion, and was satisfied with the proof.

9. The omission and delay have prejudiced nobody. The lot has not been set apart for schools, as a vacant lot, nor would it have been included in the survey of the commons, by Brown, if the commons belonging to the village had been surveyed according to their claim and confirmation, as directed by the 2d section of the act of 26th May, 1824, nor if he had consulted the records of the recorder's office, and the proof there made of this claim, as he ought to have done.

This out lot was surveyed by Brown, at the same time, and under the same instructions, as the other town lots, out lots, and common fields of Carondelet, (in 1839.) Brown might as well have included other common fields as this one in his survey of commons, in 1834. Many of them were never proved before the recorder.

The counsel for the defendant in error made (amongst others) the following points: —

I. The list returned by recorder Hunt, (certified to include a description of all the lots proved up before him,) which does not include a description of the Gamache claim, is conclusive against the plaintiffs. 3d sec. act of May 26, 1824, Statutes at Large, vol. 4, p. 66.

1. Whether, if the plaintiffs had a certificate of confirmation issued by Hunt for their claim, they could dispute the correctness of the list need not be inquired into, seeing that the plaintiffs have no such certificate.

The statute, however, designated two distinct matters of evidence which it would seem were both required to be possessed by a party claiming the benefits of the law. First, the certificate. This was intrusted to the claimant, whose claim was confirmed, and the plaintiffs should either have produced the certificate, or at least shown that it was issued. Second, the list. This was retained by the government as the record of what was confirmed; and the plaintiffs should have shown

that it included their claim. In this case it appears, affirmatively, that no such certificate was ever issued, and that neither the list nor the copy thereof embraces this claim.

2. It is not necessary, for the disposal of this case, to inquire into the validity of the acts of recorder Hunt in making supplemental and explanatory returns to the surveyor, subsequent to his return of the list required by law, seeing that the plaintiffs' claim is not included in any such return. Whether such acts were valid or not, they are cumulative evidence against the claim of plaintiffs. They go to show, that even after reviewing and revising his decisions, the recorder persevered in his rejection of the claim of Gamache's representatives.

3. The recorder expressly certified that the list contains all the lots confirmed by him. Courts cannot look behind that list. Similar lists have always been considered as binding on the ministerial departments of the government.

4. In the list are included numerous claims, proved before, and certified by the recorder as confirmed, and which were embraced within the limits of the claim. He must necessarily have decided against the Gamache claim in deciding in favor of the adversary claims.

The recorder acted in a judicial capacity in the execution of the extraordinary duties imposed on him by the act of 1824, and his decisions are *res adjudicatæ*.

II. The certificate of confirmation issued by recorder Conway in 1839, is merely void.

1. It is void on its face.

2. It is void for want of jurisdiction. The general powers of the recorder, as denoted by his title, are purely clerical, and are set forth in the law creating the office. See sections 3 and 4 of act of March 2, 1805, Statutes at Large, vol. 2, p. 326.

The powers given to the recorder by the act of 1824, were extraordinary and judicial. Upon their execution the office as to such extraordinary powers became *functus officio*. The powers, if not exhausted, ceased by limitation. First, eighteen months from the passage of the act, the power to receive claims and evidence, expressly ended by the terms of the first section.

The second section, although confined to regulating the duties of the surveyor, looks to a prompt determination of the duties of the recorder. How could the surveyor, immediately after the expiration of the eighteen months, designate the vacant lots, (namely those not certified and listed by the recorder as confirmed) unless the recorder had previously performed those duties?

The third section contemplates the issuing of the recorder's certificates within the eighteen months. After providing for

them, it proceeds to require, further, that so soon as the said term shall have expired, the recorder shall furnish the surveyor with a list of the lots so proved. The list was designed to embrace the certified lots only. The act contemplates the impossibility of the recorder preserving in his breast during a term of near eighteen months, the remembrance of many hundreds of decisions, and points out the certificates, or registry thereof, as the record which he shall preserve of the lots "so proved," and from which he is to compile his list. The making and transmitting the list was the final act. That done, the powers conferred by the law ceased.

Secondly. Although the office and general powers of the recorder are perpetual, yet special and temporary powers given for a particular purpose, will not endure forever.

Granting that the powers conferred by the act of 1824, were not simply conferred on Hunt, the recorder for the time being, but on his office; yet to have authorized Conway, or any successor, to have issued a certificate of confirmation, such successor should have succeeded to the office during the prescribed term of eighteen months, and the proof must have been made before him.

3. The head of the land department on the appeal of the plaintiffs, has decided that the proceedings of Conway were of no avail under the law.

III. The abstract from the registry of confirmations issued by Conway, is void.

The certificate itself being a "mere nullity" as declared by the Supreme Court of Missouri, the fact that it was issued, and when, is of no importance. Its only use in the case is to show affirmatively, what might otherwise appear only negatively, that recorder Hunt issued no certificate of confirmation.

IV. The extracts from Hunt's minutes are not evidence.

1. Hunt was not a commissioner to take testimony, and the affidavits were received without notice, the co-defendant in this suit being then in the actual possession of the land.

2. The act required no recorded or written proof before the recorder, and the circumstance that affidavits were taken by Hunt, touching the Gamache claim, is no evidence that he considered it as proved to have been inhabited, cultivated or possessed, prior to the 20th December, 1803, and that the land claimed was an out lot.

3. On the contrary, the circumstance that the claim was not entered in his list, is decisive to show that he was not satisfied with the proof.

V. The return of the description of the Gamache claim to the surveyor, by Conway, in 1839, was merely null, and afforded no evidence of title whatever.

The abuses to which such a practice will lead are manifest. If Hunt's list may be altered after twelve years have elapsed, alterations may be made at any distance of time; if future recorders may supply fancied omissions, they may strike out such claims as they may regard as erroneously entered; if they can thus deal with the list of Hunt, they can do the same with Bates's confirmations, and the numerous land titles depending on the action of the recorders of former days, will lie at the mercy of officers, selected not for their capacity to judge of the proofs of titles, but for their fidelity in taking care of books and papers.

Mr. Justice CATRON delivered the opinion of the court.

This case was brought here by writ of error to the Supreme Court of Missouri, and presents questions alleged to be cognizable in this court under the 25th section of the Judiciary Act. The plaintiffs claimed a tract of land of six arpents in front, and forty back, lying adjoining to the village of Carondelet, in Missouri. It was claimed as "an out lot" which had been confirmed by the act of Congress of June 13th, 1812, to John B. Gamache, the ancestor of the plaintiffs.

In support of this position there was offered, in evidence, certain documents issued from the office of the recorder of land titles. The first was a paper claimed to be a certificate of confirmation issued by Conway, the recorder of land titles, dated 22d January, 1839, under the act of Congress of the 26th May, 1824. The second was an extract from the registry kept by the recorder of certificates, issued by him under the act of 1824, by which it appears that Conway entered the certificate of Gamache's representatives on that register on the 12th March, 1839, and furnished on that day to the surveyor-general a description of the land. The third was an extract from the additional list of claims furnished by the recorder to the surveyor-general on the 12th March, 1839, which addition was of the Gamache claim alone. There were other documents showing that Hunt, who was the recorder of land titles, who acted under the act of 1824 in taking proof of claims, and who filed with the surveyor the list of claims proved before him, had filed one or two supplemental or explanatory lists after the first.

The court below rejected the evidence offered.

A survey of the claim of Gamache was made by a deputy surveyor under instructions from the surveyor-general, and the survey being returned to the office by the deputy and a plat made, the word "approved" was written upon it and signed by the then surveyor-general, but it never was recorded. It appeared, in evidence, that the practice of the surveyor's office,

when a deputy surveyor made return of a survey which he had been instructed to make, was, to have the survey examined, to see the manner in which the deputy had followed the instructions given, and if he had followed them, his work was approved, and the approval evidenced by such writing as had been made in this case, which was intended to authorize the payment of the deputy for his work; and that subsequently the survey was more carefully examined, and if found to be a proper survey in all respects it was recorded in the books of the office, which was the evidence that it was finally adopted and approved, and that by the practice of the office certified copies of surveys were not given out until they were thus finally approved and recorded. Conway, who had been surveyor-general as well as recorder, testified that he would regard the survey of the Gamache claim as an approved survey, and would record it as such if he were in the office.

It appeared, in evidence, that the present surveyor-general refused to record it as an approved survey, or to certify it to the recorder as a survey of land for which a certificate of confirmation is to issue, and that in that refusal he is sustained by the department at Washington.

After the evidence was closed, the court, by an instruction, declared that the survey was not evidence of title, nor of the boundaries and extent of Gamache's claim.

A certified copy of the affidavits made before recorder Hunt, when he was taking proof under the act of 1824, was in evidence, but an instruction given to the jury substantially excluded them from consideration.

On this state of facts the Supreme Court of Missouri held, among other things, as follows:

"In the present case we have a recorder of land titles, fourteen years from the passage of this act, attempting to give the evidence of title, by issuing a certificate of confirmation, and certifying the claim to the surveyor-general as one confirmed by the act of 1812. If the government of the United States has confirmed the title set up by the plaintiffs by that act of Congress, then the party, as has been held in this court, does not lose his land by the failure to procure the evidence provided for by the act of 1824; and under these decisions the plaintiffs in this case, after the evidence was rejected, which they claimed was rightly issued under the last-mentioned act, proceeded to prove the cultivation and possession of their ancestor, Gamache, and claimed that the title was confirmed by the act of 1812."

"If the evidence of title, purporting to be issued under the act of 1824, appeared undisputed by the United States, and acknowledged and treated by the government as effectual, then it may

be that a person who was a mere stranger to the title would not be allowed to dispute the correctness of the conduct of the officers in their attempt to carry out the law. But when we find that the government itself, in its own officers, arrests the progress of the title, and the whole reliance of the party in this case is upon the acts of the recorder, the correctness of which is denied by the government, we will examine his acts and give them effect only so far as they conform to the law."

"That the recorder, under the act of 1824, was required to act in a quasi judicial character, is perfectly manifest, although there was no mode provided by the law for the expression of an opinion against the sufficiency of the evidence given before him. If a claim was, in his judgment, confirmed by the act of 1812, he issued to the party a certificate of confirmation, and included the lot in the descriptive list which he was required to furnish the surveyor-general. If there was a failure to prove the inhabitation, cultivation, or possession to his satisfaction, he simply omitted to include the claim in his list, and he issued no certificate."

"The acts required to be done when a claim was confirmed, were to be done immediately after the expiration of the time limited for taking the proof; and when we see, from the evidence offered by the plaintiff, that the recorder filed his list of confirmations with the surveyor in October, 1827, near twelve years before Conway, his successor, returned the present claim to that office, we cannot avoid the conclusion that this latter act was not within the scope allowed for such proceeding by the act of Congress. It is not necessary to maintain that if Hunt, the recorder who took the proof, had died before he acted upon the claims, his successor could not act upon them; but when he did act, and made out and furnished to the surveyor the list required by law, the conclusion is one which the law draws, that claims not within that list are claims not proved to his satisfaction."

The claim of Gamache was anxiously prosecuted before the department of public lands at Washington during the pendency of this suit, and was there decided by the commissioner in conformity to the decision of the Supreme Court of Missouri; and which decision was confirmed by the Secretary of the Interior in September last. The reasons for this decision are here given in the language of the commissioner in reply to the plaintiffs' counsel, prosecuting the claim.

"The surveyor-general at St. Louis having declined to approve the survey as made by Brown for Gamache, and to certify the same to the recorder — You apply to this office to give orders to surveyor-general Clark, "requiring him to return the

survey of the tract of six by forty arpens in the name of John B. Gamache, sr., or his legal representatives, to the recorder of land titles, and that the recorder be directed to issue to 'you' a certificate of confirmation in the usual form, that 'you' may have the evidence of your title in the usual form for the purpose of prosecuting your rights in the courts having competent jurisdiction."

"In behalf of the representatives of Gamache it is maintained that they are confirmed by the act of 13th June, 1812.

"The first section of the supplemental act of 26th of May, 1824, made it the duty of the individual owners or claimants whose lots were confirmed by the act of 1812 on the ground of inhabitation, cultivation, or possession prior to the 20th of December, 1803, 'to proceed within eighteen months after the passage of the act of 1824,' to designate their said lots by proving before the recorder of land titles for said State and territory the fact of such inhabitation, cultivation, or possession, and the boundaries and extent of each claim, so as to enable the surveyor-general to distinguish the private from the vacant lots appertaining to the said towns and villages."

"The third section of the said act of 1824 made it the duty of the recorder to issue a certificate of confirmation for each claim confirmed, but further declares as follows:

"And so soon as the said term shall have expired, he shall furnish the surveyor-general with a list of the lots so proved to have been inhabited, cultivated, or possessed, to serve as his guide in distinguishing them from the vacant lots to be set apart as above described, and shall transmit a copy of such list to the commissioner of the general land-office."

"A report or list, purporting to contain all the claims proved up under the said act of 1824, was accordingly returned to this office in 1827, but that list does not embrace this particular claim of Gamache for 6 × 40 arpens within the limits of the Carondelet Commons.

We have no power to look behind that list in order to determine what has or has not been confirmed any more than we could look behind the face of a report of a board of commissioners or of the recorder, which had been confirmed by a law of Congress, and take cognizance of a case not embraced by such report, even if satisfied that it had been omitted by the reporting officer through inadvertence. This is a well-settled principle. See instructions to register and receiver, 13th April, 1835. 2d part Birchard's Comp. printed laws, instructions and opinions, page 757, &c.

"As the 3d section of the act of 26th of May, 1824, then expressly declares that the list to be furnished by the recorder

'shall serve as a guide' to the surveyor-general in the execution of the duties devolved on him by the act, and as it is not shown that the claim in question is embraced by that list, neither that officer, nor this office, has the power to treat the claim in question as confirmed and entitled to an approved survey, and, consequently, in my opinion, the commissioner has not the legal ability to comply with your application in the premises."

With the correctness of these decisions of the Supreme Court of Missouri and the department of public lands we entirely concur. Nor will we add any views of our own in support of the State decision, for the reason that the questions here presented are peculiarly local, being limited to the city of St. Louis and a few villages in the State of Missouri, the public at large having no concern with any question presented in this cause. And after due consideration we here take occasion to say, that although it is in the power of this court, and made its duty, to review all cases coming here from State courts of last resort, in which was drawn in question and construed prejudicial to a party's claim, the Constitution, or a law of the United States, or an authority exercised under them, still, in this peculiarly local class of cases asserting titles to town and village lots, confirmed by the act of 1812, we feel exceedingly indisposed to disturb the State decisions. So far the ability and soundness they manifest have commanded our entire concurrence and respect, and are likely to do so in future. It is proper further to remark that the jury was instructed, at the request of the plaintiffs, that inhabitation and cultivation of a part of the lot, claiming the whole, would be good for the whole within the meaning of the act of 1812.

The jury was also instructed, at the defendant's request, "that if the land spoken of by the witnesses as actually cultivated and possessed by Gamache, did not embrace the land now in dispute, they ought to find for the defendants."

In regard to these instructions the State court held that:

"The first instruction given for the defendant, if it stood alone, would be so entirely erroneous as to require a reversal of the judgment. That the jury should be required to find for the defendant, if the cultivation by the elder Gamache was not a cultivation of the precise piece of ground in controversy, would have been so gross a mistake, that neither the court nor the counsel asking the instruction could be supposed to have fallen into it. Accordingly, when we examine the second instruction given for the plaintiff, we find the court telling the jury that the cultivation of a part of a tract, under claim of the whole, was, under the act of 1812, a cultivation of the whole tract;

and, in looking into the case, we see that the controversy was whether this cultivation of Gamache was not on an entirely different tract from that now claimed to include the premises in dispute. "We are satisfied that the jury must have understood the question to be, whether the cultivation of Gamache, spoken of by the witnesses, was at any place upon the tract to which his heirs now claim title, or at some place upon an entirely different tract. In this view of the question submitted to the jury, there would be no propriety in reversing the judgment for the instruction given for the defendant."

The instructions asked by the plaintiffs, which were refused by the court, all refer to the proceedings in the recorder's office, the effect of which has been considered. On the whole it is ordered that the judgment be affirmed.

Order.

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

THE STEAMBOAT NEW WORLD, EDWARD MINTURN, WILLIAM MENZIE, AND WILLIAM H. WEBB, CLAIMANTS AND APPELLANTS, *v.* FREDERICK G. KING.

Where a libel was filed, claiming compensation for injuries sustained by a passenger in a steamboat, proceeding from Sacramento to San Francisco, in California, the case is within the admiralty jurisdiction of the courts of the United States.

The circumstance that the passenger was a "steamboat man," and as such carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers. It was the custom to carry such persons free.

The master had power to bind the boat by giving such a free passage.

The principle asserted in 14 How. 486, reaffirmed, namely, that "when carriers undertake to convey persons by the agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.

The theory and cases examined relative to the three degrees of negligence, namely, slight, ordinary, and gross.

Skill is required for the proper management of the boilers and machinery of a steamboat; and the failure to exert that skill, either because it is not possessed, or from inattention, is gross negligence.

The 13th section of the act of Congress, passed on the 7th of July, 1838, (5 Stat. at Large, 306,) makes the injurious escape of steam *primâ facie* evidence of negligence; and the owners of the boat, in order to escape from responsibility, must prove that there was no negligence.

The facts in this case, as disclosed by the evidence, do not disprove negligence. On the contrary they show that the boat in question was one of two rival boats which were "doing their best" to get ahead of each other; that efforts had been made to pass; that the engineer of the boat in question was restless, and constantly watching the hindmost boat; and that the owners of the boat have failed to prove that she carried only the small quantity of steam which they alleged.

THIS was an appeal from the District Court of the United States for the Northern District of California.

It was a libel filed by King, complaining of severe personal injury, disabling him for life, from the explosion of the boiler of the steamboat, New World, while he was a passenger, on her passage from Sacramento to San Francisco, in California.

The District Court decreed for the libellant in twenty-five hundred dollars damages and costs; and the owners of the boat appealed to this court.

The substance of the evidence is stated in the opinion of the court.

It was argued by *Mr. Cutting*, for the appellants, and by *Mr. Mayer*, for the appellee.

Points for the appellants.

First. The steamboat New World occupied no relation towards the libellant that imposed on her the duty to carry safely, or any duty whatever, as the libellant had not paid, and was not to pay any compensation for his transportation.

1. The master had no power to impose any obligation upon the steamboat, by receiving a passenger without compensation.

It was not within the scope of his authority. Grant *v.* Norway, 10 Com. Bench R. Mann. G. & S. 664, 688, reported also in 2 E. Law and Eq. R. 337, and 15 Jur. 296; Butler *v.* Basing, 2 C. & P. 613; Citizens Bank *v.* Nantucket, S. B. Co. 2 Story C. C. R. 32, 34; Pope *v.* Nickerson, 3 Story C. C. R. 475; Gen. Int. Ins. Co. *v.* Ruggles, 12 Wheat. 408; Middleton *v.* Fowler et al. 1 Salk. 282.

2. There was no benefit conferred on the steamboat whence any obligation could result.

3. It was not a case of bailment. Story on Bailm. § 2; Kent's Comm. vol. 2, p. 558; Ang. on Car. § 4.

4. The libellant assumed the risk of his own transportation.

5. The libellant stands in a less favorable relation than the steamboat's servants, but she would not be liable to them for negligence of their fellow-servants. Farwell *v.* B. & W. R. R. Co. 4 Metc. 49; Hayes *v.* Western R. R. Co. 3 Cushing, 270; Coon *v.* Syracuse & U. R. R. Co. 1 Seld. 493; S. C. 6 Barb. 231; Priestley *v.* Fowler, 3 M. & W. 1.

6. He stands in a less favorable relation than goods carried under gratuitous bailment of mandate.

For passengers carried for hire stand in less favored positions than goods.

But the gratuitous mandate imposes only the slightest diligence, and attaches liability only to gross negligence. Ang. on Car. § 21; Story on Bailm. §§ 140, 174.

7. He stands in a less favorable relation than slaves transported gratuitously from mere motives of humanity. But the carrier is only liable for gross negligence in their carriage. Boyce *v.* Anderson, 2 Pet. 156.

8. In no reported case has any such action been brought, or right of action claimed.

Second. Even if the libellant were to be regarded as a passenger carried for hire, the steamboat would only be responsible for negligence, and would not be responsible for any injury which should happen by reason of any hidden defect in the absence of negligence. Ingalls *v.* Bills, 9 Metc. R. 1; Stokes *v.* Saltonstall, 13 Pet. 181.

But as the libellant was to be carried gratuitously, the steamboat cannot, in any view of the case, be held responsible except for gross negligence. Boyce *v.* Anderson, 2 Pet. 156; Story on Bailm. § 174.

Third. There was no negligence on the part of the steamboat.

1. The boilers were properly constructed. She was built as a first-class boat. She had been inspected by the State Inspector, and allowed 40 pounds of steam; by the U. S. Inspector, and allowed 35 pounds; and by neither of these inspectors was any fault found with the structure of her boilers. Van Wart and Cook both concur in judgment that the boilers were sufficient.

Lightall is the only witness that intimates a different opinion, and he does not testify that it was usual to have a stay-brace, or that it was negligence to omit it. He merely regards it as "a measure of safety," and he then admits, that the "stay," if there, would not have prevented the explosion. It would simply, in his opinion, have made the consequence of the explosion less serious.

2. The boilers were frequently and carefully examined.

No evidence is introduced to controvert this.

3. The engineer employed, and then in charge, was a man of skill and prudence.

This is not denied.

4. The steamboat was not racing.

Mere competition is not of itself negligence, unless recklessly or improperly conducted. Barbour, J., 13 Pet. 192.

5. The steamboat was not carrying an improper amount of

steam. She was allowed 35 pounds by the lowest certificate; 40 pounds by the certificate of another inspector. She was at the time of the accident carrying only 23 pounds.

No witness testifies that she carried more than that.

This is the only fault that could have contributed to the happening of the explosion.

6. Rosin was not used to generate steam.

Haskell is the only witness that gives evidence tending to establish this. But he does not swear the article he saw was rosin. He admits that he did not see any put on the fire. He was stunned by the accident, and his recollection should not be relied on against the positive testimony of two witnesses.

Mr. Mayer contended that the decree of the District Court was right for these reasons: —

I. The wrong occurred within the range and "influence" of the tide, and was within the admiralty jurisdiction, as now by this court defined. Waring *v.* Clarke, 5 How. 441; New Jersey Steamboat Co. *v.* Merchants Bank, 6 How. 341.

II. The disaster is of itself *primâ facie* evidence of negligence, culpable to the degree necessary to attach liability for the damage, and there is no testimony here to countervail that conclusion. McKinney *v.* Neil, 1 McLean, 540; Saltonstall *v.* Stokes, 13 Peters, 181.

III. Although the steamboat may not be considered as a "common carrier" in case of a gratuitous service, (or mandate, as the Law of Bailment phrases it,) there is, nevertheless, even under a gratuitous undertaking, an obligation to have all enginery in proper condition to carry passengers safely, and a responsibility proportionate to the scrupulous care necessary in so hazardous a mode of conveyance. And it might be justly contended that a liability attaches here, if even for the slightest negligence. But gross negligence is shown not only by the conduct of the boat on the occasion, but by the incompleteness, for the perils of the passage, of the machinery. That inadequacy, *per se*, imputes gross negligence. McKinney *v.* Neil, 1 McLean, 540; Maury *v.* Talmadge, 2 McLean, 157; Hale *v.* Steamboat Company, 13 Connect. 319; Fellowes *v.* Gordon, 8 B. Monroe, 415; Story on Bailments, 125.

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating within the ebb and flow of the tide, a boiler flue was exploded through neg-

ligence, and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board.

It has been urged that the master had no power to impose any obligation on the steamboat by receiving a passenger without compensation.

But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is, even indirectly, beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities. Smith on Mer. Law, 559; Grant *v.* Norway, 10 Com. B. 688, S. C. 2 Eng. L. and Eq. 337; Pope *v.* Nickerson, 3 Story, R. 475; Citizens Bank *v.* Nantucket Steamboat Co. 2 Story, R. 32. But different employments may and do have different usages, and consequently confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we

are of opinion the master has power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects on the part of the master and owners and their boat, existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In the Philadelphia and Reading Railroad Company *v.* Derby, 14 How. R. 486, which was a case of gratuitous carriage of a passenger on a railroad, this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In Storer *v.* Gowen, 18 Maine R. 177, the Supreme Court of Maine say: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice Story, (Bailments, § 11,) says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned.

Recently the judges of several courts have expressed their

disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. Wilson *v.* Brett, 11 Meeson & Wels. 113; Wylde *v.* Pickford, 8 Ib. 443, 461, 462; Hinton *v.* Dibbin, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as Tracy et al. *v.* Wood, 3 Mason, 132, and Foster *v.* The Essex Bank, 17 Mass. R. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See Toullier's Droit Civil, 6th vol. p. 239, &c.; 11th vol. p. 203, &c. Makeldey, Man. Du Droit Romain, 191, &c.

But whether this term, gross negligence, be used or not, this particular case is one of gross negligence, according to the tests which have been applied to such a case.

In the first place, it is settled, that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." Story on Bailments, § 15.

It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence. Thus Heath, J., in Shields *v.* Blackburne, 1 H. Bl. 161, says, "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery." And Lord Loughborough declares that an omission to use skill is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones, between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it. And the same may be said of Mr. Justice Porter, in Percy *v.* Millaudon, 20 Martin, 75. This qualification of the rule is also recognized in Stanton et al. *v.* Bell et al. 2 Hawks, 145.

That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill

vigilantly and faithfully, endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves. We do not hesitate therefore to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the act of July 7, 1838, (5 Stat. at Large, 306,) provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *primâ facie* evidence sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer called the Wilson G. Hunt, was then about a quarter of a mile astern of the New World, and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of the Hunt says he hardly knows whether the boats were racing, but both were doing their best, and this is confirmed by the assistant pilot, who says the boats were always supposed to come down as fast as possible; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place called "the slough" the Hunt attempted to pass the New World. Fay, a passenger on board the New World, swears, that on two occasions, before reaching "the slough" the Hunt attempted to pass the New World, and failed; that to his knowledge these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that the Hunt attempted to pass the New World in "the slough" is denied by two of the respondents' witnesses, but they do not meet the testimony of Fay, as to the two pre-

vious attempts. Haskell, another passenger, says, "about ten minutes before the explosion I was standing looking at the engine, we saw the engineer was evidently excited, by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time." The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of the New World, were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says they were not racing. The engineer says: "We have had some little strife between us and the Hunt as to who should get to Benicia first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement, that it does not appear to have been known to any other person on board either boat, that this witness and the pilot were both directly connected with and responsible for the negligence charged, and that the fact of racing is substantially sworn to by two passengers on board the New World, and by the pilot and assistant pilot of the Hunt, and is not denied by the master of the New World, we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the act of Congress has thrown on the claimants. It is possible that those managing a steamboat engaged in a race may use all that care and adopt all those precautions which the dangerous power they employ renders necessary to safety. But it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness and skill the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *primâ facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried, as wholly unsatisfactory. They say the boiler was allowed by the inspector to carry forty pounds to the inch, and that when the explosion occurred, they were carrying but twenty-three pounds. The principal engineer says he does not remember how much steam they had on. The master is silent on the subject and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, doing its best. We are not convinced that she was carrying only twenty-three pounds, little more than half her allowance.

This is the only evidence by which the claimants have endeavored to encounter the presumption of negligence. In our opinion it does not disprove it; and consequently the claimants are liable to damages, and the decree of the District Court must be affirmed.

Mr. Justice DANIEL dissented.

Mr. Justice DANIEL.

From the opinion of the majority of the judges in this case I dissent.

That the appellee in this case has sustained a serious injury cannot, consistently with the proofs adduced, be denied, and it is probable that the compensation which has been awarded him may not be more than commensurate with the wrong inflicted upon him, or greater than that for which the appellants were justly responsible. But the only question in my view which this court can properly determine, relates neither to the character nor extent of the injury complained of, nor to the adequacy of the redress which has been decreed. It is a question involving the power of this court to deal with the rights or duties of the parties to this controversy in the attitude in which they are presented to its notice.

This is a proceeding under the admiralty jurisdiction, as vested in the courts of the United States by the Constitution. It is the case of an alleged marine tort. The libel omits to allege that the act constituting the gravamen of the complaint, did not occur either *infra corpus comitatus*, nor *infra fauces terræ*. It will hardly be denied that the rule of the admiralty in England, at the time of the adoption of the Constitution, confined the jurisdiction of the admiralty within the limits above referred to, or that the admiralty never had in England general or concurrent jurisdiction with the courts of common law, but was restricted to controversies for the trial of which the *pais*, or local jury, could not be obtained. Having on a former occasion investigated extensively the origin and extent of the admiralty powers of the federal courts, (see New Jersey Steam Navigation Company *v.* Merchants Bank, 6 How. 344,) it is not now my purpose to do more than to refer to that examination, and to maintain my own consistency by the reassertion of my adherence to the constitutional principles therein propounded, principles by which I am constrained to deny the jurisdiction of this court and of the Circuit Court, in the case before us.

It is true that the libel in this case alleges the injury to have been committed within the ebb and flow of the tide, but it is obvious that such an allegation does not satisfy the description

of an occurrence which to give jurisdiction must be marine or nautical in its character and locality. Although all tides are said to proceed from the action of the moon upon the ocean, it would be a *non sequitur* should the conclusion be attempted that therefore every river subject to tides was an ocean.

It to my view seems manifest, that an extension of admiralty jurisdiction over all waters affected by the ebb and flow of the tide, would not merely be a violation of settled and venerable authority, but would necessarily result in the most mischievous interference with the common law and internal and police powers of every community. Take one illustration which may be drawn from subjects within our immediate view.

In the small estuary which traverses the avenue leading to this court room, the tides of the Potomac regularly ebb and flow, although upon the receding of the tide this watercourse can be stepped over. Upon the return of the tide there may be seen on this water numerous boys bathing or angling, or passing in canoes. Should a conflict arise amongst these urchins, originating either in collision of canoes or an entangling of fishing lines, or from any similar cause, this would present a case of admiralty jurisdiction fully as legitimate as that which is made by the libel in the case before us. Yet the corporate authorities of Washington would think strangely no doubt of finding themselves, by the exertion of a great national power designed for national purposes, ousted of their power to keep the peace, and to inflict upon rioters within their notorious limits, the discipline of the workhouse.

I am opposed to every assumption of authority by forced implications and constructions. I would construe the Constitution and the statutes by the received acceptation of words in use at the time of their creation, and in obedience to this rule, I feel bound to express my belief that, in the present and in all similar cases, this court has no jurisdiction under the Constitution of the United States.

Order.

This cause came on to be heard on the transcript of the record, from the District Court of the United States for the Northern District of California, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause, be, and the same is hereby affirmed, with costs and interest, at the same rate per annum that similar decrees bear in the courts of the State of California.

William H. Seymour and Dayton S. Morgan, Plaintiffs in error, v. Cyrus H. McCormick.

In 1834, McCormick obtained a patent for a reaping machine. This patent expired in 1848.

In 1845, he obtained a patent for an improvement upon his patented machine; and in 1847, another patent for new and useful improvements in the reaping machine. The principal one of these last was in giving to the raker of the grain a convenient seat upon the machine.

In a suit for a violation of the patent of 1847, it was erroneous in the Circuit Court to say that the defendant was responsible in damages to the same extent as if he had pirated the whole machine.

It was also erroneous to lay down as a rule for the measure of damages, the amount of profits which the patentee would have made, if he had constructed and sold each one of the machines which the defendants constructed and sold. There was no evidence to show that the patentee could have constructed and sold any more than he actually did.

The acts of Congress and the rules for measuring damages, examined and explained.

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

The manner in which the suit was brought, and the charge of the Circuit Court, which was excepted to, are stated in the opinion of the court. The reporter passes over all other questions which were raised and decided, except those upon which the decision of this court turned.

It was argued by *Mr. Gillet*, for the plaintiffs in error, and by *Mr. Stevens* and *Mr. Johnson*, for the defendants in error. There was also a brief filed by *Mr. Selden*, for the plaintiffs in error.

The following points are taken from the brief of *Mr. Gillet*, for the plaintiffs in error.

Sixth. Where the claim on which the suit is founded is for an improvement on old machines, patented or unpatented, the plaintiff is not entitled to recover, as a measure of damages, the mechanical profits that he could make upon the whole machine, including the old part. His damages are limited to the profits on making and vending the improvement patented and infringed.

The plaintiff recited in his declaration and furnished oyer of his old patent of 1834, for a reaping machine, which expired in 1848, and his patent of 1845, which is described as an "improvement upon his patented machine." In his patent of 1847, he claims "new and useful improvements in the reap ıg machine formerly patented by me," in which he also claims other improvements besides the one in controversy, which is his last claim, and relates to the seat. For the purpose of this suit, the machine described in the patent of 1834, (which had in fact be-

come public property,) and the improvements in the patent of 1845, and a large portion of those included in that of 1847, the defendants had a perfectly lawful right to use. This covered the whole of the improved reaping machine, except what related to the seat, and its combination with the reel. It cost the defendants to make their machine, which had no seat, about $64.26. There was no proof to show the extent of the cost of the plaintiff's seat. One was made by Zinck, for one dollar. The plaintiff allowed Brown in effect, in 1845, 1846, $75 each, for making machines without the elevated seat — and he proved on this trial by Blakesley, that it cost him only $36, and by Dorman, $37, to make them with it. There can be no pretence that the addition of the seat, and what is covered by the last claim, added much, if any thing, to the cost of constructing the improved machine. The plaintiff proved by Blakesley, that the manufacturer's profit on the whole machine, including a $30 patent fee, was $74.

It is evident that the manufacturer's profit constituted the principal item of gain in constructing and selling the plaintiff's reaper. The court instructed the jury that this profit on the two old machines, and on that part of the new not in controversy, could be recovered as a part of the plaintiff's "actual damage" for violating the last claim of the patent of 1847. The old machine of 1834 was public property, and everybody had a right to construct and use it. The patents show that it contained the great and fundamental parts, and nearly the whole of the new machine. As the plaintiff had decided not to proceed on his patent of 1845, that was, in effect, public property. By waiving any right to proceed on the first claim of his patent of 1847, the plaintiff limited himself to the seat, combined with the reel. The defendants had a right to make every other part of the improved machine, and having the right, the profits up to that point were lawfully theirs. They had the right to construct the whole, save the seat. If a profit could be made upon such construction, it was as clearly theirs as if they had been made upon a machine totally unlike the plaintiff's. There is no law, statute, or otherwise, which prohibits their making and receiving such profits. The court instructed the jury that all these profits belonged to the plaintiff, but pointed to no law showing him entitled to them. The manufacturer's profits were distinct from his patent profits, which he estimated and charged the defendants and his partners generally at $30. The charge of the court gives him both. It makes the monopoly of a patent confined to an inexpensive improvement carry with it a monopoly of manufacturers' profits upon what is public property, precisely the same as if the whole had been included in the claim on which the trial was had.

The ruling of the judge allowed the plaintiff damages to as great an extent as if the trial had been on, and had established, the old patents of 1834 and 1845, and on the first claim of that of 1847, as well as on the last. If the defendants pay these damages, there is nothing to prevent the plaintiff suing on the patent of 1845, and on the first claim of that of 1847, because this trial and verdict were confined to the last claim of the latter patent. They were not recovered upon. But the plaintiff was adjudged to enjoy their advantages under the head of manufacturers' profits. But we deny that the patent laws confer a monopoly of profits on any thing not actually patented. It would be extending the statute so as to make it cover, in effect, things that the patentee did not invent, and which by law belong to the public at large. This principle would authorize the patentee of an improvement in steamboat machinery, or railroad cars, carding, spinning, weaving, and other like machines, to recover on a patent for some trifling improvement of either the entire profits of manufacturing the whole apparatus to which it might be attached.

The judge's rule allows the plaintiff precisely the same damages as if his last claim covered the whole reaping machine, and had been held to be valid. Under his ruling, if the material parts, other than the seat, had been covered by several other patents, the defendants would have been responsible on each, as well as to the plaintiff, for all profits, manufacturing as well as for the patent-right. In such a case the plaintiff's rights, as against the defendants, would be precisely as strong as when the latter used what is now public property. If the plaintiff should bring a new suit on his patent of 1845, the recovery on that of 1847 would be no bar, and he might obtain a second manufacturer's profit. The defendants sought to attack the validity of the patent of 1845, but the evidence was ruled out; still the plaintiff was allowed to recover for the manufacturer's profits of the part of the machine covered by this patent, just the same as if it had been a part of the last claim of the patent of 1847. If the defendants had been patentees of the whole machine except the seat, and they had infringed the patent for that, could the plaintiff recover manufacturer's profits on the whole machine? Clearly not. Still the rights of the defendants to make and use all but the seat, are just as strong and legal, when they use what is public property, or what is not covered by the last claim of the patent of 1847, as if they exercised them under a patent. The fact that they had or had not a patent for every thing but the seat, can neither increase nor diminish the plaintiff's rights to damages; they must rest solely upon his patent, and not upon those of others. The law allows him all

the profit he can make on his patented improvement, and nothing beyond. The judge's instruction was clearly erroneous, and vitiates the verdict.

Seventh. In estimating the plaintiff's damages for an infringement, his "actual damages" alone are to be considered, and the jury are not authorized to presume that if the defendants had not made and sold machines, "all persons who bought the defendants' machines would necessarily have been obliged to go to the patentee and purchase his machines."

The proof showed that the plaintiff manufactured his machines only at Chicago, in Illinois, and his sales were in the Western States, except a few in western New York. The defendants manufactured their machines at Brockport, near Rochester, in New York, and sold them there, in Canada, and some at the west, as proved. It was proved by Hanna — "The demand within my knowledge has been unparalleled, the manufacturer oftentimes not being able to supply the demand at certain points." The plaintiff offered no proof tending to show that he could and did supply all the demands for his machine, and could have furnished more if called for. In the absence of this evidence, and in direct conflict with the oath of the plaintiff's own witness, who was his superintendent, the court instructed the jury, that as a matter of law they were to presume that if the defendants had not constructed and sold any machines, the plaintiff would have manufactured and sold machines to the same persons to whom the defendants had sold. Hence, the jury were instructed to presume "in the judgment of the law" what was grossly improbable, and what the plaintiff himself had actually disproved. The law does not presume that all the persons who purchased of the defendants would have purchased of the plaintiff, because the law does not presume absurdities, and what is substantially a physical impossibility; nor does it presume, without evidence, that the plaintiff had introduced a witness who had sworn falsely. This part of the charge is clearly erroneous; the court should have submitted this matter to the jury, to pass on as a question of fact.

(Mr. Stevens's eighth point was relative to the following exception which had been taken by the defendants below, namely:)

To that part of the charge which states, "the general rule is that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement; and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights. That view proceeds upon the principle that if the defendants had not interfered with the patentee, all persons who bought

the defendants' machines would necessarily have been obliged to go to the patentee and purchase his machine;" — the defendants' counsel excepted.

VIII. The tenth exception cannot be sustained. That exception is to that part of the charge which states that the rule of damages is, "that the plaintiff is entitled to recover the actual damages he has sustained by reason of the infringement." Those damages may be determined by ascertaining the profits which the plaintiff would have made if the defendants had not interfered with his rights.

It is submitted that this is the correct rule of damages in any case; but in this case its correctness cannot be doubted. The defendants, with a full knowledge of plaintiff's rights, intentionally violated them. They were intentional wrongdoers, and were, therefore, bound to pay the plaintiff all the damage he had sustained by their tortious acts, just as much as they would be bound to pay him the full value of a horse, or any other chattel, of which they had tortiously deprived him.

It was, indeed, contended on the trial, that defendants were only bound to pay such profits as they had made by this intentional piracy.

Without stopping to discuss the question whether there may not be considerations in a suit in equity, where the defendants ignorantly infringed a patent, which might limit the damages in accordance with the rule contended for by the defendants, it is respectfully submitted, that in a suit at law, where the defendants have wilfully, knowingly, and intentionally, pirated the invention of the patentee, and appropriated it to their own use, the rule of damages laid down by the court in this case is correct.

An infringer can afford to sell the machine patented at a less profit than the patentee can.

He has spent no time, exercised no intellect, in excogitating the discovery or invention.

He has spent no time nor money in procuring the patent and bringing it into public use. Any other rule of damages, therefore, than that laid down by the court, would do great injustice to the patentee.

According to the rule contended for by defendants, if they had sold the reapers made by them for simply what it cost to construct them, or had given them away, although it deprived the patentee of the profits which he might have made upon those reapers, yet he could recover no damages.

But the defendant's counsel did not request the court to charge that the rule of damages was different from that stated by the court. They simply excepted to the charge of the court

in that respect, without giving any reasons, or stating how otherwise they desired the court to charge, in that regard.

As to the rule of the damages, see Pierson v. Eagle Screw Company, 3 Story, 402, 410; Allen v. Blunt, 2 Woodbury & Minot, 123, 446–7.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiff below, Cyrus H. McCormick, brought this action against the plaintiffs in error, Seymour & Morgan, for the infringement of his patent right. The declaration consisted of two counts.

The first alleged that the plaintiff was the true and original inventor of certain new and useful improvements in the machine for reaping all kinds of small grain, for which he obtained letters-patent on the 21st of June, 1834. And moreover, that the plaintiff was the inventor of certain improvements upon the aforesaid patented reaping machine for which he obtained letters-patent on the 31st day of January, 1845. And it charged that the defendant had made three hundred reaping machines which infringed the inventions and improvements, fourthly and fifthly claimed in the schedule or specification of the last-named letters-patent.

The second count alleged that the plaintiff was the first inventor of certain other improvements upon his said reaping machine before patented, for which he obtained letters-patent on the 23d day of October, 1847. And that the defendant manufactured and constructed three hundred machines embracing the principles of the last-named invention and improvements. The defendants pleaded not guilty, and the case being called for trial in October, 1851, they prayed a continuance of the cause on account of the absence of certain witnesses material to their defence against the charge laid in the first count, to wit, the infringement of the patent of 1845.

The court intimated an opinion that the affidavit was sufficient to put off the trial of the cause, whereupon the plaintiff's counsel stated to the court that rather than have the trial put off, they would not on said trial seek to recover against the defendant on account of any alleged infringement or violation by the defendants of the plaintiff's rights under his letters-patent bearing date January 31st, 1845, set forth in his declaration, but would proceed solely for a violation of the rights secured to him by his letters-patent bearing date October 23d, 1847, set forth in his declaration, under the last claim specified in that patent relating to the seat for the raker.

The trial then proceeded on the last count in the declaration for the infringement by defendants of this last patent, and testi-

mony offered to show that the plaintiff was not the original and first inventor of the reaping machine as described in his patents of 1834 and 1845, was rejected.

Numerous exceptions were taken by defendants in the course of the trial and to various instructions contained in the charge of the court. Most of these involve no general or important legal principle, and could not be understood without prolix statements with regard to the facts of the case and the structure of the peculiar machines. To notice them in detail would be both tedious and unprofitable. We deem it sufficient, therefore, to say that the defendants have failed to support their exceptions as to the rulings of the court concerning the testimony, and that the charge of the learned judge is an able and correct exposition of the law as applicable to the case, with the exception of the points which we propose now to examine, and which are contained in the following portion of the charge.

"The only remaining question is that of damages. The rule of law on this subject is a very simple one. The only difficulty that can exist is in the application of it to the evidence in the case. The general rule is that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement, and those damages may be determined by ascertaining the profits which in judgment of law he would have made, provided the defendants had not interfered with his rights.

"That view proceeds upon the principle that if the defendants had not interfered with the patentee, all persons who bought the defendants' machines would necessarily have been obliged to go to the patentee and purchase his machine. That is the principle on which the profits that the patentee might have made out of the machines thus unlawfully constructed, present a ground that may aid the jury in arriving at the damages which the patentee has sustained.

"It has been suggested by the counsel for the defendants, that inasmuch as the claims of the plaintiff in question here are simply for improvements upon his old reaping machine and not for an entire machine and every part of it, the damages should be limited in proportion to the value of the improvements thus made, and that therefore a distinction exists, in regard to the rule of damages, between an infringement of an entire machine and an infringement of a mere improvement on a machine. I do not assent to this distinction. On the contrary, according to my view of the law regulating the measure of damages in cases of this kind, the rule which is to govern is the same whether the patent covers an entire machine or an improvement on a machine. Those who choose to use the old machine have a right to use it with-

out incurring any responsibility; but if they engraft on it the improvement secured to the patentee, and use the machine with that improvement, they have deprived the patentee of the fruits of his invention, the same as if he had invented the entire machine; because it is his improvement that gives value to the machine on account of the public demand for it. The old instrument is abandoned, and the public call for the improved instrument, and the whole instrument, with the improvement upon it, belongs to the patentee. Any person has a right to use the old machine; and if an inventor engrafts upon an old machine, which he has a right to use, an improvement that makes it superior to any thing of the kind for the accomplishment of its purposes, he is entitled to the benefit of the operation of the machine under all circumstances with the improvement engrafted upon it, to the same degree in which the original inventor is entitled to the old machine.

"There are some data, furnished by the counsel on both sides, which it is proper the jury should take into view in ascertaining the damages, provided they arrive at this question in the case. It is conceded that just three hundred machines have been made by the defendants, of the description to which I have called your attention, and testimony has been gone into on both sides for the purpose of showing the cost of the machines, and the prices at which they sold. In order to ascertain the profits accruing to the party who makes machines of this description, you must first ascertain the cost of the materials and labor, and the interest on the capital used in the manufacture of the machines. You must also take into account the expenses to which the manufacturer is subjected in putting them into market, such as that of agencies and transportation, also of insurance; and where the article is sold on credit, a deduction must also be made for bad debts. All these things must be taken into account, in order to bring into the cost every element that properly goes to constitute it in the hands of the manufacturer. When you have ascertained the aggregate sum of the cost, deduct it from the price paid by the purchaser, and you have the net profit on each machine. By this process you are enabled to approximate to something like the actual loss that the patentee sustains in a case where his right has been violated by persons interfering with him and putting into market his improvement."

The plaintiffs in error complain that these rules with regard to damages, as thus laid down by the court, are incorrect, and have produced a verdict for most ruinous damages, far beyond any thing justified by the facts of the case. 1. Because the jury were instructed that it is a legal presumption that if defend-

ant had not made and sold machines, all persons who bought the defendant's machines would necessarily have been compelled to go to the patentee and purchase his machines. That this principle was enunciated as a binding principle of law, although the plaintiff below had given no evidence to show that he could have made and sold a single machine more than he did, or was injured in any way by the competition of the defendants, or hindered from selling all he made or could make. And, secondly, because the jury were instructed that the measure of damages for infringing a patented improvement on a machine in public use is the same as if the defendant had pirated the whole machine and every improvement on it previously made, and as a consequence that the plaintiff below had a right to recover as great damages for the infringement of the patent in his second count as if he had proceeded on both counts of his declaration and shown the infringement of all the patents claimed, and that in consequence of these instructions they have been amerced in damages to the enormous sum of $17,306.66, and with costs to nearly the round sum of $20,000.

We are of opinion that the plaintiffs in error have just reason of complaint as regards these instructions and their consequent result.

The first patent act of 1790 made the infringer of a patent liable to "forfeit and pay to the patentee such damages as should be assessed by a jury, and, moreover, to forfeit to the person aggrieved the infringing machine."

The act of 1793 enacted "that the infringer should forfeit and pay to the patentee a sum equal to three times the price for which the patentee has usually sold or licensed to other persons the use of said invention." Here the price of a license is assumed to be a just measure of single damages, and the forfeiture by way of penalty is fixed at treble that sum. But as experience began to show that some inventions or discoveries had their chief value in a monopoly of use by the inventor, and not in a sale of licenses, the value of a license could not be made a universal rule, as a measure of damages. The act of 17th of April, 1800, changed the rule, and compelled the infringer "to forfeit and pay to the patentee a sum equal to three times the actual damage sustained by such patentee." This act continued in force till 1836, when the act now in force was passed.

Experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits. The defendant who acted in ignorance or good faith, claiming under a junior patent, was made liable to the same penalty with the wanton and malicious pirate. This rule was manifestly unjust. For there is no good reason why taking a

man's property in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages. It is true, where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant.

In order to obviate this injustice, the Patent Act of 1836 confines the jury to the assessment of "actual damages." The power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.

It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted. A man who invents or discovers a new composition of matter, such as vulcanized India rubber, or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in the market, the patentee being himself able to supply the whole demand at his own price. If he should grant licenses to all who might desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entire new machine. If any person could use the invention or discovery by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such cases the profit of the infringer may be the only criterion of the actual damage of the patentee. But one who invents some improvement in the machinery of a mill could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement. And where the profit of the patentee consists neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Stimpson's patent for a turn-out in a railroad may be cited as an example. It was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not be liable to damages to the amount of the profits of his railroad, nor could the actual damages to the patentee be measured by any known ratio of the profits on the road. The only actual damage which the patentee has suffered in such a case is the non-payment of the price which he has put on his license, with interest, and no

more. There may be cases, as where the thing has been used but for a short time, in which the jury should find less than that sum; and there may be cases where, from some peculiar circumstance, the patentee may show actual damage to a larger amount. Of this a jury must judge from the evidence, under instructions from the court that they can find only such damages as have actually been proved to have been sustained. Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims any thing above that amount, he is bound to substantiate his claim by clear and distinct evidence. When he has himself established the market value of his improvement, as separate and distinct from the other machinery with which it is connected, he can have no claim in justice or equity to make the profits of the whole machine the measure of his demand. It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss. Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee "would have made, if the infringer had not interfered with his rights," is a question of fact and not "a judgment of law." The question is not what speculatively he may have lost, but what actually he did lose. It is not a "judgment of law" or necessary legal inference, that if all the manufacturers of steam-engines and locomotives, who have built and sold engines with a patented cut-off, or steam whistle, had not made such engines, that therefore all the purchasers of engines would have employed the patentee of the cut-off, or whistle; and that, consequently, such patentee is entitled to all the profits made in the manufacture of such steam engines by those who may have used his improvement without his license. Such a rule of damages would be better entitled to the epithet of "speculative," "imaginary," or "fanciful," than that of "actual."

If the measure of damages be the same whether a patent be for an entire machine or for some improvement in some part of it, then it follows that each one who has patented an improvement in any portion of a steam engine or other complex machines may recover the whole profits arising from the skill, labor, material, and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built. By this doctrine even the smallest part is made equal to

the whole, and "actual damages" to the plaintiff may be converted into an unlimited series of penalties on the defendant.

We think, therefore, that it is a very grave error to instruct a jury "that as to the measure of damages the same rule is to govern, whether the patent covers an entire machine or an improvement on a machine."

It appears, from the evidence in this case, that McCormick sold licenses to use his original patent of 1834 for twenty dollars each. He sold licenses to the defendants to make and vend machines containing all his improvements to any extent for thirty dollars for each machine, or at an average of ten dollars for each of his three patents. The defendants made and sold many hundred machines, and paid that price and no more. They refused to pay for the last three hundred machines under a belief that the plaintiff was not the original inventor of this last improvement, whereby a seat for the raker was provided on the machine, so that he could ride, and not be compelled to walk as before. Beyond the refusal to pay the usual license price, the plaintiff showed no actual damage. The jury gave a verdict for nearly double the amount demanded for the use of three several patents, in a suit where the defendant was charged with violating one only, and that for an improvement of small importance when compared with the whole machine. This enormous and ruinous verdict is but a corollary or necessary consequence from the instructions given in that portion of the charge of the court on which we have been commenting, and of the doctrines therein asserted, and to which this court cannot give their assent or concurrence.

The judgment of the Circuit Court is reversed, with a *venire de novo.*

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.*

HENRIETTA AMIS, EXECUTRIX, AND WILLIAM PERKINS, EXECUTOR, OF JUNIUS AMIS, DECEASED, APPELLANTS, *v.* DAVID MYERS.

Where a complainant filed a bill on the equity side of the Circuit Court, for an injunction to prevent the sale of slaves which had been taken in execution as the property of another person, the evidence shows that they were the property of the complainant, and the Circuit Court was directed to make the injunction perpetual.

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

Junius Amis filed his bill under the following circumstances:

The respondent, David Myers, having obtained a judgment against William D. Amis, issued execution thereon and caused to be seized seven slaves. The complainant, Junius Amis, thereupon filed his bill, claiming these slaves as his property, and praying an injunction to arrest the sale of them. He made David Myers and W. F. Wagner, the marshal, parties defendant to the bill. The injunction was afterwards granted.

David Myers appeared and filed his answer. He admitted the issuance of the execution as alleged, and he admitted the marshal's seizure of the property as alleged, and the advertisement for sale under the process; but he denied the complainant's title, and denied all interest in him, legal or equitable, concerning the said slaves. And the defendant further charged that these slaves were purchased by William D. Amis, of Nathaniel Hill, in New Orleans, for the sum of five thousand dollars; that they were delivered to him and taken by him to the plantation on which he resided, in the parish of Madison, where they remained until the levy aforesaid.

The Circuit Court, upon the final hearing upon bill, answer, depositions, and proofs, dissolved the injunction, and dismissed the bill with costs. The complainant appealed to this court, and, having died, his executor and executrix were made parties.

It was argued by *Mr. Goold* and *Mr. Lawrence*, for the appellants, and by *Mr. Baxter*, for the appellee.

There being no point of law involved in the case, the reporter does not deem it expedient to insert the arguments upon the question of ownership, as shown by the evidence.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff filed his bill in the Circuit Court of the United States for the Eastern District of Louisiana, to restrain the sale of certain slaves taken in execution of a judgment of that court, in favor of the defendant against William D. Amis.

The case of the plaintiff is, that the slaves are his lawful property, and are not subject to the execution of the defendant. The defendant denies this allegation and insists that the property in the slaves is vested in his debtor.

The evidence shows that the slaves were purchased in New Orleans, by the defendant in the execution. He provided the purchase-money by procuring the acceptance and discount of a draft at thirty days date, by a mercantile firm, upon the promise of sending funds for its payment at its maturity. He was disabled from doing this by the occurrence of facts that are detailed in the evidence, and the plaintiff, for his relief, caused the draft to be paid by his own factor, and agreed to take the slaves as his property.

The bill of sale, given to the defendant in execution, did not contain the name of the vendee, but a blank space was left for the insertion of the name. When this arrangement took place, the plaintiff's name was inserted and the paper given to him. The slaves have been at his plantation, and although William D. Amis resides there, no act of mastership is shown, and he denies having any interest in the slaves.

We think this testimony establishes the case of the plaintiff.

It is proper to notice that this case is not one of equitable cognizance. The plaintiff had a clear and adequate remedy at law, under the Code of Practice of Louisiana. C. P. 298, § 7.

It is not usual for this court to take an exception of this nature on its own motion and where no objection has been made by the defendant; but this case is one so clearly beyond the limits of the equitable jurisdiction of the Circuit Court, that the fact is noticed that it may not serve as a precedent.

The decree of the Circuit Court is reversed, and the cause remanded, with directions to enter a decree to perpetuate the injunction.

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 perpetuate the injunction granted in this cause.

worked at the same time, until the common fence fell down and was neglected to be repaired, and Paul Guitard cultivated the land lying adjoining and north of the said Chouteau mill tract until the common fence fell down. His cultivation was towards the west on the hill, and he did not cultivate the land on the very eastern end, because it was rather low ground there. The cultivation of Guitard, starting from the hill, went west towards the middle of the piece of land; but how far it commenced from the eastern end, or how far it extended towards the west, was not proved. It was called Guitard's Cul-de-sac field from the west end of the St. Louis prairie fields to the west end of the Chouteau mill tract, which was the west line of the Cul-de-sac fields, now near the rock spring. The land sued for was proved to fall within one arpen in width, north of the Chouteau mill tract, and forty arpens in depth or length west from the St. Louis prairie fields; but whether it was a part of the very spot cultivated by Guitard was not proved. The plaintiffs introduced a deed from Paul Guitard which conveyed all his property and rights of property in St. Louis county, to his grandson, Vincent Guitard, but this specific claim was not mentioned; the deed was dated the 11th of January, 1822, and he died in 1823. Vincent Guitard died in 1836, leaving but three children, who are the plaintiffs and the sole representatives of their father. Vincent Guitard never in any way disposed of this land. Paul Guitard never had any concession for this land from the Spanish authorities; he never presented any claim he had to it under the act of 1812, to the recorder of land titles, nor made any claim for it before any board of commissioners. His grandson Vincent, nor none of the family, ever presented any claim to it before the recorder of land titles, under the act of the 26th of May, 1824, nor was the land ever surveyed either by the Spanish or American government, as a field lot. The defendant introduced a confirmation and patent, by virtue of the act of the 4th of July, 1836, to Mordecai Bell's representatives, and a survey of the United States which included the land in controversy and a regular chain of title to defendant. He also introduced map X, purporting to contain the out boundary lines of the surveyor-general, at St. Louis, projected under the first section of the act of the 13th of June, 1812, and it was proved that the land described in the declaration, but not the whole forty arpens claimed by plaintiff, lies within said out boundary lines. Plaintiff introduced an experienced surveyor, who stated that in his opinion the out boundary line, as projected on map X, was not correctly run under the act of 1812; that said out boundary line should have been run so as to include the out lots, common field lots, and commons, in, adjoining, and belong-

ing to St. Louis, which he thought it did not do. It did not include the Grand prairie fields or the Barrier des noyer fields, nor the Cul-de-sac fields, either as they purport to be located on the township plat of the township in which St. Louis lies, nor as proved in this suit, except about one third of their length as proved on the eastern end, nor does it include all of the commons of St. Louis; that in his opinion an out boundary line run under the act of 1812, so as to include the out lots, common field lots, and commons of St. Louis, would necessarily include the out lots, common field lots, in all the prairie fields as laid down on the township plat and commons. And such survey would also necessarily include land that was neither out lot, common field lot, or commons.

Agreement.

It was agreed that in any court to which this action might be carried, map X and township plat, above alluded to, might be introduced and used without including them in this bill of exceptions.

It is also agreed that the property in dispute is worth more than two thousand dollars, exclusive of costs. This was all the evidence in the case, and thereupon the plaintiffs asked of the court the following instructions, namely:

Plaintiff's instructions. 1. The act of Congress of 13th June, 1812, is in its terms a grant, and confirms the right, title, and claim of all town lots or village lots, out lots and common field lots, in, adjoining, and belonging to such towns and villages as are mentioned in the act, to those inhabitants of the towns and villages or to their legal representatives who inhabited, cultivated, or possessed such lots, rightfully claiming them prior to the 20th December, 1803. And the principal deputy surveyor of the territory of Missouri was required by said act to run an out boundary of the towns and villages mentioned in said act, so as to include the out lots, common field lots, and commons thereto respectively belonging, which out boundary line should be one continuous line, and not separate surveys of the town and lots, and should include the out lots, common field lots, and commons, and said towns and villages.

2. A common field lot, as intended by said act of Congress, is a piece of land of larger or smaller dimensions, as the case may be, according to ancient cultivation, lying alongside of, and parallel to, other similar pieces of land, and claimed or cultivated under the protection of a common fence by those who inhabited said towns or villages prior to the 20th December, 1803; and said pieces of land might not have been conceded or surveyed by any French or Spanish authority, or surveyed officially by the United States as a common field lot.

3. If then the jury believe, from the evidence, that the land sued for formed part of a common field lot, as just defined in instruction 2, and that said common field lot was rightfully claimed, and in part or altogether cultivated prior to the 20th December, 1803, by Paul Guitard, the plaintiffs are entitled to recover; which were refused, to which plaintiffs at the time excepted, and defendant asked the following instructions:

Defendant's instructions. 1. If the jury believe, from the evidence, that the cultivation by Paul Guitard, testified to by the witnesses, was on a tract of land called a Cul-de-sac common field, and if the jury shall also believe, from the testimony, that the Cul-de-sac common fields, including the one cultivated by Paul Guitard, were at a place to the south-west from the premises sued for, and that neither of said Cul-de-sac common fields include the premises in question, then the plaintiff cannot recover in this action.

2. If the land sued for is within and forms a part of the tract confirmed to Mordecai Bell, or his legal representatives, and within the official survey of said Mordecai Bell tract, then the defendant has shown a title in him paramount to the title of the plaintiff, and the latter cannot recover.

3. There is no evidence that Paul Guitard, under whom the plaintiff derives and claims title to the premises in question, cultivated any out lot or common field lot, nor that any one existed at the place where the cultivation that has been spoken of by plaintiffs' witnesses, existed, nor had the act of 1812 application to this land, so far as Paul Guitard and those claiming under him are concerned. The plaintiff, therefore, cannot recover in this action.

4. If the out boundary line of the town of St. Louis run under the act of Congress of 13th June, 1812, as shown by the official survey and plat, marked X, read in evidence, includes the land in controversy, then the plaintiff cannot recover. Which were given by the court; and the court of its own motion gave the following:

Instruction by the court. "The court also instructed the jury, that there having been no concession nor grant, nor survey, nor permission to settle or cultivate, or possess the land claimed by Paul Guitard, to said Guitard, under and by the Spanish authorities or government; and no location of said claim by or under said government, nor under the French government, and no proof having been made at any time by said Paul Guitard, or those claiming under him, or any inhabitation, cultivation, or possession, or of the location and extent of said claim, either under the provisions of the act of the 13th June, 1812, or those of the act of the 26th May, 1824, either before the recorder of

land titles or other United States authority; and there having been no survey or location of said land by or under the authority of the United States, the said plaintiffs cannot now set up said claim and locate it, and prove its extent and inhabitation and cultivation by parol evidence merely, and therefore cannot recover in this action;" to which plaintiffs also excepted at the time, and here now tender this their bill of exceptions, and pray that it be signed and sealed and made part of the record in this cause; which is done accordingly. R. W. WELLS. [SEAL.]

Upon this bill of exceptions, the case came up to this court and was argued by *Mr. Williams* and *Mr. Geyer* for the plaintiffs in error, and by *Mr. Johnson* for the defendant in error. Upon that side there was also a brief by *Mr. Ewing*.

The following notice of the points made on behalf of the plaintiff in error is taken from the brief of *Mr. Geyer*: —

It being admitted on the record that the premises in controversy were within the confirmation to Mordecai Bell, the instruction numbered two was decisive against the plaintiff, and the instruction numbered three decided the whole case in favor of the defendant. So that the additional instruction was wholly unnecessary to a decision of the cause. It furnishes, however, the construction given by the circuit court to the acts of 13th June, 1812, and 26th May, 1824, on which the decision against the title of the plaintiff is founded — a construction opposed to that uniformly given to the same acts, by the Supreme Court of Missouri, and presents to this court a question upon the decision of which depend the titles to many lots of great value in and near the towns and villages named in those acts, and especially the now city of St. Louis.

On behalf of several persons interested in the question, but not parties to the record, I submit that the construction given by the Circuit Court to the acts before mentioned, is erroneous.

1. The first section of the act of 13th June, 1812, (Land Laws, vol. 1, p. 216,) is *proprio vigore*, a confirmation of the rights, titles, and claims to all town or village lots, out lots, common field lots, and commons, in or belonging to the towns and villages named, which had been inhabited, cultivated, or possessed, prior to the 20th December, 1803, to the inhabitants of said town and villages, according to their several right or rights in common thereto.

2. The act does not refer such claims to the recorder or any other tribunal for examination, report, or adjudication, nor does it require or contemplate the exhibition of such claim, or the proof of inhabitation, cultivation, or possession, before any officer or authority of the United States, for any purpose.

3. No concession, grant, survey, permission to settle, or other documentary evidence of title, from the French or Spanish government, is necessary to maintain a title to any lot or commons under the act of 1812; the confirmation is made by the act solely upon the inhabitation, cultivation, or possession prior to 20th December, 1803.

4. The legal title to the lots and commons, confirmed by the act of 13th June, 1812, became vested on that day in the inhabitants of the respective towns and villages, "according to their several right or rights in common thereto," leaving it to them to prove, orally or otherwise, the only facts required by the act of 1812, of inhabitation, cultivation, or possession, prior to the 20th December, 1803.

5. The act of the 26th May, 1824, (Land Laws, vol. 1. p. 397,) does not annex conditions to the confirmations by the first section of the act of 13th June, 1812; those who availed themselves of that act, and "designated their lots" by making the proof required, obtained a certificate, which served as *prima facie* evidence of a confirmation, not by the recorder, but by the act of 1812. Those who failed to appear and designate their lots obtained no new evidence of title, but they did not forfeit that which was acquired twelve years before by the act of 1812.

REFERENCES. *Letters.* — C. B. Penrose, commissioner to secretary of the treasury; Thos. F. Riddick, secretary of commissioners to the chairman of the committee of public lands, H. R.; Gales and Seaton's State Papers, Public Lands, vol. 2, pp. 448, 451.

Acts of Congress. — Land Laws, vol. 1, Senate editi n, 1838; 2d March, 1805, c. 74, p. 122; 28th February, 1806, c. 79, p. 132; 21st April, 1806, c. 84, 138; 2d March, 1807, c. 91, p. 153; 13th June, 1812, c. 140, p. 216; 2d March, 1813, c. 153, p. 230; 12th April, 1814, c. 162, p. 242; 29th April, 1816, c. 197, p. 286; 26th May, 1824, c. 311, p. 397; 27th January, 1831, c. 406, p. 478; 4th July, 1836, c. 505, p. 557.

Cases. — Foster *v.* Elam, 2 Peters, 253; United States *v.* Percheman, 7 Peters, 51; Strother *v.* Lucas, 12 Peters, 410. Vasseur *v.* Benton, 1 Mo. R. 212; Lajoye *v.* Primm, 3 Mo. R. 368; Janis *v.* Gurno, 4 Ib. 458; Gurno *v.* Janis, 6 Ib. 330; Trotter *v.* St. Louis Public Schools, 9 Ib. 69; Biehler et al. *v.* Coonce, Ib. 347; Machlot *v.* Dubrueil, Ib. 477; Montgomery & Co. *v.* Landusky, Ib. 705; Page *v.* Scheibel, 11 Mo. R. 167; Harrison *v.* Page, 16 Ib. 182; Kissell *v.* St. Louis Public Schools, Ib. 553; Gamache *v.* Piquignot, 17 Ib. 310; Soulard *v.* Clarke, MSS.

The act of 13th June, 1812, is the first in which the village claims are mentioned as a class; the previous acts provide only

for the investigation of claims and a future confirmation upon the proof of certain facts. Thus the first section of the act of 2d March, 1805, (Land Laws, vol. 1, p. 122,) providing as to one class of claims, declares that, when proved, they "shall be confirmed;" the second section, in reference to the claims of settlers, declares that the "tract of land" proved to have been inhabited and cultivated as required "shall be granted." The first section of the act of 1812, in reference to the village claims, declares that they "shall be and are hereby confirmed." The language of the act of 1805 is precisely that of the English version of the Florida treaty, which was construed to be executory, in Foster *v.* Elam, 2 Peters, 253. That of the act of 1812 is quite as emphatic as the Spanish version of the same clause of the same treaty, which is translated, "shall remain ratified and confirmed," and held to be a present ratification and confirmation in United States *v.* Percheman, 7 Peters, 51.

Again, the third section of the act of 3d June, 1812, provides that every donation claim embraced in the report of the commissioners, and not confirmed on account of some specified cause, "shall be confirmed," and that certain other claims, to the extent of 800 arpens, "shall be confirmed."

The acts of the 12th April, 1814, (Land Laws, vol. 1, p. 242); 29th April, 1816, (Ib. 280); and 4th July, 1836, (Ib. 557,) are acts confirming claims recommended for confirmation by the recorder or commissioners. The first declares that the claimants "shall be, and they are hereby, confirmed in their claims;" the second, that the claims recommended for confirmation be, and the same are hereby, confirmed; in the last, the same language is employed in confirming the decisions in favor of the claimants.

In every case where it is declared that claims "shall be confirmed," provision is made for an investigation and adjudication. None such is made by the act of 1812, in relation to the village claims confirmed by the first section. By the fourth section the recorder is required to extract from the books of the commissioners the donation claims directed to be confirmed by the third section. By the eighth section the powers and duties of the commissioners are conferred upon him in relation to donation claims filed under the seventh section, and the claims which had been theretofore filed and not decided on by the commissioners.

It is true that the recorder did examine and report for confirmation many village claims that were confirmed by the act of June, 1812, and that the report was confirmed by the act of 29th April, 1816. The confirmation furnished convenient evidence of title, but it is neither conclusive nor indispensable. Proof of inhabitation, cultivation, or possession, is all that the

law requires, and, when made, establishes a title from the 13th June, 1812, which is superior to a confirmation by the act of April, 1816, unaccompanied by evidence of inhabitation, cultivation, or possession, prior to 20th December, 1803. See Vasseur *v.* Benton, 1 Mo. Rep. 212, 296; Page *v.* Scheibel, 11 Ib. 167; Harrison *v.* Page, 16 Ib. 182.

The information upon which the act of June, 1812, was based, was contained in letters addressed to the Secretary of the Treasury by Mr. Penrose, one of the commissioners, and one addressed to the chairman of the committee on public lands by Mr. Riddick, secretary of the board, which had just then closed its labors and made report, under the provisions of the several acts of Congress for the adjustment of land claims. The letters were written at Washington, dated 20th, 24th, and 26th March, 1812, and are published in Gales & Seaton's edition of State Papers, Public Lands, vol. 2, pp. 447 to 451.

The first letter of Mr. Penrose contains a classification of the claims not finally confirmed. Class 8th embraces claims for out or field lots, as they are termed, which he says "should be confirmed, recorded or not recorded, if those not recorded do not interfere with claims confirmed; all these tracts have been possessed from fifteen to fifty years." Class 9th — "the commons." Class 10th — "town or village lots." He says: "It would probably be best to confirm the town generally to the inhabitants, and if there be any vacant lots, grant them for public schools."

In his second letter, he says: "The five following classes will include nearly all such claims as have sufficient merit to be confirmed." . . . . "Class 5th "embraces claims for towns or villages, then common fields or field lots and their commons, either recorded or not recorded." Mr. Penrose says: "By the spirit of the ordinances all these claims would have been confirmed or granted."

The letter of Mr. Riddick (the secretary) arranges the land claims into 49 classes. The last (49th) embraces "villages, common , common fields, and lands adjacent, given to the inhabitants individually for cultivation, possessed prior to the 20th December, 1803."

Mr. Riddick says: "The foregoing table or list is intended to show the claims of Louisiana in all the variety of shades in which it is possible for the claimants to place them, out of which a selection may be made of such as are not yet provided for by law; but nevertheless 'ought in justice to be confirmed or granted' to the claimant."

After some suggestions in respect to the other classes, the letter proceeds: "The forty-second, forty-third, and forty-fourth

classes have great merit, and ought to be provided for. It is believed that no actual settlement was made in Louisiana without the express permission of a proper Spanish officer. In fact, the known vigilance of that government was such as to prevent an idea of that kind being entertained a moment. Even the subjects of Spain, old residents of the country, were not permitted to travel from one village to another, a distance of not more than twenty miles, without obtaining from the commandant a passport, in which was specially stated the road to be travelled, going and returning. Under these circumstances, it is impossible that any settlements could have been made without the knowledge of the government."

"The forty-ninth class will comprise nearly one fourth in number of all the claims of the Territory of Louisiana, and, if confirmed at once by the outer lines of a survey to be made by the principal deputy, would give general satisfaction, and save the United States a deal of useless investigation into subjects that are merely matters of individual dispute."

"The United States can claim no rights over the same, except a few solitary village lots, and inconsiderable vacant spots of little value, which might be given to the inhabitants for the support of schools."

"The villages established prior to the 20th December, 1803, are as follows, to wit: "In St. Charles District, St. Charles and Portage des Sioux; in St. Louis District, St. Louis, St. Ferdinand, Maria des Liards, and Carondelet; in St. Genevieve District, St. Genevieve and New Bourbon; in New Madrid District, New Madrid and Little Prairie; in Arkansas District, Arkansas."

These letters suggest every provision contained in the two first sections of the act of June, 1812, the confirmation of the claims of the inhabitants to in-lots, out-lots, common field lots and commons, the survey of an out boundary, and the reservation of vacant lots for the support of schools. They show also the reason why no title paper was required, and no investigation or adjudication provided for, but the claims confirmed at once by force of the act alone.

The act supplementary to the act of 13th June, 1812, approved 26th May, 1824, (Land Laws, vol. 1, p. 397,) and the further supplement thereto, approved 27th January, 1831, (Ib. 478,) show that the act of 1812 was understood by congress to be a confirmation of the village claims *proprio vigore*. The first requires the owners of lots "which were confirmed by the act of June, 1812, on the ground of inhabitation, cultivation, or possession, to designate their respective lots by proving before the recorder the fact of such inhabitation, &c., within eighteen

months. The last is a quitclaim by the United States in favor of the inhabitants of the several towns and villages to the lots and commons confirmed to them respectively by the act of 13th June, 1812."

It was not the object of the supplementary act of 1824 to institute an investigation of village claims, or to require or authorize an adjudication of the rights of claimants. It embraces no unconfirmed claims, and of those confirmed only such as it recognizes to have been confirmed by the act of 1812.

These confirmations had been made without any record or documentary evidence by which it could be ascertained what lots had been confirmed, their extent and boundaries; and, because these facts depended on parol evidence, the surveyor-general could not distinguish the private from the public lots. This evil it was the object of the act of 1824 to remedy as far as practicable, and therefore it provides that the owners of lots confirmed by the act of 1812 (and none other, confirmed or unconfirmed) shall, within a limited period, designate their lots by proof of inhabitation, &c., and their extent and boundaries "so as to enable the surveyor-general to distinguish the private from the vacant lots," or, as it is expressed in the third section, "to serve as his guide in distinguishing them" (the confirmed lots) "from the vacant lots to be set apart as above described," that is, for the use of schools.

The recorder is directed to issue a certificate of confirmation for each claim confirmed, that is, for each claim which, in his opinion, shall have been proved to have been confirmed twelve years before, by force of the act of 13th June, 1812, and it has been held that the certificate is *primâ facie* evidence of such confirmation to the person named in it. Janis *v.* Gurno, 4 Mo. Reports, 458; but it may be rebutted; and if it is proved that the lot was inhabited, cultivated, or possessed by another person prior to the 20th December, 1803, that title is the best. The act of 1824 does not declare the consequence of a failure by an owner to make the proof required, and certainly cannot be construed to divest the title vested by the act of 1812. Gurno *v.* Janis, 6 Mo. R. 330; Page *v.* Scheibel, 11 Ib. 167; Harrison *v.* Page, 16 Ib. 182; Montgomery *v.* Landusky, 9 Ib. 705.

A construction of the act of the 13th June, 1812, was for the first time given by the Supreme Court of Missouri, in 1823, in the case of Vasseur *v.* Benton, 1 Missouri Reports, 212, 296.

(The counsel then examined that case particularly, and also the cases of Lajoye *v.* Primm, 1 Mo. Rep. 368; Janis *v.* Gurno, 4 Ib. 458; Gurno *v.* Janis, 6 Ib. 330; Beihler *v.* Coonce, 9 Ib. 347; Montgomery *v.* Landusky, Ib. 705; Page *v.* Scheibel, 11 Ib. 167; Harrison *v.* Page, 16 Ib. 182; Russell *v.* St. Louis

Public Schools, Ib. 553; Gamache *v.* Piquignot, 17 Ib. 310; Soulard *v.* Clarke, MS. March, 1854.)

Mr. Ewing made the following points for the defendant in error.

1st. It appears that the claim of the individual inhabitant is confined to the bounds of the village or town. The plaintiffs cannot claim any thing under this act except a town lot, out lot, common field lot, or commons belonging to St. Louis. The first question, therefore is, does St. Louis, its common fields or commons, within the provisions of the above-named act, include the land in controversy. It was never intended by that act that the claim of each inhabitant to the town lot, out lot, common field lot, or commons, should be separately set apart and severed from the national domain, by survey or otherwise; but that the "out bounds" of the town, with its appurtenant common fields and commons, should be surveyed and severed from the national domain by a regularly constituted officer, and then that each inhabitant should have secured to him his rights, whatever they might be, within the bounds of the town. It was the duty of the town authorities to attend to procuring the survey, and in its execution to guard the interests of the town, and with them the rights of the individual inhabitants.

The law directs that the survey be made "as soon as may be," so that the rights of the town and its inhabitants being defined, all others entitled may assert their claims. It would not do to allow a claim like that to the commons of St. Louis to remain unmarked, indefinite, hovering like a moving cloud over and around the adjacent titles. It must therefore be surveyed and its limits defined "as soon as may be." This was accordingly done. The precise date of the survey is not given but it was in or prior to 1817, in which year the plat was filed in the general land-office, pursuant to the provisions of the act above cited. That survey has been acquiesced in for thirty-seven years, and lands have been purchased and titles acquired and transmitted conformably to it for more than a generation. The survey was made by an authorized officer of the United States upon the one side, in the presence and with the actual or implied assent of the city authorities and the interested citizens on the other; and it is now much too late to question it in any quarter. The evidence on which it is now assailed is the opinion of an experienced surveyor, who thinks the out boundary line of the city ought to have been so projected as to include the land in controversy. It is not probable that he is better informed as to the state of the city and its appurtenant commons in 1812 than the public surveyor who projected the

out boundary line in 1816, and the public authorities of the city and the interested inhabitants who at that time witnessed and acquiesced in the said out boundary. But too much time has elapsed — the acquiescence has been too long to admit of evidence or question on the subject of this out boundary, even if the evidence were otherwise entitled to consideration.

2d. But waving this objection, the plaintiffs show no claim whatever under the statute.

The language of the first section, so far as it touches the rights of individuals, is somewhat vague and indefinite. It provides that lots which "have been inhabited, cultivated or possessed prior to the 20th day of December, 1803, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto." But it does not admit of a construction, which would give to the inhabitants of a town lands which they had occupied and cultivated many years before 1803, and which they had before that time abandoned. The expression, as I have said, is not clear, but the tense of the verb "have been inhabited" implies a continuing inhabitation, &c., down to the time named, December 20th, 1803. The more brief and common expression "were inhabited prior," &c., would convey distinctly the idea that "inhabitation," &c., at any time prior to that date was sufficient. But the word used to transfer title is, I think, decisive of the question — "shall be and is hereby confirmed to," &c. The term "confirmation," implies *proprio vigore*, an existing title or claim on which it is to operate — it can have no effect whatever on an inhabitation, cultivation, or possession, which existed in the indefinite past, but which had been abandoned and was as if it had never existed at the time of the confirmation.

But the second section of the act removes all possible doubt on the subject. The survey having been directed by the first section, the second goes on to provide, "that all town and village lots, out lots, or common field lots, included in such surveys, which are not rightfully owned or claimed by private individuals . . . shall be and the same are hereby reserved for the support of schools. Showing that there must be a present subsisting claim or ownership at the time of the passage of the law. Nothing which was abandoned, prior to its passage, is intended to be restored by it. It saves subsisting rights or claims only.

Whatever possession was in Paul Guitard of the land in question prior to 1796 was abandoned, when the common fence fell down and was abandoned by the town, namely, in 1796–97. From that time until the commencement of this suit in 1853, a period of nearly sixty years, no claim has been set up to these

lands, either by the city or the inhabitants. Twenty years after the fields, once inclosed by the common fence, were thrown open and abandoned, the boundary of the city, its out lots and commons, was settled by the city authorities and a public officer of the United States, and a record duly made thereof in the proper department of the government. The city has ever since acquiesced in its reputed boundary. Private individuals have acquiesced, and it has never yet been disturbed. I submit that it is too late to disturb it now, and unsettle titles which have for a full generation rested undisturbed upon it.

I ought, perhaps, also to notice the singularly unsatisfactory kind of title set up by the plaintiffs in their ancestor, Paul Guitard. They say he cultivated and claimed. But how or by what title did he claim? And where did he possess and cultivate? It might be possible to prove that a flock of crows lighted on the scrub-oaks in the Cul-de-sac sixty years ago, and flew away again, but it would be hard to prove the particular tree on which any one individual crow lighted. The proof is here equally unsatisfactory. There is no more trace left in the one case than in the other; no line drawn, stake set, tree marked, or stone planted, no ancient pile of rubbish to mark the spot claimed by Guitard or any other inhabitant out of the surveyed bounds of the town.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiffs claim a lot of ground in the city of St. Louis, as representatives of Paul Guitard, an ancient inhabitant of that city, under a confirmation in the act of Congress of the 13th of June, 1812, for the settlement of land claims in Missouri. 2 Stat. at Large, 748.

The record shows, that Guitard, from 1785–6 till the common fence which surrounded and protected the field lots and commons of that city was thrown down, in 1797 or 8, claimed and cultivated a parcel of land, one arpen in width and forty in depth, in the Cul-de-sac prairie. The tract claimed was called Guitard's Cul-de-sac field to its whole extent, and was in the usual form of field lots in that village. His cultivation did not extend over the whole claim, nor was it ascertained whether the portion sued for was within that part cultivated. There were eleven other lots of the same description, claimed and cultivated at that period by different persons in the Cul-de-sac prairie lying together, that of Guitard's being to the north of the others. The land sued for is within the survey directed by the first section of the act referred to. The defendant produced a patent from the United States for the land in dispute; but as the case was determined upon the title of the plaintiffs, that becomes of

no importance. The Circuit Court instructed the jury, "That there having been no concession, nor grant, nor survey, nor permission to cultivate or possess the land claimed by Paul Guitard to said Guitard under and by the Spanish authorities or government; and no location of said claim by or under said government, nor under the French government, and no proof having been made at any time by said Paul Guitard, or those claiming under him, of any inhabitation, cultivation, or possession, or of the location and extent of said claim, either under the provisions of the act of 1812 or those of the act of the 26th of May, 1824, either before the recorder of land titles or other United States authority; and there having been no survey or location of said land, by or under the authority of the United States, the said plaintiffs cannot now set up said claim and locate it, and prove its extent and inhabitation and cultivation by parol evidence merely." This instruction comprehends the entire case, and the examination of this will render it unnecessary to consider those given or refused upon the motions of the parties to the suit.

The act of the 13th of June, 1812, declares "that the rights, titles, claims to town or village lots, out lots, common field lots, and commons in, adjoining, and belonging to the several towns and villages named in the act, including St. Louis, which lots have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, shall be and they are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."

This act has been repeatedly under the consideration of this court, and to ascertain what has been decided upon it will facilitate the present inquiry. In Chouteau *v.* Eckhart, 2 How. 345, the defendant relied upon the title of the village of St. Charles to the *locus in quo*, as being a part of the commons of that village, and confirmed to it by the act of June, 1812. In that case, the right of the village was established from a concession made by the lieutenant-governor of Upper Louisiana, and a formal survey by the Spanish authority. The judgment of this court was, that a title of this description was confirmed by the act of 1812, and that this confirmation excluded a Spanish concession of an earlier date, which had been confirmed by a subsequent act of Congress.

In the case of Mackay *v.* Dillon, 4 How. 421, the defendant defended under the claim of St. Louis to its commons, and produced evidence of a Spanish concession, of a private survey which had been presented to the board of commissioners, and of proof having been made before the recorder of land titles. Whether the private survey made in 1806, and submitted to the

government, was conclusive of boundary, was the question before the court. Mr. Justice Catron, in delivering the opinion of the court, says, "By the first section of the act of 1812 Congress confirmed the claim to commons adjoining and belonging to St. Louis, with simila claims made by other towns. But no extent or boundaries were given to show what land was granted; nor is there any thing in the act of 1812 from which a court of justice can legally declare that the land, set forth in the survey and proved as commons by witnesses in 1806, is the precise land Congress granted: in other words, the act did not adopt the evidence laid before the board for any purpose; and the boundaries of claims thus confirmed were designedly, as we suppose, left open to the settlement of the respective claimants by litigation in courts of justice or otherwise."

Again in the case of Les Bois *v.* Bramell, the same learned judge says of this act, "that this was a general confirmation of the common to the town as a community, no one ever doubted, so far as the confirmation operated on the lands of the United States."

The questions settled by this court are that the act of 1812 is a present operative grant of all the interest of the United States, in the property comprised in the act, and that the right of the grantee was not dependent upon the factum of a survey under the Spanish government.

No question before this has been submitted to the court upon the interpretation to be given to the "rights, titles, and claims" which were the subject of the confirmation of the United States.

The instruction given to the jury by the Circuit Court implies that the confirmee, before he can acquire a standing in court, must originally have had or must subsequently have placed upon his title or claim an additional mark of a public authority besides this act of Congress; — that he must evince his right or claim by some concession, survey, or permission to settle, cultivate, or possess, or some recognition of his claim under the provisions of some act of Congress by some officer of the executive department, indicative of its location and extent. The laxity of the legislation in the act of 1812 is painfully evident, when the fact is declared that the large and growing cities of the State of Missouri have their site upon the land comprehended in this confirmation. Nevertheless an attempt to correct the mischief would probably create more confusion and disorder than the act has produced.

The act, in the form in which it exists, was adopted by Congress upon the solicitation and counsel of citizens of Missouri, interested in the subject and well acquainted with the conditions of its population. The towns and villages named in it

were then, and for many years continued to be, small, and the property of no great importance. During this time conflicting rights and pretensions were adjusted, facts necessary to sustain claims to property ascertained, and the business and intercourse of the inhabitants accommodated to its conditions. The act itself, with all the circumstances of the inhabitants before and at the time of its passage, have formed the subject of legal judgments and professional opinions upon which mighty interests have grown up and now repose. This court fully appreciates the danger of disturbing those interests and of contradicting those opinions and judgments.

The act of 1812 makes no requisition for a concession, survey, permission to settle, cultivate, or possess, or of any location by a public authority as the basis of the right, title, and claim, upon which its confirmatory provisions operate. It may be very true that there could have been originally no legitimate right or claim without some such authority. Congress, however, in this act, was not dealing with written or formal evidences of right. Such claims in Missouri have been provided for by other acts. These pretensions to town and village lots formed a residuum of a mass of rights, titles, and claims, which Congress was advised could be equitably and summarily disposed of by the abandonment of its own rights to the property, and a reference of the whole subject to the parties concerned. Congress afforded no means of authenticating the rights, titles, and claims of the several confirmees. No board was appointed in the act to receive the evidence nor to adjust contradictory pretensions.

No officer was appointed to survey or to locate any individual right. All the facts requisite to sustain the confirmation — what were village or town lots, out lots, common field lots, or commons — what were the conditions of inhabitation, cultivation, or possession, to bring the claimant within the act, were referred to the judicial tribunals. The act has been most carefully and patiently considered in the Supreme Court of Missouri, and conclusions have been promulgated, which comprehend nearly all the questions which can arise upon it.

In Vasseur *v.* Benton, 1 Mo. Rep. that court says, "we are of opinion that the claims to town or village lots, which had been inhabited, cultivated, or possessed, prior to the 20th of December, 1803, are by the express words of the act *ipso facto* confirmed as to the right of the United States." In Lajoye *v.* Primm, 3 Mo. Rep. 368, the court says, "the great object of the act was to quiet the villages in their titles to property (so far as the government was concerned) which had been acquired in many instances by possession merely, under an express or implied permission to settle, and which had passed from

hand to hand without any formal conveyance. In such cases possession was the only thing to which they could look; and taking it for granted that those who were found in possession at the time the country was ceded, or who had been last in possession prior thereto, were the rightful owners — the confirmation was intended for their benefit." In Page *v.* Scheibel, 11 Mo. 167, the same court says "the whole history of the progress of settlements in the French villages, so far as it has been developed in the cases which have come up to this court, shows that the villagers did not venture to take possession of the lots, either for cultivation or inhabitation, without a formal permission of the lieutenant-governor, or the commandant of the post. These permissions, it is also probable, were most generally in writing, and accompanied by a survey made by an officer selected and authorized by the government.

But the title of the claimants under this government does not depend upon the existence or proof of any such documents. Congress did not think proper to require it. In all probability, the fact that possession, inhabitation, and cultivation could not exist under the former government without such previous permission from the authorities of that government, was known to the framers of the act of 1812, and constituted the prominent reason for dispensing with any proof of this character in order to make out a title under that act. However this may be, the act requires no such proof, but confirms the title upon possession, inhabitation, or cultivation alone, without regard to the legality of the origin of such title."

We have quoted these portions of the reports of those cases to express our concurrence in the conclusions they present.

We shall now inquire whether it was necessary for the confirmee to present the evidence of his claim under the act of 1824, (4 Stat. at Large, 65,) supplementary to the act of 1812?

This act makes it the duty of the claimants of town and village lots "to proceed, within eighteen months after the passage thereof, to designate them by proving the fact of inhabitation, &c., and the boundaries and extent of each claim, so as to enable the surveyor-general to distinguish the private from the vacant lots." No forfeiture was imposed for a non-compliance. The confirmee by a compliance obtained a recognition of his boundaries from the United States, and consequently evidence against every person intruding, or claiming from the government *ex post facto*. The government did not by that act impair the effect and operation of its act of 1812.

Under the act of 1812 each confirmee was compelled, whenever his title was disputed, to adduce proof of the conditions upon which the confirmation depended. As the facts of inha-

bitation, possession, and cultivation at a designated period, are facts *in pais*, it followed as a matter of course that parol evidence is admissible to establish them. In the case of Hickie *v.* Starke, 1 Pet. 98, a question arose upon an act of Congress which confirmed to "actual settlers" within a ceded territory all the grants legally executed prior to a designated day, and this court held that the fact of "a settlement on that day" must be established, and proof of occupancy and cultivation was adduced. In the city of Mobile *v.* Eslava, 16 Pet. 235, certain water lots were confirmed to the proprietors of the front lots adjacent thereto, who had improved them before the passage of the act of Congress, and this court sustained the title upon parol proof of location and improvements. The court said "being proprietor of the front lot and having improved the water lot opposite and east of Water street, constitute the conditions on which the right, if any, under the statute vests. In his charge to the jury, the judge laid down these conditions in clear terms; and instructed the jury, if the facts brought the defendant within them, that they should find against the plaintiffs. The jury did so find, and this is conclusive of the facts of the case."

The question of boundary under the act of 1812, as it was decided in Mackay *v.* Dillon, was left open to the settlement of the respective claimants by litigation, in the courts of justice, or otherwise. Nor has this court, in any case, decided that statutes, which operate to confirm an existing and recognized claim or title with ascertained boundaries, or boundaries which could be ascertained, are inoperative without a survey, or made one necessary to the perfection of the title. A survey, approved by the United States, and accepted by the confirmee, is always important to the confirmee; for, as is said by the court in Menard's Heirs *v.* Massy, 8 How. 294, it is conclusive evidence as against the United States, that the land granted by the confirmation of Congress was the same described and bounded by the survey, unless an appeal was taken by either party or an opposing claimant to the commissioner of the land-office. This consideration depends upon the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped."

The cases of Harrison *v.* Page, 16 Mo. 182; Gamache *v.* Piquignot, 17 Mo. 310, which has been affirmed at the present session of this court; and Soulard *v.* Clarke, are in harmony with the views we have expressed upon the latter branch of the instructions of the Circuit Court.

We think it proper to state, that we express no opinion upon the effect of the evidence to establish the plaintiff's title as a subsisting title, and none upon the claim to such of the land as lies

beyond the boundary line, settled by the survey of the United States under the first section of the act of 1812.

The judgment of the Circuit Court is reversed and the cause remanded.

Order.

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

JAMES IRWIN, APPELLANT, *v.* THE UNITED STATES.

On 6th November, 1836, W. F. Hamilton, William V. Robinson, and wife, by deed, conveyed to the United States "the right and privilege to use, divert, and carry away from the fountain spring, by which the woollen factory of the said Hamilton & Robinson is now supplied, so much water as will pass through a pipe or tube of equal diameter with one that shall convey the water from the said spring, upon the same level therewith, to the factory of the said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same, by tubes or pipes, through the premises of the said grantors in a direct line, &c. &c.

The distance to which the United States wished to carry their share of the water being much greater than that of the other party, it was necessary, according to the principles of hydraulics, to lay down pipes of a larger bore than those of the other party, in order to obtain one half of the water.

The grantors were present when the pipes were laid down in this way, and made no objection. It will not do for an assignee, whose deed recognises the title of the United States to one half of the water, now to disturb the arrangement.

Under the circumstances, the construction to be given to the deed is, that the United States purchased a right to one half of the water, and had a right to lay down such pipes as were necessary to secure that object.

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

The facts were these:

On 6th November, 1836, W. F. Hamilton, William V. Robinson, and wife, by deed, conveyed to the United States "the right and privilege to use, divert, and carry away from the fountain spring by which the woollen factory of the said Hamilton & Robinson is now supplied, so much water as will pass through

a pipe or tube of equal diameter with one that shall convey the water from the said spring, upon the same level therewith, to the factory of the said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same, by tubes or pipes, through the premises of the said grantors in a direct line, or as nearly as practicable thereto; and the privilege of entering upon the premises of the said grantors for laying, and when necessary altering, the said pipes, or repairing them; also the privilege of erecting and repairing the said cistern or reservoir, or other erection as may be deemed necessary for preserving the said water for the use aforesaid, and all other rights and privileges in common with said grantors, their heirs and assigns."

The United States proceeded to lay down the pipes in the manner described in the following testimony, which was given by Mr. Bates.

Giles S. Bates being produced on part of complainant, and sworn, says: I was employed at the United States arsenal, at Lawrenceville, Alleghany county, Pennsylvania, for about sixteen years; I ceased to be employed there about the last of June, 1852. I know the spring from which the arsenal is supplied with water, on the land of Samuel H. Kellar; it is the same spring from which Mr. James Irwin's factory is supplied; the distance from the spring to the reservoir of the arsenal is five hundred and forty-seven yards or thereabouts; the ground is somewhat broken or uneven. There are three ravines; the first ravine, from summit to summit, is about two hundred feet wide, and from twenty-five to thirty feet deep; the second is about one hundred feet wide and about fifteen feet deep; the third is about fifty feet wide and from eight to ten feet deep, that is the width and depth at the point where the United States pipes pass; the pipes follow the inequalities of the ground; they are about three feet below the surface of the ground, from that to four feet; the pipe from the spring to the reservoir is two-and-a-half bore pipe; the copper pipe connecting the iron pipe with the cistern is two inches and five eighths, and about one foot long; the hole through the body of the cistern is one inch in diameter; the copper pipe is bolted to the cistern by a flange; the hole through which the water passes to supply Mr. Irwin's works is the same size as the one through which it passes to supply the arsenal, and the two holes are on the same level. I was in the employment of the United States when the pipes referred to for the supply of the arsenal were laid; I was present most of the time while they were laying them; they are the same pipes which are now in use; they have been in use since 1837. I saw Mr. William V. Robinson present on two occasions

when the pipes were being laid; he was present with Colonel Baker; I heard him express no dissatisfaction; they appeared to have a perfect understanding in the arrangement, and that arrangement is the one now in use. I was and am still under the impression that the copper pipe was an inch one originally, but I am not positive; with that exception the arrangement is now as it was then. I do not know of any change in the size of the pipe since; some pipes were put down to secure the air-valve, but no alteration in the size of the pipe; any deposits in the pipes collect in the ravines, and when the air gets into the pipes from the cistern it has to be drawn out at these air-valves in order to fill the pipes; the amount of water discharged at the reservoir would fill a three-quarter inch pipe. I have had partial charge for some time of the work; have been frequently at the spring; assisted to clear the pipes of air and to fill them. The ground where the United States pipe crosses from the ground of Mr. Irwin is about fifteen feet higher than where the pipe discharges its contents at Mr. Irwin's factory; the ground through which the pipe passes from the spring to Mr. Irwin's factory is a regular slope. The distance from the spring to where the United States pipe passes from Mr. Irwin's land is greater than from the spring to Mr. Irwin's factory; it is hardly one third of the distance to the reservoir; the body or rim of the cistern through which the inch hole passes, is about seven eighths thick.

Question. When the United States arsenal and Mr. Irwin's factory are both in operation, what is the relative amount of water drawn off by the pipes of each?

I believe the amount to be about equal.

Cross examined. I do not know that the ravines spoken of would make any difference in the flow of the water, provided there was a sufficient head at the spring to exclude the air from the pipe; if air was admitted into the pipe, I am of opinion that the water would still continue to flow, but to a limited extent.

We can see the water flowing from the United States pipe into the reservoir. When the reservoir was first established, the pipe discharged about four feet from the bottom of the reservoir, and I have frequently seen the water discharging into the reservoir from the pipe. That mode of discharging was discontinued between seven and eight years ago. It discharged through a brass cock, two-inch bore. The United States used the water for ornamental purposes on the parade at intervals for a number of years, when the supply of water would permit. The centres of the holes in the cistern from which the water is taken to the reservoir and to Mr. Irwin's factory, are on the same level, and the centres of the pipes are on the same level, but the difference

in the diameter of the pipes throws the United States pipe about three fourths of an inch below Mr. Irwin's pipe. The diameter of Mr. Irwin's pipe is an inch bore, I should judge.

Direct. I think the deposit of sediment in the pipe in the ravines would obstruct the water, unless there was a sufficient draft in the pipe to draw it out. I know that sediment has collected in the pipe in the bottom of the large ravine. The sediment was a kind of sand, oxide of iron, and of a muddy nature.

Cross examined. I only know of sediment having collected in the pipe once so as to require opening during the time I was at the arsenal. The air-valves spoken of were constructed to insure a continuous flow of water, and in order to draw off the foul air and allow the water to flow; and they answered the purpose of their construction. The discharge of the water into the reservoir from the two-inch cock is from a half to three quarters of an inch. If the pipe used by the United States had been of lead instead of iron, the obstruction from sediment would probably not have been as great. There is quite a sediment comes from the water of this spring. We used it in our boilers at the public works, and found it quite objectionable from the accumulation of sediment — of fine sand. We have been compelled to clean out the reservoir from sediment, but I cannot say whether it has been necessary to clean out the cistern at the spring or not.

Direct. — The flow of water mentioned as coming from the brass cock at the reservoir was the entire supply received from the spring. G. S. Bates.

On the 13th of January, 1842, Robinson and Hamilton conveyed their interest to James Caldwell, whose interest was conveyed by the sheriff to William Black, in December, 1843.

On the 30th of January, 1848, Black conveyed to Irwin (the appellant) by deed, reciting all the mesne conveyances, and among them the deed from William F. Hamilton and William V Robinson and wife, "to the United States of America, for privilege of one half the spring, &c., dated 26th November, A. D. 1836, and recorded in Book C, 3d p. 480."

On the 16th of January, 1852, the said James Irwin (now appellant) gave the notice to Major Bell, of the Alleghany arsenal, alleging that the government have in use a pipe to convey the water from the spring to the arsenal, "which is over four times the capacity of that contracted for." . . . "That unless some satisfactory proposition be made by the government within thirty days, I will cut off the pipe referred to."

Instead of a proposition to purchase, the United States exhibited their bill, and obtained an injunction.

The bill sets forth the agreement, &c.

And claims that after the parties have respectively drawn off their several shares, by holes or tubes inserted in said vessel, of equal diameter and on the same level, they may then carry away the water by a pipe or pipes of such size and diameter as they may respectively think proper to adopt.

It further charges that the defendant, at the time of his purchase, knew the extent of the complainants' right, under their said deed, and was well aware that it conferred on them a right to one half of the water of the said spring.

The answer admits the agreement, and asserts that although the complainants were permitted by the said Hamilton & Robinson to lay down their pipes of a dimension far exceeding those which had been at any time used to convey the said water to their factory, the same was permitted because the said grantors were not carrying on business at the said factory, or using the said water for the purposes thereof, and with the understanding that the license thus temporarily accorded should not be taken to operate in any way to the enlargement of the rights of the complainants, or to the prejudice of those of the grantors; that the defendant was not advised, at the time of his purchase, of the dimensions of the complainants' pipes, or that they were exceeding their rights, and had no means of ascertaining the same, but was induced to suppose, from the dimensions of the vent or orifice, that the pipes which were concealed from view were entirely correspondent therewith:

And further, that the recital in defendant's deed is not to be taken either as an interpretation of the original grant, or the admission of a right, on the part of complainants, to one half of the water, or as operating, or intended to operate, as an enlargement of the grant, because no part of the said water was used by the party under whom he claims, and the said conveyance is set forth merely as a part of the chain of title, and with express reference to the deed itself, and the record thereof, for the details, both of which manifestly show that the same was a misdescription or a mistake of the scrivener in the recital thereof, and no way affecting the conveyance to the defendant, which is of the whole interest of the grantor:

And further, that although his immediate grantor may have labored under such an impression, neither he nor the defendant, who is his assignee, is to be concluded or affected by any mistake in regard to his rights in a conveyance to which the complainants were neither parties or privies.

The answer further admits that the complainants did enter and construct a common vessel or reservoir, as alleged — that the same was pierced with two circular holes, of equal diameter

and elevation, for the use of the respective parties, and that the complainants did proceed to lay through the premises of the grantors a pipe for the conveyance of the water from one of the said holes or orifices.

It denies, however, that the said cistern was pierced at any time with any tubes whatever, or that complainants laid down, through the premises of the grantors, any pipes or tubes of a dimension corresponding with either of the said holes or orifices, or of equal diameter with the tubes or pipes which were used for supplying the works or factory of the grantors; but avers to the contrary, that although the pipe or tube which was then used and continued to be used, for the purpose of supplying the factory of the grantors, has at no time exceeded the diameter of one inch, and has conformed precisely to the position and level of one of the said holes or orifices, the said complainants have laid down and are now using, through the premises of the defendant, a tube of the diameter of two and a half inches, with a capacity more than six times that of the tube used by the defendant, and not conforming in its level or elevation with either of the orifices aforesaid, but affixed to the exterior circumference or rim of the said cistern in such manner as to extend below the said orifice, and to increase the weight or head of water about seven eighths of an inch over and above that of the defendant.

The above are the material facts of the answer.

To this answer a general replication was filed, and the cause sent to an examiner; and on the 19th of November, 1852, the cause came on to be heard on bill, answer, exhibits, replication, and testimony, and was argued by counsel, and upon consideration thereof, the court awarded a perpetual injunction against the defendant, as prayed, with costs.

Whereupon the defendant entered this appeal from the said decree.

It was argued by *Mr. Wylie* and *Mr. Ritchie*, upon a brief prepared by *Mr. Irwin*, for the appellant, and by *Mr. Cushing*, (Attorney-General,) for the United States.

The following extracts from the brief filed by the counsel for the appellant, will show their views;

The learned judge who decided the case below was of opinion that the words of the deed imported a conveyance of one half of the water.

It is most certain, however — and so much is admitted by the learned judge himself — that there is nothing in the terms of the deed, or, to use his own language, "in so many words," to convey such an interest.

It is not less certain that if such was the intent of the parties, it might have been precisely indicated by the obvious, easy, and familiar form of expression which the occasion would naturally and almost necessarily have suggested.

And the presumption is, that it would have been so indicated, instead of either resorting to a standard which was erroneous, or clouding the meaning with a periphrasis.

It is a part of the case, however, that a tube or pipe leading to the arsenal of the complainants, of equal diameter with that used to convey the water to the factory of the grantors, will not deliver more than a fractional part of the water conveyed by the latter; and that this is the result of a law of hydraulics which every man, and certainly every agent of the government, is bound to know.

It is also to be taken as a part of the case that the localities of the several properties, and the distance to which the water was to be conveyed or at all events to the premises of the grantee, were well understood by the parties, and of course a plea of ignorance of the facts would be as unavailable to the complainants, as the more discreditable plea of ignorance of a natural law.

It is incontrovertible, therefore, that if only a fractional part of the water delivered to the grantors could be conveyed by the means agreed on, to the premises of the grantees, then it was just that portion, and no more, that was intended to be conveyed to the complainants.

Nor is it any answer to say that the grant would be rendered illusory, and the object of the grantee defeated thereby. There is nothing in the deed to indicate either the quantity of water required, or the purpose for which it was destined, and although it might be convenient or even necessary for the government to enlarge the supply, this court can make no new contract for the parties by the substitution of terms which they have not thought proper to use. There is no ambiguity in the language, and in such case it is a maxim of the law that no construction can be made against the words. And yet it is by such a process of change and substitution that it is now sought to escape from the consequences of what is considered a hard bargain for the government.

The effect moreover of the departure on the part of the complainants, from the terms of the contract, and the simple and easy rule which it prescribes, is to produce irregularity in the flow, and to render every thing uncertain. No witness, examined by the government, has undertaken to speak with any degree of precision in regard to the comparative quantities of water drawn through the two pipes. They suppose them to be

"near about equal," but they admit that "the flow of water through the complainants' pipe is much greater at some times than at others, and that this does occur frequently;" and that "at times the complainants' pipe draws more water than that of the defendant, and at times it loses, so that the quantity drawn by both pipes is near about equal."

The facts of irregularity and occasional advantage are thus admitted, in connection with the liability to abuse, and the impossibility of precise measurement, and of course of detection or correction — an objection which led the Supreme Court of Pennsylvania to hold, in the case cited from Wharton, that a circular aperture could not be substituted for a square.

It is sufficient, however, for our case — even though the court were right in their construction of the deed — that the arrangement was such as to deprive us of our share of the water at any time. We are entitled to it at all times. We are not to be put off with a mere average — a principle which would authorize the government to take the whole of the water for one half the year, provided it allowed us the whole for the other.

But there is another violation of the contract — supposing even the construction of the court to be the correct one — in the position of the copper adjutage, as well as in the level and inclination of the distributing pipes. The deed provides that the complainants' pipe shall be upon the same level with that which shall convey the water to the factory of the grantors. The copper adjutage is however seven eighths of an inch below, while the point of discharge is lower by at least sixty — perhaps one hundred feet — thus conferring the twofold advantage of a greater head and a more rapid chute.

Supposing however that the water was, by the terms of the contract, to be gauged by equal orifices, it has been settled, as already shown, by the Supreme Court of Pennsylvania, in the case of the Schuylkill Navigation Company *v.* Moore, that no artificial contrivance can be resorted to, for the purpose of increasing the volume of discharge at the point of delivery.

It remains, then, only to consider the supplementary reasons by which it is sought to supply any possible insufficiency in the terms of the contract. They are

1st. The construction supposed to have been given to it by the parties themselves, as shown by the assertion of a larger right in the laying of the present pipes with the knowledge and without any objection on the part of one of the grantors; and

2d. The recital in the deed of William Black to the defendant.

I pass over the suggestion in regard to the rule that the "words are to be taken most strongly against the grantor," which is

hinted at as a possible though unnecessary resort in the present case. That rule, which is one of great rigor, applies only to cases of ambiguity in the words, or where the exposition is necessary to give them effect, and is only to be resorted to when all other rules of exposition fail. 2 Kent's Com. 556. And it is now superseded by the more reasonable practice of giving to the language its just sense, and searching for its precise meaning. Ibid.

To the argument, however, drawn from the fact that the present pipes were laid without objection, I reply

1st. That there is no ambiguity which would authorize an appeal to the acts of the parties themselves for the purpose of giving a construction to their contract. In the case even of a patent ambiguity the deed must speak for itself. It is not pretended that there is any which is latent, and which parol evidence might therefore raise and remove.

2d. That the evidence shows that the factory never went into operation after the purchase by the United States, and no inference is therefore to be drawn to the prejudice of the defendant from the acquiescence of the grantors. If such inference might thus be drawn, then by the same process the rights of the grantors might be taken as altogether abdicated by mere non-user, and a mere temporary parol license without consideration, be regarded as an absolute conveyance of the entire fee.

3d. That the right, being an incorporeal one, could only pass by grant or prescription, which presupposes it. Callen *v.* Hocker. 1 Rawle, 108.

4th. That the evidence shows further that the copper pipe was a one-inch bore originally; while, on the other hand, there is no evidence that either the grantors or their assigns were ever advised of the change.

Then as to the recital in the deed, the answer is,

1st. That the conveyance is of the whole interest held by Black, which was the entire estate of the original grantors; and the recital is not even a description of the property intended to be conveyed, but a mere enumeration of sundry deeds with a reference, for their contents, to the records themselves, which exhibit a clear case of mistake.

2d. That if the said Black was even mistaken as to the extent of his right, it was entirely "*res inter alias acta*," and cannot either compromise that right or enlarge the terms of a grant made to a third person, between whom and the immediate grantor of the defendant there was no priority whatever. And

3d. That the inference that the defendant knew that he was buying only one half of the water right, is entirely gratuitous, neither warranted by any evidence in the cause nor by any just

view of the law. The conveyance was of the whole estate of the grantors, &c., and there is no lawyer who would not have advised him that it would pass, notwithstanding a mistake in his references or a misdescription of any of his deeds.

Mr. Cushing, (Attorney-General,) contended that, the title deed to the United States shows they are entitled to the use of one half of the water; the title paper of the appellant, Irwin, shows the same; the proof shows that the pipes of the United States and of the appellant convey an equal quantity of water, and that the threat of the appellant to cut away the pipe was without any just cause, designed, as the bill charges, to compel the United States to purchase of the said Irwin the residue of the water at an exorbitant price.

Mr. Justice GRIER delivered the opinion of the court.

The appellant, James Irwin, was respondent below to a bill filed by the United States, in the nature of a bill "*quia timet*," in which Irwin was charged with threatening to cut off certain pipes conveying water to the United States Arsenal, near Pittsburg. The whole merits of the case are involved in the construction to be put on a certain deed under which the United States claimed to have a right to "one half of the water" delivered from a certain spring or reservoir. The parties both claim under William F. Hamilton and W. V. Robinson, who conveyed to the United States "the right and privilege to use, divert, and carry away from the fountain spring, &c., by which the woollen factory of grantors is now supplied, so much water as will pass through a pipe or tube of equal diameter, with one that shall convey the water from the said spring, upon the same level therewith to the factory of said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same through the premises of the said grantors, &c."

This grant to the United States was made in November, 1836, for the consideration of $2,500. Without stating, in so many words, that the water from the common cistern is to be divided equally, or each to have one half, this deed points out a mode of equal distribution at the cistern. The water is to be delivered to each by a pipe or tube of equal diameter at the same level. The mode of conducting it by either party to the place of its use is not prescribed. Each might have had his share delivered into a tank or cistern of his own placed along side of the common cistern, which would have been probably the best plan. The United States were permitted to conduct their share of the water through the lands of the grantors "by

tubes or pipes" without any restriction as to the size of them. The distance from the common cistern to the arsenal of the United States, where their share of the water was to be conducted, is four times as great as that to the grantors' premises. Owing to friction, and other causes, explained by the witnesses, it was proved that the flow of water in equal tubes is in the inverse ratio of the squares of the distances. Hence an orifice or tube capable of receiving and passing equal quantities at the fountain-head, if continued of the same size to the place of delivery, would have distributed to the United States about one sixteenth and to the vendors fifteen sixteenths. In fact, from the unevenness of the ground over which the water must necessarily flow to the arsenal, and the quantity of deposit made in its course, such a construction of the contract would leave the United States very frequently, if not always, without any water at all.

The grantors in the deed had no intention of overreaching the grantees, by taking advantage of their want of knowledge of the science of hydraulics, or claiming a construction of their deed which would give their grantees nothing, and thus allow the grantors to again extort from the necessities of the government a double price.

Robinson, one of the grantors, was examined by the appellant as a witness, and swore that one half the water was sold, and one half reserved, "that such was the agreement." This was the practical (and only reasonable) construction put on the grant by both parties at the time it was made; and, accordingly the officers of the United States proceeded to make a common cistern, and to ascertain the size of two tubes sufficient to convey the whole water held in common, and distribute it equally —leaving the vendors to convey their share in pipes of any size they saw fit, they used pipes to convey the water to the arsenal of such size as was deemed necessary from the distance and nature of the ground. The vendors looked on, assisted and acquiesced in all that was done. If the deed were ambiguous, and capable of a construction, which would permit one party to overreach and defraud the other; if there were no such rule of law as that which gives a construction to a deed most favorable to the grantee; yet we have here a practical construction by the vendor and vendee made on the ground, and acquiesced in for sixteen years. The appellant's deed from an assignee of the original vendors, carefully refers to this sale to the United States, as a sale "of one half of the water." We are of opinion, therefore, that a reasonable construction of the deed to the United States, having reference to the principles of hydraulics, necessarily requires that each party should have half the water, and conduct it in such pipes as they see fit and proper: and

also, that assuming the deed to be capable of the construction contended for, the parties to it have construed it honestly and correctly; and that this practical construction having been acquiesced in by all parties interested for sixteen years, is conclusive. The appellant, whose deed purports to convey to him but one half the water, cannot now claim to put a new construction on the grant to the appellees which would give them nothing for the large consideration paid, and the appellant all for nothing. However plausible and astute the reasoning may be, on which such a claim is founded, it does not recommend itself on the ground of justice or equity.

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

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western 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.

TIMOTHY FANNING, APPELLANT, *v.* CHARLES GREGOIRE AND CHARLES BOGG.

In 1838, the Legislature of the Territoty of Iowa authorized Fanning, his heirs and assigns, to establish and keep a ferry across the Mississippi river, at the town of Dubuque, for the term of twenty years; and enacted further, that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque.

In 1840, Fanning was authorized to keep a horse ferry-boat instead of a steamboat.

In 1847, the General Assembly of the State of Iowa passed an act to incorporate the city of Dubuque, the fifteenth section of which enacted that the "city council shall have power to license and establish ferries across the Mississippi river, from said city to the opposite shore, and to fix the rates of the same.

In 1851, the mayor of Dubuque, acting by the authority of the city council, granted a license to Gregoire (whose agent Bogg was) to keep a ferry for six years from the 1st of April, 1852, upon certain payments and conditions.

The right granted to Fanning was not exclusive of such a license as this. The prohibition to license another ferry did not extend to the legislature, nor to the city council, to whom the legislature had delegated its power.

Nor was it necessary for the city council to act by an ordinance in the case. Corporations can make contracts through their agents without the formalities which the old rules of law required.

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

It originated in the State Court, called the District Court of the County of Dubuque, and was transferred to the District Court of the United States, at the instance of Gregoire and Bogg, the defendants. Gregoire was a citizen and resident of Missouri, and Bogg of Illinois.

The facts in the case are stated in the opinion of the court. The District Court dismissed the petition of Fanning, with costs, upon the ground that his ferry franchise was not exclusive, whereupon he appealed to this court.

It was argued by *Mr. Wilson*, for the appellant, and by *Mr. Platt Smith*, for the appellees.

The points made by *Mr. Wilson* were the following.

The act of the Legislature of Iowa, entitled "An act to authorize Timothy Fanning to establish and keep a ferry across the Mississippi river at the town of Dubuque," approved December 14th, 1838, gave said Fanning an exclusive right as against any other ferry not established by a direct act of the legislature. See that act in vol. 1st of Iowa Statutes, pages 205 and 206.

By the word "court," in the first line of the 2d section of said act, is meant, Webster's definition of the word, "any jurisdiction, civil, military, or ecclesiastical." See Webster's Dictionary, definition of "court."

It did not mean a judicial tribunal. The legislature uses the word as defined by Webster. See Iowa Laws, vol. 1st, p. 208–9, where it is applied to a tribunal which could have no judicial power. See Act of Congress organizing Iowa, published in the same book, p. 34, § 9.

The authority, by virtue of which the defendants claim the right to carry on a ferry at the same place where Fanning's ferry is established, is derived from a contract between the mayor and aldermen of the city of Dubuque, of the one part, and A. L. Gregoire, of the other; the city authorities claim to derive this power from the 15th section of an act of the Legislature of Iowa, to incorporate and establish the city of Dubuque, approved February 24, 1847.

If Fanning's charter was not exclusive, as contended for, and if the city authorities could establish and license another, they can only do so in the manner prescribed by the act creating the city, to wit, by ordinance. See § 15 of said city charter.

Sec. 20 of said city charter provides that every ordinance of said city, before it shall be of any force or validity, or in any manner binding on the inhabitants thereof, or others, shall be signed by the mayor and published in one or more newspapers in said city, at least six days.

The ferry of defendants was established by contract, and not by ordinance.

"A corporation can act only in the manner prescribed by the act creating it." Chief J. Marshall, in Head & Amory *v.* Prov. Ins. Co. 2 Cranch, 127, (1 Cond. 371); 4 Wheaton, 518, (4 Cond. 528); 12 Wheaton 64; 4 Peters, 152; 8 Wheaton, 338; 2 Scammon, 187.

The act of City Council of Dubuque establishing the ferry, which the defendants claim to carry on, was null and void, and confers upon them no ferry franchise, and the plaintiff's right to maintain this action follows, as a matter of course.

"The owner of an old established ferry has a right of action against him who, in his neighborhood, keeps a free ferry, or a ferry not authorized by the proper tribunal, whereby an injury accrues to the owner of the established ferry." Long *v.* Beard 3 Murph. 57.

Mr. Smith divided his argument into the two following heads.

1. That the Legislature of Iowa had no right to grant such an exclusive right as the one contended for. The argument upon this head is omited for want of room.

2. But admit the power of the legislature to confine the travelling public to horse-boat accommodation, still the words of the act do not give an exclusive right; there are no words of exclusion expressed, and none should be implied. The act by express terms prohibits courts and boards of commissioners from granting other ferry rights, *exprcssio unius est exclusio alterius.* The legislature were not excluded from giving the city of Dubuque a right to license another ferry.

It is a well-settled principle of law that in construing government grants, the courts will construe them most strongly against the grantee, and in favor of the grantor; that if the terms of the grant are ambiguous, or admit of different meanings, that meaning which is most favorable to the government will be adopted, and no right or privilege will be deemed to be surrendered by implication. 2 Blackstone's Com. 347; 1 Kent's Com. 460.

This proposition is sustained by numerous and well-adjudged cases. In the case of Charles River Bridge *v.* Warren Bridge et al. 11 Peters, 420, Ch. J. Taney says: "The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, (22 Eng. Common Law, 185,) in the case of the Proprietors of the Stourbridge Canal *v.* Wheely and others, the court says, "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and

the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. But we are not now left to determine for the first time the rule by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction, above stated, fully established. In the case of the United States *v.* Arredondo, 6 Peters, 691, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized, that in grants by the public nothing passes by implication."

"When a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, the community have a right to insist 'that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court in 4 Peters, 514, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State would, in this instance, be affected by the surrender of this line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are safely guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depend on their faithful preservation."

In the case of the Mohawk Bridge Co. *v.* The Utica and Schenectady Railroad Co. 6 Paige's Ch. R. 554, it is held that "the grant to a corporation of the right to erect a toll bridge across a river, without any restriction as to the right of the

legislature to grant a similar privilege to others, does not deprive a future legislature of the power to authorize the erection of another toll bridge across the same river so near to the first as to divert a part of the travel which would have crossed the river on the first bridge if the last had not been erected."

"Grants of exclusive privileges, being in derogation of public rights belonging to the State, or to its citizens generally, must be construed strictly, and with reference to the intent and particular objects of the grant."

In the case of Barrett *v.* Stockton Railway Co. 40 Eng. Com. Law, 208, the court held that, "Where the language of an act of parliament, obtained by a company for imposing a rate of toll upon the public, is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favorable to the public." And the court refer to the general principle laid down by Lord Ellenborough, in his judgment in Gildart *v.* Gladstone, 11 East, 675, (an action for Liverpool dock dues,) who there says, — "If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public and against that of the company; because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended." In the case of the Leeds and Liverpool Canal *v.* Hustler, 1 B. & C. 424, (8 Eng. Com. Law, 118,) the court say, "Those who seek to impose a burden upon the public should take care that their claim rests upon plain and unambiguous language." All these cases are decided on the principle that government grants are construed strictly against the grantee, and in favor of the grantor.

In the case of Dyer *v.* Tuscaloosa Bridge Co. 2 Alab. R. 305, the court hold, that a grant of a ferry over a public watercourse, and for the convenience of the community, is not such an exclusive grant as necessarily implies that the government will not directly or indirectly interfere with it by the creation of a rival franchise or otherwise.

See also the case of the Cayuga Bridge Co. *v.* Magee, 2 Paige's Ch. R. 119, where it is laid down, "that acts in derogation of common right, must be construed strictly against the grantee, according to the principles of the common law."

But there is another ground on which this case might be rested with safety. It is a well-settled principle of law that statutes *in pari materia* are to be construed together; that the different statutes are to be construed as one; that they must be viewed together in all their parts; and if, by any fair construction, the whole can stand together, it is the duty of the court to put that

construction upon them. United States *v.* Freeman, 3 Howard, 564. In which case the court say, "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. Doug. 30; 2 Term Rep. 387, 586; Maule & Selw. 210. If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Lord Raym. 1028; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. Morris *v.* Mellin, 6 Barn. & Cress. 454; 7 Barn. & Cress. 99."

This mode of construing statutes is so old and well settled as to make the citation of further authorities unnecessary. It is very obvious, by applying these principles to the present case, that courts and boards of county commissioners were enumerated as the tribunals prohibited from granting ferry rights. The legislature reserved the right of granting the like franchise to any other person whenever the public good required it. In pursuance of this reserved right the legislature delegated the power of licensing ferries to the city council. The council, by this act, were made the proper judges of the necessity of other ferries, and in fact were constituted the guardians of the public interest in this respect, and when the city council have exercised this power and granted a license, no tribunal is authorized to revise or annul their proceedings on the ground that no necessity existed for another ferry. This court has no more power to inquire into and revise the action of the city council, in this respect, than it has to declare war or issue a proclamation for the conquest of Cuba or Canada. The power of granting franchises is a political and police regulation, resting exclusively with the legislature. The legislature is the judge of the number of ferries required for public accommodation, and the city council, when acting under a delegated authority from the legislature, possess the same power, which is not examinable by any other department of the government except to ascertain whether the power has been properly delegated. See Salem & Hamburg Turnpike Co. *v.* Lyme, 18 Conn. R. 456.

The omission of the word *exclusive*, which word the legislature well understood and freely used in various other charters granted at the same term of the legislature, is a very significant circumstance in this case.

In the case of Harrison *v.* The State, 9 Missouri, 526, where

in the repeal of one city charter and the adoption of another, in a provision with regard to ferry charters the word "exclusive," which was employed in the first one, was dropped in the second. The court say that "according to the charter of 1839 the city authorities were invested with exclusive power within the city to license and regulate the keeping of ferries; but in the charter of 1843, which was in force when this indictment was found, the word "exclusive" is omitted, with the design, as we must presume, of leaving this subject upon the same basis with the other subjects of city taxation.

"The question whether a law be void for its repugnancy to the constitution is a question which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Fletcher *v.* Peck, 6 Cranch, 87, 131; 2 Cond. Rep. 317.

"If any act of Congress or of the legislature of a State violates the constitutional provisions, it is unquestionably void; if, on the other hand, the legislature of the Union or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is in their judgment contrary to the principles of natural justice. If the legislature pursue the authority delegated to them, their acts are valid; if they transgress the boundaries of that authority, their acts are invalid." Iredell, J., in Calder *v.* Bull, 3 Dallas, 386; 1 Cond. Rep. U. S. 184 n.

But these different rules of construction all point one way. They all require the court to construe the charter favorably to the public and strictly against the grantee. Nothing can be taken by implication or construction.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the District Court of the United States for the District of Iowa.

The plaintiff filed his petition in the District Court of the county of Dubuque, stating that by an act of the legislative assembly of the Territory of Iowa, approved the 14th of December, 1838, he was authorized to establish and keep a ferry across the Mississippi, at the town of Dubuque, and depart from and land at any place on the public landing of said town for the term of twenty years from the passage of said act; and that the act provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town; that the petitioner was required, within

two years from the passage of the act, to use for said ferry a good and sufficient steam ferry-boat; that a sufficient number of flat-boats were also required to be kept, with a competent number of hands to work them, so as to convey across the river Mississippi persons and property as might be required; that a horse ferry-boat, by an amendatory act, was substituted for a steam ferry-boat.

And the plaintiff avers, that the above acts of the legislature conferred on him the exclusive privilege of ferrying across the river at the above place during the twenty years named in the act. And he avers that in all things he has complied with the requirements of the above acts, and that in doing so, he has incurred great expense; that at the commencement his ferry yielded little or no profit; but he persevered in keeping it up, hoping to be remunerated for his expense in its future profits.

He represents that the defendants, confederating with others to defraud him of his ferry right, have placed upon the ferry at the town of Dubuque a steam ferry-boat for the transportation of passengers, &c., and charges them for such transportation, &c., and claim that they have a right to do so, although the twenty years of the plaintiff's grant have not yet expired. He therefore prays for an injunction, &c.

At the appearance term of said court the defendants represented that one of them was a citizen of the State of Missouri, and the other a citizen of the State of Illinois; that the matter in controversy exceeds five hundred dollars, and they pray that the said action may be removed to the next District Court of the United States, to be held in the northern division of the district of the State of Iowa, and gave the security required by law; and the cause was removed to the District Court.

The defendants, in their answer, admit that the plaintiff has a charter to ferry across the river Mississippi at Dubuque, but they deny that it secures to him an exclusive right. And they say that their steam ferry-boat was put on and is run by them in accordance with a contract made with the city of Dubuque, authorizing the running of said boat for six years, from the first day of April, 1852; and they say that in running said boat they do not interfere with the right of the plaintiff other than such interference as is necessarily the result of a fair competition.

And the defendants say that the city of Dubuque entered into said contract with the said Gregoire by virtue of the power vested in the council by the fifteenth section of an act to incorporate and establish the city of Dubuque, of the 24th of February, 1847.

The act granting the ferry right to the plaintiff bears date the 14th of December, 1838. The first section provides, "that

Timothy Fanning, his heirs and assigns, be and they are hereby authorized, to establish and keep a ferry across the Mississippi river, at the town of Dubuque, in the county of Dubuque, and to depart from, and land at any place on the public landing of said town, which was set apart for public purposes by act of Congress approved the 3d of July, 1836, for the term of twenty years from the passage of the act.

The second section declared, "that no court or board of county commissioners shall authorize any person (unless as herein provided for by this act) to keep a ferry within the limits of the town of Dubuque. The conditions annexed were, that Fanning, his heirs and assigns, should, within two years from the passage of the act, procure a sufficient steam ferry-boat, and shall keep flat-boats and a sufficient number of hands for the accommodation of the public. On failure to do so, proof being made to the satisfaction of the county commissioner or the county court, the charter should be declared to be void.

By the act of July 24th, 1840, a horse-boat was substituted for the steam ferry-boat.

The right of the defendants arises under a contract made between the city of Dubuque and Charles Gregoire, the 11th of November, 1851; in which it was agreed by the corporation of the city, "in consideration of the covenants and stipulations hereinafter enumerated, have granted a license to Gregoire to keep a ferry across the Mississippi river, opposite the city of Dubuque, for six years from the first day of April next; it being understood that the city grant all the right it has and no more, with the privilege to land at any point opposite the city that he may choose.

Gregoire agreed to pay the city the sum of one hundred dollars annually, and to provide for said ferry a good and substantial steam ferry-boat, of sufficient capacity and dimensions to accommodate the travelling community, and to keep the same in good repair. And if the city should wish to grant the said franchise to any railroad before the expiration of the lease, they reserved the power to do so.

By the fifteenth section of the act incorporating the city, power is given to the city council to license and establish ferries across the Mississippi river, from the city of Dubuque to the opposite shore, to fix the rates of the same, and to impose reasonable fines and penalties for the violation of such laws and ordinances. This act was approved the 24th of February, 1847.

It is objected by the plaintiff's counsel, that the license set up by the defendants cannot avail them, as there is no ordinance of the council granting a ferry license to them, and that the

council can only act under their corporate powers in that way.

That the council have legislative powers in regard to the police of the city is admitted, but it does not follow that a contract may not be made under their sanction by the mayor, as was done in this case. The contract was in writing, and contained stipulations in regard to the public accommodation, which were important. The old rule was, that a corporation can make no contract which shall bind it except under its seal. That doctrine has long since been overruled, and it is now fully established, that the agents of a corporation may bind it by parol.

A license having been given, which, according to its terms must be considered binding on the corporation, it is unnecessary to look into the acts of the council regulating ferries, as they are not important, as regards the question of power. If the form of the license had been laid down in the city charter, or the mode of granting it, a conformity to such a regulation would be required, but no such provision is found in the charter. Regulations are made by ordinances, but as to them, beyond the granting of a license in this case, we need not inquire.

The principal question in the case is, whether the right granted to Fanning is exclusive.

The language used in the territorial act, it is argued, would seem to authorize an inference, that the right was intended to be exclusive. The right was given for twenty years to Fanning and his heirs, subject to the conditions expressed. An ordinary license is not granted to a man and his heirs. But it is said the beginning of the second section is somewhat explicit on this point. It provides, "that no court or board of county commissioners, shall authorize any other person (unless as hereinafter provided for by this act) to keep a ferry within the limits of the town of Dubuque."

The condition provided for, in the act above referred to, is any neglect on the part of Fanning or his heirs, which shall incur a forfeiture of his right. The prohibition on the court and the board of county commissioners to grant a license for another ferry, it is urged, would seem to show an intent to make the grant exclusive. And that the reason for this might be found in the alleged fact, that when the ferry was first established, a considerable expenditure was required, and little or no profit was realized for some years. But all the judges present except one held that the grant was not intended to be exclusive. In their opinion this view is sustained by the consideration that although the county court and county commissioners were prohibited from granting another license at Dubuque, yet this

prohibition did not apply to the legislature; and as it had the power to authorize another ferry, the general authority to the council to "license and establish ferries across the Mississippi river at the city," enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done.

This power was clearly given to the city, and it may be exercised, unless the grant of Fanning be exclusive.

The board of commissioners has been established, and the legislature has substituted in its place, for the purpose of licensing ferries at Dubuque, the city council, and it is contended that this change of the power ought not to affect the rights of the plaintiff. The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it cannot be made to apply by implication. The license to Gregoire was granted thirteen years after the grant to the plaintiff. And it may well be presumed, from the increase of the city at Dubuque, and the great increase of the line of trade through it, that additional ferry privileges were wanted. Of this the granting power was the proper judge.

The exclusive right set up must be clearly expressed or necessarily inferred, and the court think, that neither the one nor the other is found in the grant of the plaintiff, nor in the circumstances connected with it.

The argument that the free navigation of the Mississippi river, guaranteed by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with the police power of the States, in granting ferry licenses. When navigable rivers, within the commercial power of the Union, may be obstructed, one or both of these powers may be invoked.

The decree of the District Court is affirmed with costs.

Order.

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

MARY E. BARNEY, BY HER NEXT FRIEND MAXWELL WOODHULL, APPELLANT, *v.* DAVID SAUNDERS, ROGER C. WEIGTMAN, AND SAMUEL C. BARNEY.

There were two trustees of real and personal estate for the benefit of a minor. One of the trustees was also administrator de bonis non upon the estate of the father of the minor; and the other trustee was appointed guardian to the minor.

When the minor arrived at the proper age, and the accounts came to be settled, the following rules ought to have been applied.

The trustees ought not to have been charged with an amount of money, which the administrator trustee had paid himself as commission. That item was allowed by the Orphans' Court, and its correctness cannot be reviewed, collaterally, by another court.

Nor ought the trustees to have been charged with allowances made to the guardian trustee. The guardian's accounts also were cognizable by the Orphans' Court. Having power under the will to receive a portion of the income, the guardian's receipts were valid to the trustees.

The trustees were properly allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income.

Under the circumstances of this case, the trustees ought not to have been charged upon the principle of six months rests and compound interest.

The trustees ought to have been charged with all gains, as with those arising from usurious loans, unknown friends, or otherwise.

The trustees ought not to have been credited with the amount of a sum of money, deposited with a private banking house, and lost by its failure, so far as related to the capital of the estate, but ought to have been credited for so much of the loss as arose from the deposit of current collections of income.

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

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

It was argued by *Mr. Chilton* and *Mr. Linton*, for the appellant, and by *Mr. Lawrence* and *Mr. Bradley*, for the appellees.

The points made by the counsel for the appellant were the following.

I. That the trustees should have been charged with the thirty-five shares of Bank of Metropolis stock and the dividends accruing thereupon, alleged to have been sold in 1836 by defendant, D. Saunders, to satisfy his commission as administrator de bonis non of Edward DeKraft, he not being entitled to such commission, and not having the right to sell the bank stock without the order of the Orphans' Court.

Dorsey's Testamentary Laws of Maryland, 90, §§ 3, 4; Hill on Trustees, 381; 4 Ves. 497; Pocock *v.* Reddington, 5 Ves. 799; 2 Story's Equity, 1263; Pierson *v.* Shore, 1 Atkyns, 480; 5 Peters, 562; 5 Gill & Johns. 60–64; Gist *v.* Cockey and Fendall, 7 Har. & Johns. 135; McPherson *v.* Israel, 5 Gill & Johns. 63, 64; 12 Id. 84.

II. That the trustees should not have been credited by the

sums of money alleged to have been paid R. C. Weightman, as guardian of plaintiff in error. That the will of Edward DeKraft creating the trust did not give the trustees such power or authority, nor was the same warranted by the facts of the case. The trustees should have invested said moneys in bank or other stocks, or put the same out at interest upon good and sufficient security, as directed by the will.

Hill on Trustees, 395, 400, 402, 574; 1 Rop. on Leg. 568; Dorsey's Testamentary Laws of Maryland, 114, § 8, p. 115, § 13; Brodess v. Thompson, 2 Harris & Gill, 120; 3 Harris & Johns. 268; Hatton and Weems, 85–110.

III. That the trustees should not have been allowed and credited by 5 per cent. on the principal of the personal estate, and 10 per cent. on the income, as was done by the auditor. That they should not be allowed any commission at all, either upon the principal or income of the estate. That in any event they should not be credited by any commission upon the amount of principal never collected — upon the amount of the bank and other stocks. Winder v. Diffenderffer, 2 Bland, 207; Miller v. Beverly, Beverly v. Miller, 4 Hening & Munford, 420; Ringgold v. Ringgold, 1 Harris & Gill, 11, 109; Gwynn v. Dorsey, 4 Gill & Johns. 460; 3 Ib. 348; Harland's Account, 5 Rawle's Reports, 323.

IV. That the auditor did not charge the trustees upon the principle of six months' rest and compound interest. De Peyster v. Clarkson and others, 2 Wendell, 77; Schieffelin v. Stewart, 1 Johns. Ch. R. 620; Garniss v. Gardiner, 1 Edwards's Ch. 130; Harland's accounts, 5 Rawle's Rep. 323; 2 Story's Equity, 517–521; Tucker's Commentaries, 457; Raphael v. Boehm, 11 Ves. 92; Ringgold v. Ringgold, 1 Harris & Gill, 11; Wright v. Wright, 2 McCord, 185; Voorhees v. Stoothoff, 6 Halsted's Rep. 145; Tebbs v. Carpenter, 1 Mad. R. 305; Dunscomb v. Dunscomb, 1 Johns. Ch. Rep. 508; 5 Johns. Ch. Rep. 497.

V. That the trustees should have been charged by the auditor with all gains, as with those arising from usurious loans, unknown friends, or otherwise. 2 Story, §§ 1210, 1211, 1261; Holton v. Bern, 3 Stu. 88, (note); 1 Johns. Chancery Rep. 625; 4 Ib. 284, 308; 2 Kent's Commentaries, 230; Story on Contracts, 485; Hill on Trustees, 383; Walker v. Symonds, 3 Swans. 58.

VI. That the trustees should not have been credited by the loan to Fowler & Co. or any part thereof. Hill on Trustees, 368–378, 404; 2 Story's Equity, 509–516; Tebbs v. Carpenter, 1 Maddock's Rep. 305; 3 P. Williams, 100, (note); Ringgold v. Ringgold, 1 Harris & Gill's Rep. 12; 1 McCord's Ch. Rep. 250, 495.

VII. That the trustees, Saunders and Weightman, should have been dismissed, and others appointed in their place.

The points made by the counsel for the appellees were the following.

First. The court was right in not charging the trustees with the thirty-five shares of the Bank of the Metropolis, sold by Saunders, administrator de bonis non, to pay his commission.

1. Administration was necessary in order to pass the trust property to the trustees. This gave the right to commissions.

2. The maximum of ten per cent. can be exceeded.

3. The allowance to Saunders was in April 1836, and the final allowance to the administratrix, who did not settle the whole estate, was in 1846, and it should have been taken from that account.

4. The allowance of seven and a half per cent. to the administratrix enured to the benefit of the complainant, she being her only child.

5. The allowance to Saunders was made by the Orphans' Court before the money was paid over to the trustees, and is conclusive.

In addition to the authorities cited by the auditor, see Jones *v.* Stockett, 2 Bland's Ch. 416.

Second. The trustees were properly credited with the amount paid to R. C. Weightman, as guardian.

1. His accounts as guardian were not before the auditor for settlement and examination. The parties and their counsel were there, and the auditor certifies to the court, "the guardianship trust of Mr. Weightman has been settled, as was admitted before me by the counsel of both parties."

2. Under the will, the guardian had the right to receive the three fourths of the income.

3. The object of the trust was to provide for the maintenance and education of his daughter. If the accounts of the guardian are to be considered in evidence, they show that this was the only fund out of which these objects could have been satisfied. No charge is made in them for these objects.

4. His accounts, as guardian, are open for revision in the Orphans' Court.

Third. The allowance of five per cent. on the personal estate, and ten per cent. on the income, is right.

1. It is the rule in most of the States to allow commissions to trustees. Boyd *v.* Hawkins, 2 Dev. Eq. 334.

The cases on this point have been collected with care, and will be found in the Notes of American Cases — to the case of Robinson *v.* Pett, 2 White & Tudor's Equity Cases, 353 and the following.

2. The rule has been long settled in Maryland; and,

3. It has been fully adopted by the Circuit Court of the District of Columbia.

Fourth. The court has charged the defendants with interest, making annual rests. There is no appeal by the defendants; but if that point is open, they will insist that no interest ought to have been charged against them.

The liability of a trustee to pay interest depends upon the money being held or appropriated according to, or in violation of, the purposes of the trust. Sandford, 404; and the principle is, that he should be charged with what he did make or might lawfully have made. McNair *v.* Ragland, 1 Dev. Eq. 517, 524; Sparhawk *v.* Buel, 9 Vermont, 42, 82.

The general rule is to allow a trustee (having power to invest) a reasonable discretion, and for simple neglect to charge simple interest until the investment is made, and only for an intentional violation of duty, or a corrupt use of the money, to make rests, or, according to the circumstances, compound the interest as the measure of profits are undisclosed. 5 Johns. Ch. 517; 4 Barb. Sup. Ct. 649; 2 W. & S. 565; 1 Pick. 528, note; 10 Pick. 104; 1 Rob. Vir. 213; 5 Dana, 78, 132; 12 Ala. 355; 6 Geo. 271; 2 Dev. & Bat. 339; 4 Humph. 215; 6 Halst. 145; 1 H. & G. 80; 3 G. & J. 342.

The English rule is essentially the same.

Fifth. There is no exception upon which the complainant's fifth point can rest. If it is now open, the defendants rest on the view taken by the auditor.

Sixth. The trustees were entitled to credit for the deposit with Fowler & Co.

The facts in regard to this deposit will be found in the answers of the defendants Saunders and Weightman, in the evidence.

The substance is, that by the will the trustees were to invest the income in bank or other stocks, or good security, with power to sell the real estate and invest the proceeds in other real estate, bank, or other stocks, and if in real estate, that was to be in some of the cities north or east of the city of Washington. In 1838, the banks in the city had suspended specie payments. Their charters were about to expire, and the several laws were passed, to which reference is made.

The trustees had a discretion. They also had a right to retain a sum to meet the contingencies of the estate. One of the original loans was in part repaid, and the ordinary income was coming in. They consulted counsel. Acting under his advice, and exercising a sound discretion, they de-

posited the fund with bankers in good credit, on an agreement to allow the depositors six per cent. It was a deposit, not a loan — a deposit awaiting investment — a deposit where their own funds and those of other discreet business men was made — a deposit of funds received from accruing income of the estate in small sums, and in money not bankable, at a period of great irregularity and pressure in the money market; and a deposit where such funds were earning money instead of being idle. The auditor credited a portion only. The court allowed the whole sum.

If the trustees acted in good faith, exercised a sound discretion, kept the money, or deposited it from necessity or convenience, used ordinary care and diligence in the mode of keeping it, acted under the advice of counsel, and were actuated by a sincere desire to promote the interest of the trust estate, they are not to be charged with the loss.

They can only be charged in a case of clear negligence, perversion of the trust, or wilful default. Morley *v.* Morley, 2 Chan. Ca. 2; Knight *v.* Earl of Plymouth, 3 Atk. 480; Jones *v.* Lewis, 2 Vez. Sen. 240; 5 Ves. 144; Rowth *v.* Howell, 3 Ves. 564; Ambl. 419; Thompson *v.* Brown, 4 Johns. Ch. 628, 629; 10 Pet. 568, 569; 3 G. & J. 341; 11 G. & J. 208; 8 Gill, 403, 428–30, and cases therein cited.

Mr. Justice GRIER delivered the opinion of the court.

The complainant, Mary E. Barney, is the only daughter of Edward DeKraft, who devised all his real estate and the residue of his personal estate to respondents, Saunders and Weightman, (together with Joseph Pearson, since dead,) on the following trusts: 1st. To permit the widow to enjoy during life or widowhood certain portions of the trust estate. 2. In trust to receive the rents, interest, dividends, &c., and to pay over quarterly to his widow, until his daughter Mary arrived at the age of 18, three fourths of the said rents and profits for the support and maintenance of herself and daughter, and

3dly. To lay out and invest the residue of the said rents and profits, &c., with the annual produce thereof, from time to time in bank or other stocks or on good security.

4th. At the death of the widow, the trustees to hold the estate with its increase for the sole and separate use of the daughter; and with numerous other provisions not necessary to be stated, for the purposes of this case.

The widow of the testator refused to take under the will, and claimed her legal rights; the executors also renounced, and letters of administration, with the will annexed, were granted to the widow.

Mrs. DeKraft died in October, 1834, leaving the complainant, her only child, then about four years of age. At her death the trustees went into possession of the trust estate. Saunders, one of the trustees, took out letters of administration de bonis non to the estate of DeKraft; received the assets of the estate, which remained unconverted, and transferred them to himself and Weightman, as trustees.

In 1836, Weightman was appointed guardian of the person and property of the complainant.

Besides the real estate, consisting of four houses in the city, the personal property transferred to the trustees, in mortgages and stocks, amounted to about $17,000.

The complainant intermarried with Lieut. Barney, in 1847, and attained the age of 18, in August, 1848. In March, 1849, the bill in this case was filed, charging the trustees with divers breaches of trust, demanding their removal; an account of the trust estate, and the appointment of a receiver. The respondents filed their answer, and an account, which was referred to a master or auditor, who made report in October, 1850.

Numerous exceptions were made to this report by the complainant, which were overruled by the court below, to whose judgment this appeal is taken.

We shall notice those only which have been urged by the counsel in this court. The first is

"I. That the trustees should have been charged with the thirty-five shares of Bank of the Metropolis stock and the dividends accruing thereupon, alleged to have been sold in 1836 by defendant, D. Saunders, to satisfy his commission as administrator de bonis non of Edward DeKraft, he not being entitled to such commission, and not having the right to sell the bank stock without the order of the Orphans' Court."

The acts of D. Saunders as administrator de bonis non of DeKraft are not the subject of review in this suit. He settled his account as administrator in the Orphans' Court, and the allowances made there cannot be reviewed collaterally in another court, in a suit in which a different trust is involved. The appellant may possibly have good reason to complain that her estate has been almost devoured by the accumulation of per centages it has been compelled to pay to the numerous hands through which it has passed, but must have her remedy, if any, by demanding a review of the accounts in the court which has, in the exercise of its jurisdiction, allowed them. We are of opinion, therefore, that this exception has not been sustained.

II. The second exception is to the allowance of a credit to the trustees for sums paid to Weightman, as guardian of the complainant.

What has been said in reference to the first exception will apply to this. Weightman's accounts, as guardian, were not before the auditor for settlement; and the guardian being entitled under the will to receive a portion (not to exceed three fourths) of the income, and apply it, if necessary, to the maintenance and education of his ward, his receipts would be good and valid vouchers to the trustees.

The guardian's account is open for revision in the Orphans' Court, on the petition of the complainant.

While on this subject, we would take the opportunity to remark, on the impropriety of appointing persons to trusts, however high their personal character may be, who are allowed to pay from their right hand into their left; as where A, as administrator, has to settle an account with A as trustee; and B, as trustee, to deal with B as guardian. To instance the present case: Saunders, the trustee, whose duty it was to scrutinize the accounts of the administrator de bonis non, from whom they receive the trust estate, is himself appointed administrator, and thus left without a check, or any one to call him to strict account except his co-trustee, for many years, and until the ward comes of age. Weightman, the other trustee, is appointed guardian, being the only person who for many years could call to account the trustees for any negligence, mismanagement, or fraud. Thus the estate of the infant is left at the mercy of chance, the solvency or insolvency, the negligence or fraud of the trustees for sixteen years or more, with no one to call them to account. That the persons appointed in this particular case were highly honorable men, is true; but the same rule should be applied in all cases. If the estate of the infant in this case has been so fortunate as to escape, it is an accident or exception, which cannot affect the propriety of a general rule. Experience has shown that the estates of orphans are more frequently wasted and lost by the carelessness of good-natured and honorable men who undertake to act as trustees, than by the fraud and cupidity of men of a different character.

Such appointments, we are aware, are generally made on *ex parte* applications, and without objection. But in all cases the court, exercising this important power, should remember that orphans are under their special protection, and should make no appointments of guardians of their estates without due inquiry and proper information.

III. The third exception is,

"That the trustees should not have been allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income, as was done by the auditor; that they should not be allowed any commission at all, either upon the

This exception is therefore sustained.

VI. The sixth exception is, "that the trustees should not have been credited by the loan to Fowler & Co. or any part thereof."

This is the most important point in the case.

The facts affecting it are reported by the auditor, as follows:

"C. S. Fowler & Co. were brokers in this city, dealing in exchange, loans, and all the usual business of such an establishment; and, in addition, issued notes which formed a part of the circulating medium of the city. They also received deposits and allowed interest at six per cent., permitting the depositor to check on the amount to his credit at pleasure. The establishment was in good credit in 1841, and up to the failure, in the early part of 1842, many of the business men of the city deposited their funds with them. On the 22d of May, 1841, Mr. Saunders placed with Fowler & Co. $1,181 under the following agreement, entered in a pass or check book:

"CITY OF WASHINGTON, 22 May, 1841.

"We hereby agree with D. Saunders, acting trustee of Edw. DeKraft's estate, to receive his deposits and to allow him six per cent. interest thereon, he to check at will.

C. S. FOWLER & Co."

And an account was opened in said pass-book, headed thus:

"Dr. — C. S. Fowler & Co., in account with D. Saunders, acting trustee of Edw. DeKraft's estate — Cr." Other sums were afterwards added, and on the 3d of February, 1842, when the last was made, they amounted to $5,277.38, and the checks to $2,306.69; to the 1st of December, 1841, the checks amounted to $1,312, and the deposits to $3,133.88, leaving $1,825.83 undrawn in the hands of Fowler & Co. The sums received from Cooper, and left with Fowler & Co., amounted to $1,876, and the other sums placed with them prior to the 1st of December, 1841, to $1,261.88, within $50.12 of the amount checked out up to this time.

The first sum paid in ($1,181) was a payment made on the same 22d of May, by Cooper, on account of the principal and interest due on his mortgage. The $1,700 paid on the 17th of August was also a part of Cooper's debt. The $800 paid in on the 3d of February, was a part of Jones's mortgage debt. The residue is supposed to have been the current collections of the trustees from rents, dividends, &c.

"On the 14th March, 1842, Fowler & Co. failed. No interest had been calculated or paid. The account was balanced after the failure, when $2,970.96, were found standing to the credit of Saunders, as acting trustee. It is a total loss. The

credit of Fowler & Co. was good up to the time of their failure."

Before placing the trust fund with Fowler & Co. the trustees took the opinion of counsel, whether they could safely do so. It was in evidence, also, that at any time within the last ten years two or three thousand dollars could have been safely loaned on mortgage of real estate in this city.

By the decision of the auditor the trustees were charged with those portions of the Fowler deposit which were composed of the original capital paid in by Cooper before December, and the residue of that loss, composed of their current annual collections and of Jones's payment in February, on account of the original debt, was allowed as a credit.

The court below overruled this decision of the auditor, and ordered the charge against the trustees of $2,521.53, on this account, to be stricken out. We are of opinion, that the court below erred in making this correction of the auditor's report.

The reasons given by the auditor, including the peculiar facts of the case and the principles of law applicable to them, are well stated in his report, and we fully concur in their correctness. It will be only necessary to state them.

"The sums placed by D. Saunders, as acting trustee, with Fowler & Co., were of two descriptions — original capital, and current collections. Cooper's and Jones's payments were of the former description. 1. As to those, the general rule seems to be that a trustee, though compensated for his services, is bound to take no greater care of the trust funds than a prudent man would of his own. 2 Story's Eq. § 1268. But at the same time if the line of his duty is prescribed he must, according to Mr. Lewin, (p. 413,) "strictly pursue it, without swerving to the right hand or the left;" and if he fail to do so, and keep funds, which ought to be invested, longer on deposit than necessary, and loss occur, he must bear the loss. Whatever doubt may be entertained as to the duty of the trustees in this case, to invest the surplus annual income beyond the fourth, it is thought there can be no doubt as to their obligation to reinvest the original loans and debts of the testator, when paid in. If this be so, then were these sums paid by Cooper and Jones to the trustees, and by them placed with Fowler & Co., a loan or deposit with them. They were repayable with interest at pleasure.

"It looks very much like a loan, payable with interest, on demand. And if a loan, clearly the trustees are liable, because made without security of any description. The directions of the will are to invest on some security "in bank or other stocks, mortgages or other good security," words which exclude personal security. But the trustees, in their answers, deny it was a loan,

and state that these sums were deposits made to await a fit opportunity of investment.

"Assuming them to be such, the proof is that mortgages could be obtained at any time in this city. But trustees shall be allowed a reasonable time to select investments. What is a reasonable time? Five months have been held to be an unreasonable time to keep money on deposit. Cooper's first payment was left with Fowler & Co. nearly ten months before the failure, from May, 1841 to March, 1842, and his second, seven months, from August to March. Jones's was left February 3, 1842 — not quite six weeks before the failure. Cooper's would seem to have been on deposit waiting for investment too long, and therefore I have charged the trustees with those sums, deducting the arrear of interest due from him, and deeming three months not to be an unreasonable time to be allowed for selecting investments, have charged interest from that time. By that rule, Jones's payment of original capital would not be chargeable to the trustees."

We concur also in the decision of the auditor as to his refusal to charge the trustees with the balance arising from current collections and the payment of Jones, made within six weeks of the failure. The funds were deposited where the accountants deposited their own private funds. The trust funds were not mingled with their own. Other prudent and discreet men made deposits with the same bankers. The advice of counsel was taken. There was no reason to suspect the solvency of the bankers. On the whole, we do not think the trustees have acted with such want of prudence or discretion as to render them liable for the loss of this portion of the funds.

VII. As the whole trust estate has been delivered over to the *cestui que trust*, and as the trustees hold only the bare legal estate for the purpose of protecting the complainant in the enjoyment of it from the debts and control of her husband, the exception taken to the action of the court below in refusing to remove them, becomes of no importance, and has not been insisted on.

The decree of the court below is therefore reversed, as to the fifth and sixth exceptions above stated — and affirmed as to the residue. And the record remitted to the court below, with directions to amend the decree in conformity with this decision.

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 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.

DANIEL R. SOUTHARD, SAMUEL D. TOMPKINS, WILLIAM L. THOMPSON, MATILDA BURKS, JOSEPH R. TUNSTALL, JOHN BURKS, JAMES BURKS, SAMUEL BURKS, CHARLES BURKS, AND MARY BURKS (the four last named by WILLIAM L. THOMPSON, their next friend,) *v.* GILBERT C. RUSSELL.

A bill of review, in a chancery case, cannot be maintained where the newly discovered evidence, upon which the bill purports to be founded, goes to impeach the character of witnesses examined in the original suit.

Nor can it be maintained where the newly discovered evidence is merely cumulative, and relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling: such as the question of adequacy of price, when the main question was, whether a deed was a deed of sale or a mortgage.

Where a case is decided by an appellate court, and a mandate is sent down to the court below to carry out the decree, a bill of review will not lie in the court below to correct errors of law alleged on the face of the decree. Resort must be had to the appellate court.

Nor will a bill of review lie founded on newly discovered evidence, after the publication or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose.

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

Being a continuation of the case of Russell *v.* Southard and others, reported in 12 Howard, 139, it is proper to take it up from the point where that report left it.

In 12 Howard, 159 it is said, "After the opinion of the court was pronounced, a motion was made on behalf of the appellees for a rehearing and to remand the cause to the Circuit Court for further preparation and proof, upon the ground that new and material evidence had been discovered since the case was heard and decided in that court. Sundry affidavits were filed, showing the nature of the evidence which was said to have been discovered."

The reporter abstained from stating the substance of these affidavits in consequence of the following order, which was indorsed upon them in the handwriting of Mr. Chief Justice Taney.

"The court direct me to say, that these affidavits are not to be inserted in the report, as they implicate the character of indi-

viduals who can have no opportunity of offering testimony in their defence. The reporter will merely state, in general terms, that affidavits were filed to support the motion."

As the present case turned chiefly upon the contents of these affidavits (which were made the groundwork for the bill of review) it becomes necessary to state them now. They were affidavits to sustain the two following points:

1. That Dr. Wood, a witness for Russell, was bribed either by him or his attorney, Stewart; that Wood had in his possession a note given to him by Stewart for about three hundred dollars, then past due; that Wood had applied to a person named Addison to collect it for him, and left the note in his possession for that purpose; and that Wood had confessed to James J. Dozier, Esq., that the note had been given to him for his testimony in the case.

2. The following affidavit of George Hancock.

"I, George Hancock, state that some short time previous to the sale by Col. Gilbert C. Russell, of his farm near Louisville, to James Southard, he offered to sell it to me for five thousand dollars, and he made the same offer to my sister, Mrs. Preston. I thought it a speculation, and would have bought it but for the reputation the place bore for being extremely sickly. He also explained to me the reason why he had given so large a price for the place, which it is not deemed necessary here to state, and which satisfied me that he knew he was giving much more than its value, at the time he made the purchase.

GEORGE HANCOCK."

Upon these affidavits, the motion for a rehearing was made and overruled; the opinion of the court, overruling the motion, being recorded in 12 Howard, 158.

The mandate went down to the Circuit Court, and was there filed at May term, 1852. The Circuit Court decreed that the conveyance from Russell to Southard was a mortgage, and that Russell was entitled to redeem; and in further pursuance of the opinion of the Supreme Court that the case was not then in a condition for a final decree in respect to the other defendants, it was remanded to the rules.

At the same term, namely, in June, 1852, Southard and the other appellants moved the court for leave to file a bill of review of the decree rendered at the present term, and in support of the motion presented their bill, and read the following documents, namely:

The affidavits of James Guthrie, Willett Clarke, Daniel S. Rapelge, U. E. Ewing, Thomas G. Addison, George Hancock, Charles M. Truston, John P. Oldham, J. C. Johnston, D. F. Clark, and of R. F. Baird, and a paper purporting to be an ex-

tract from a letter from Russell to J. W. Wing, and a copy of the deed from G. C. Russell to Joseph B. Stewart. And the said Russell, by his counsel, opposed the motion, and objected that the grounds made out were insufficient, and read in his behalf the documents which follow: — The affidavits of Elias R. Deering, Elijah C. Clark, Robert F. Baird, J. B. Stewart, Philip Richardson, and of Robert F. Baird, a copy of the record of Burks against Southard, and a copy of the opinion of the Supreme Court of the United States upon a new hearing, with the affidavits attached thereto.

After argument, the court gave leave to the complainants to file their bill of review; whereupon the defendant, Russell, moved the court to strike from the bill all that portion relating to champerty and all that portion relating to the explanation of the evidence of J. C. Johnston, by the introduction of his affidavits, and all other parts of said bill which is designed to explain the evidence already in the original record. The court overruled the motion, but reserved all the questions of the competency and effect of the matters the defendant moved to have stricken from the bill, to be decided when they may be made in the progress of the cause, or on the final hearing thereof.

In September, 1852, Russell filed his answer.

The substance of the bill and answer are stated in the opinion of the court.

In May, 1853, the Circuit Court dismissed the bill with costs, upon the ground that "there is not sufficient cause for setting aside said decree of the Supreme Court of the United States, entered here, according to the mandate of said Supreme Court."

From this decree, the complainants appealed to this court.

It was submitted on a printed argument by *Mr. Nicholas*, for the appellants. On the part of the appellees, it was argued, orally, by *Mr. Johnson*, and in print by *Mr. Robertson* and *Mr. Morehead*.

Mr. Nicholas reviewed the case as it stood upon the former testimony, with a view of showing the value of that now introduced for the first time. The only parts of the argument which can be noticed in this report are those which related to the two subjects mentioned in the opinion of the court, namely:

1. The new evidence of Mr. Hancock relating to the inadequacy of price.

2. The bribery of Dr. Wood, by Russell, the original complainant.

1. The substance of Hancock's testimony is given above in the affidavit, which was filed for a rehearing.

(Upon this point, Mr. Nicholas's argument was as follows.)

Hancock's testimony presents two questions; first, its materiality; secondly, its admissibility as newly discovered proof.

1. No single fact could shed so much clear light on the case as the offer to sell, and the anxiety to sell at $5,000. It furnishes an unerring key to the interpretation of the cotemporaneous written proposition made by R. to S. Thus interpreted, it shows his willingness, in a manner neither to be mistaken or misrepresented, to take about $6,000; one sixth cash, balance in produce, bagging, &c., payable in one to five years. It shows conclusively that R.'s witnesses are mistaken in their estimate of the then value, or at least of its vendible value. But whether so mistaken or not, it neutralizes the effect of all such testimony, by showing the price R. was willing to take, and had for months been endeavoring to obtain. If he were willing and anxious to make an unconditional sale at $5,000, it is easy to understand his willingness to make a conditional one at the price paid by S. Taken in connection with the other strong facts and circumstances, it overthrows and outweighs the testimony of Wood and Johnston, even if the latter were unambiguous. Dr. Johnston is not more intelligent or respectable than Hancock. The recollections of one respectable witness, and another of doubtful character, would never be allowed to disturb a twenty years possession, and contradict a solemn written agreement, corroborated, as it is, by so many and such strong facts and circumstances.

The vast importance of this testimony affords most satisfactory reason for believing that it was wholly unknown to S. before the original decree, even if the accidental manner in which it recently came to his knowledge, were not satisfactorily explained, as it is, by Hancock.

2. Does this testimony alone afford sufficient ground for opening and setting aside the decree?

It presents a new fact, not directly put in issue, or attempted to be proved, yet, if known, might have been proved under the issue. It is not mere cumulative proof upon a point before in contest, but a new fact, which, in aid of the old facts, conclusively proves a sale, the main matter in issue.

Can parol proof be used for this purpose?

In applying the authorities about to be cited, let it be remembered that this parol proof is offered, not to disturb, but to quiet long possession; not to impair, but confirm a written title; not to oppose full satisfactory proof, but to contradict the weakest of all proof — parol proof of confessions, and that, too, resting on the doubtful meaning of one witness and the doubtful veracity of another, which has been allowed to rewrite a written contract and contradict a possession of twenty years. It is the

mere opposing of new parol to the old parol proof. It also aids to fix the otherwise doubtful construction of a muniment of title or cotemporaneous, written document. When the authorities are thus scanned, it will be found that we are more than sustained, and that our right to the review upon the single testimony of Hancock alone, is clearly made out.

The recognized right to review a decree upon newly discovered testimony, is coeval with the court of chancery.

The ordinance of Lord Bacon, made to define the right and regulate its exercise, says: — "No bill of review shall be admitted on any new proof which might have been used, when the decree was made. Nevertheless, upon new proof that has come to light after decree made, which could not possibly have been used at the time when decree passed, a bill of review may be grounded."

This ordinance was explained or construed, (2 Freem. 31,) thus: "When a matter of fact was particularly in issue before the former hearing, though you have new proof of that matter, upon that you shall never have a bill of review. But where a new fact is alleged, that was not at the former hearing, there it may be ground for a bill of review."

The ordinance, as construed in 2 Freeman, was recognized and adopted at an early day in Kentucky. Respass *v.* McClanahan, Hard. 346. The adoption is accompanied with the following pertinent remarks: "There is an important difference between discovery of a matter of fact, which, though it existed at former hearing, was not then known to the party, or which was not alleged or put in issue by either party; and the discovery of new witnesses or proof of a matter or fact which was then known or in issue. In the former case, the party not knowing the fact, and it not being particularly in issue, there was nothing to put him on the search, either of the fact or the evidence of the fact; and therefore the presumption is in his favor, that as the matter made for him, his failure to show the matter was not owing to his negligence or fault."

The cases in which this right of review has been acted on or recognized in England and this country are too numerous for citation.

Judge Story's Eq. Jur. 326–7, thus gives the rule: "The new matter must be relevant and material, and such, as if known, might probably have produced a different determination. But it must be such as the party, by the use of reasonable diligence, could not have known, for laches or negligence destroys the title to relief."

In Daniel's Ch. 1734, the rule is given thus: "The matter must not only be new, but material, and such as would clearly

entitle plaintiff to a decree, or would raise a question of so much nicety and difficulty, as to be a fit subject of judgment in the cause." Ord *v.* Noel, 6 Madd. 127; Blake *v.* Foster, 2 Mos. 257.

In Kennedy *v.* Ball, Litt. Sel. Cas. 127, it was held that "When a review is asked on account of discovery of a fact not put in issue, it should not be granted, unless that fact, when combined with the other proof in the cause, would produce a change in the decree."

In Talbott *v.* Todd, 5 Dana, 194, it is held to be one of the grounds for review, "where new matter has been discovered, though it lies in parol, if not put in issue or determined by the court."

No case has been found which says parol proof is not admissible to prove the new matter allowed by the rule. The absence of any such expressed exception in the ordinance and its commentaries, demonstrate that such exception is no part of the rule. The cases and *dicta* in Kentucky and elsewhere which say, that when the matter was before particularly in issue or contested, the new proof must be of an unerring character, as record or writing, need not be noticed, for they have no application. They are, in truth, a relaxation of the first member of the rule, as given in the ordinance, and in 2 Freeman, taken restrictedly, and have no bearing on the second or latter branch of the rule.

It however may not be amiss to refer to Wood *v.* Mann, 2 Sumn. 332, where Judge Story, after a careful review of authorities, as to the admissibility of cumulative parol proof, upon a matter before in issue, says: "Upon bills of review, for newly discovered evidence, parol evidence to facts is not necessarily prohibited by any general practice or rule of law." Again, at p. 334, he thus gives the result of his examination of the authorities and of his own consideration of the subject: "That there is no universal or absolute rule which prohibits the court from allowing the introduction of newly discovered evidence of witnesses to facts in issue in the cause, after the hearing. But the allowance is not a matter of right in the party, but of sound discretion in the court, to be exercised sparingly and cautiously, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause."

In Ocean Insurance Company *v.* Fields, 2 Story, Rep. 59, the same learned judge decided: "Although a court of equity will not ordinarily grant relief, in cases after verdict, where mere cumulative evidence of fraud, or of any other fact is discovered; yet it will, where the defence was imperfectly made out, from the want of distinct proof, which is afterward discovered, although there were circumstances of suspicion."

He says: "I do not know that it ever has been decided, that when the defence has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, some presumptions of a loose indefinite bearing before the jury, and afterward newly discovered evidence has come out, full, direct, and positive, to the very gist of the controversy, a court of equity will not interfere and grant relief and sustain a bill to bring forth and try the force and validity of the new evidence. The disposition of the courts is not to encourage new litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made *a fortiori;* all reasoning upon such a point must be powerfully increased in strength, where it is applied to a case which is composed and concocted of the darkest ingredients of fraud, if not of crime."

As it appears from these two decisions, that there is no general rule to exclude mere cumulative parol proof in all cases, there can be no doubt of its admissibility in a case like this, where it is offered to establish a most material fact, not before contested or "specially in issue." The attention of the court is particularly invited to Ocean Insurance Company *v.* Fields, with another view. Should the court, contrary to expectation, feel unwilling, from any technical reason, to set aside the decree under the charge of fraud, then that case is full authority for allowing Hancock's testimony, if for no other reason, because it would then afford the only available means of frustrating the iniquity perpetrated through Wood's bribed testimony, this case being also "composed and concocted of the darkest ingredients of fraud and crime."

All the authorities concur, that the rule for granting a review (or awarding new trial out of chancery) is substantially the same as that for granting a new trial at law, upon the ground of newly discovered testimony. In Talbott *v.* Todd, 5 Dana, 196, it was held, "that the powers which a court of common law may exercise during the term in granting a new trial upon the discovery of new matter, may be exercised by a court of chancery after the term."

In Langford's Adm. *v.* Collier, 1 A. K. Mar. 237, a bill for a new trial at law was sustained upon discovery, since the term, of parol proof of confessions by Collier, he having obtained the verdict upon such proof of confessions by Langford. Held, opinion by Ch. J. Boyle, that, "in general when proper for courts of law to grant a new trial during the term, it is equally proper for chancery to grant new trial on same grounds arising after the term."

The distinction made in both courts, is between merely cumulative evidence to a point before in contest, and proof of a new matter or fact not before contested, but bearing materially on the original issue. The distinction is well expounded in Waller *v.* Graves, 20 Conn. 305: "If new evidence is merely cumulative, no new trial, unless effect be to render clear what was equivocal or uncertain. By cumulative evidence is meant additional evidence of same general character, to some fact or point, which was subject of proof before. Evidence of distinct and independent facts of different character, though it may tend to establish some ground of defence or relate to some issue, is not cumulative within the rule."

So also in Chatfield *v.* Lathrop, 6 Pick. 417, "Cumulative evidence is such as tends to support the same fact, which was before attempted to be proved." Barker *v.* French, 18 Vt. 460, new trial granted for newly discovered cumulative evidence, because it made a doubtful case clear.

Gardner *v.* Mitchell, 6 Pick. 114. Action for breach of warranty in the sale of oil, testimony by both parties, as to quality. Motion for new trial, on ground of evidence newly discovered, of admission by plaintiff, that oil was of proper quality. This held to be a new fact, not cumulative, and the evidence being nearly balanced, a new trial was granted.

If Daniel *v.* Daniel, 2 Litt. 52, be cited on the other side, it will be found, on examination, to be either a felo-de-se, or inaccurate in the statement of the turning point, or erroneous for not attending to the distinction as to what is and what is not cumulative proof, so accurately defined in Waller *v.* Graves, (20 Conn.) and so distinctly recognized by Respass *v.* McClanahan, (Hard.) and numerous other cases. Daniel *v.* Daniel, itself distinctly recognizes, as one of the grounds for awarding new trial at law out of chancery — "the discovery of new evidence, relevant to a point not put in issue, for want of proof to sustain it." The true meaning of "putting in issue," was either mistaken by the court, or the true ground of decision is misstated.

In Talbot *v.* Todd, (5 Dana, 197,) it was decided that a party who seeks to open a decree upon discovery of new matter, is not held to very strict proof, either as to his former ignorance or as to his industry in making inquiries which might have led to the discovery. In Young *v.* Keighly, 16 Ves. 350, it was said by Lord Eldon, that, though the fact were known before decree, yet, if the evidence to prove it were only discovered afterward, "though some contradiction appears in the cases, there is no authority that the new evidence would not be sufficient ground for review."

We have no need for either of these cases. They are merely cited to prevent any possible doubt on that score. The vast importance of Hancock's testimony is the most satisfactory evidence that Southard could not have been apprised of it, or it would most certainly have been used by him. Even if he had suspected the fact, he could not have found the proof but by interrogating every man who he supposed had been in Louisville and its vicinity at the time of the sale. Indeed, when the suit was brought, if not during its whole pendency, Hancock resided in another county.

We have thus, by what is supposed to be an overabundant array of authority, established the right to use Hancock's testimony in any aspect of the case that can possibly be taken. We cannot doubt the disposition of the court to go as far that way as legal authority will allow, for the attainment of justice in a case like this. We have already proved the effect of his testimony is to clearly show Southard's right to a decree.

2. The second point of Mr. Nicholas's argument was to show that the former decree would not have been rendered unless the court had faith in Wood's testimony; and that as Wood was now shown, by new evidence, to have been bribed, his testimony was destroyed, and consequently the foundation of the decree was swept away.

Mr. Nicholas inferred the bribery of Dr. Wood for the following reasons, which must be merely stated, without the deductions from them.

1. That Stewart's note to Wood bore date on the very day when the deposition was taken.

2. That no proof whatever was brought of the alleged consideration of the note, namely, Wood's former medical services to Russell's slaves, and money loaned to Wing. On the contrary, that the allegation was disproved by the non-production of the account which was said to be certified by Wing; by Wood's never having sued on the demand, or made a claim when he knew of the sale of the farm and removal of the stock and negroes; by the extraordinary conduct of Russell in thus promptly assuming a debt which was barred by the statute of limitations; by Wood's former evidence when he said that he knew from Russell himself that Wing was his agent, and had contracted debts for him, whereas if this debt had existed he would have said so.

(Mr. Nicholas then proceeded in this branch of his argument, as follows:)

But it is contended, that the decree ought not to be set aside for this fraud, because the only effect of establishing the fraud is to impeach the bribed witness, and that the rule is,—you can

never open a decree to impeach a witness. For this they rely on Respass *v.* McClanahan, Hardin, 346.

It is sufficient answer to this objection, that it is not the witness alone, or principally, whom we impeach, but Russell and Stewart, whom we impeach for fraud in obtaining the decree, by means of the bribed witness. No rule of law or policy is violated in permitting us to do this, merely because the witness also is incidentally but necessarily assailed. If such were the rule, this case is all-sufficient to prove that the rule is based neither on justice nor policy, and ought therefore to be wholly disregarded, or so restricted, as not to apply to a case like this. But such is not the rule. Neither is this case of Respass *v.* McClanahan an authority to prove it, or if it be, then the case cannot be relied on, because it is sustained by no authority. The case contains merely a *dictum* that the conviction of perjury of the witness, on whose testimony the verdict was rendered, is one of the exceptions to the general rule, that the chancellor will not award a new trial to let in new witnesses to a contested point. The case does not say, nor has any authority ever said, that the testimony of a witness can in no way be so assailed, unless you first convict him of perjury; for instance, where the perjury was made with the knowledge or at the solicitation of the plaintiff, much less where it was procured by him through bribery. Still less does Respass *v.* McClanahan or any other authority say, that either at law or by bill of review you cannot have a new trial or a decree opened, by showing with newly discovered testimony, either the incompetency of the witness, or by new matter so contradicting him as to prove his perjury. Bribery goes to his competency as well as credibility. It may not be one of the established exceptions which, like interest, will exclude the witness altogether from the jury, because the jury is the more appropriate tribunal for determining the question of bribery, and is in no danger of improper influence from the testimony of a bribed witness. But what judge would hesitate in instructing the jury, that if they believed the bribery they ought to disregard his testimony? Neither would a chancellor hesitate, if it were necessary to justice so to act in sustaining an exception to the deposition of a bribed witness, and ruling it out of the cause. It would be singular, indeed, if interest to the amount of a dollar should render a witness incompetent, while a bribe to the amount of hundreds would have no such effect. Many witnesses, if they could be heard, would be believed by court and jury, though interested to the amount of thousands; but neither would regard the testimony of a witness who had received a bribe to the amount of only five dollars. If, therefore, there be any technical rule which limits incompetency to

the interested, and will not include the bribed witness, yet every principle of justice and sound policy requires that they should be considered as, at least, on the same footing, in fixing the rule as to what should be considered ground for a new trial, or in setting aside a decree for fraud. The law goes upon the broad general principle, that litigants must sustain their cases by disinterested testimony, and if an interested witness is palmed upon the court, it is treated as a fraud, for which the verdict will be set aside. A bribed witness is an interested witness; his own self-interest is used, not only to give him directly an undue bias, but he infamously sells a falsehood and commits wilful perjury for a reward. The true character of witnesses *quoad* this subject, must, therefore, stand on the same footing; or, rather, that is the most favorable view that can be taken for Russell.

In Talbott *v.* Todd, 5 Dana, 196, the court properly says: "the same power which a court of law may exercise during the term in granting a new trial for the discovery of new matter may be exercised by the chancellor after the term." All the authorities concur, that the powers of the chancellor to award a new trial and sustain a bill of review are identical.

In McFarland *v.* Clark, 9 Dana, 136, where a witness denied a receipt given by her, the court ordered a new trial on the ground of surprise, though the effect of the new testimony was to impeach the witness. This, too, though, as Ch. J. Robertson says, in delivering the opinion of the court: "It has often been decided, that a new trial should not be awarded merely on the ground of discovery of testimony to impeach a witness. But surprise is altogether a different ground for a new trial. It does not, like discovery, imply negligence. That the new testimony may impeach a witness, is not material." Cannot we here equally rely upon this ground of surprise? The bribery was a fact locked up in the knowledge of Stewart and the witness. No amount of vigilance or diligence would have enabled Southard to prove the fact, until it accidentally leaked out, in consequence of Wood's necessities having driven him to try to sell the note. Or can we not with much better reason contend that bribery is "altogether a different ground," and a much more satisfactory one for a new hearing; and, therefore, the fact that the witness is also impeached, "is not material." For no degree of negligence whatever can be imputed to Southard, whereas it was incautious to trust the proving of the receipt to the witness of the other party. See also Millar *v.* Field, 3 A. K. Mar. 109, a strong case to same effect.

Allen *v.* Young, 6 Mon. 136, opinion by Ch. J. Bibb: a new trial was awarded, because of the infamous character of the

witness, as disclosed in his own testimony. Though the court conceded that to determine the credibility of a witness was the peculiar province of the jury, yet it said: "It is due to the pure administration of justice, to example and effect in society, that a verdict, based exclusively upon the testimony of confession, sworn to by an infamous witness, should not stand."

Thurmond *v.* Durham, 3 Yerger, 106: new trial will be ordered in chancery, where the verdict was obtained by accident, or by the fraud or misconduct of the opposite party, without any negligence in the other.

Peterson *v.* Barry, 4 Binney, 481: new trial ordered, because of surprise in proof of payment by two witnesses strongly suspected of having been tampered with.

Fabrilius *v.* Cock, 3 Burr. 1771: new trial ordered, on after-discovered testimony, to show the demand fictitious and supported by perjury procured by subornation.

Niles *v.* Brackett, 15 Mass. 378: new trial ordered, where interest of witness was known to party producing him, and not to the other party.

Chatfield *v.* Lathrop, 6 Pick. 418: new trial ordered, where witness, on his *voir dire*, denied interest, and it was afterward discovered that he had an interest. See, also, Durant *v.* Ashmore, 2 Richm. 184, and 2 Bay, 520.

George *v.* Pierce, 7 Modern, 31: new trial refused at law on affidavit that material witness had said he had received a guinea to stifle the truth, *sed per uniam;* "his affidavit who got the guinea would be something, but his saying so is nothing."

Ocean Insurance Company *v.* Field, 2 Story, 59: the bill was sustained for new trial upon the discovery of testimony that the vessel had been fraudulently sunk, though the effect of the new testimony was necessarily to impeach the witnesses, who had proved on the trial a *bonâ fide* loss.

The case of Tilly *v.* Wharton, 2 Vernon, 378, 419, is the only one in which the point was ever directly made and decided, whether a conviction of perjury or forgery was necessary, before the chancellor would award a new trial or set aside a decree on the ground of newly discovered testimony, as to the perjury or forgery; and there it was ultimately decided that such conviction was not necessary. That case was thus: Verdict and judgment on bond and bill to subject real assets. Defendant insisted bond was forged, and made strong proof. That, however being the point tried at law, the court would not enter on the proof thereof, saying, if the witnesses had been convicted of perjury, or the party of forgery that might have been a ground of relief in eqaity, especially since the proceeding by attaint had

become in a manner impracticable. But upon appeal to the House of Lords, a new trial was directed, and the bond found to be forged. Though the report does not say so, yet the presumption is that, according to uniform usage, the decision of the lords was given upon the advice of the twelve judges. The case was one of cumulative proof merely upon the points of perjury and forgery, which were the very points contested in the trial before the jury; yet, even in that kind of case, the chancellor said, a conviction of perjury or forgery would have entitled the party to a new trial, and it was awarded by the lords, even without such conviction. But even the chancellor gives no intimation that, if the proof offered had been new matter, and the perjury and forgery had not been contested before the jury, that then a conviction would have been necessary to let in the proof. The more modern decisions show that he would have been wrong, if he had so decided; similar proof has frequently been let in, without any previous conviction. In Coddrington *v.* Webb, 2 Vernon, 240, a new trial was awarded by the chancellor upon the ground of surprise, and upon the charge that the bond was forged, without any allegation of conviction for perjury or forgery. And in Attorney-General *v.* Turner, Ambl. 587, after there had been two verdicts and a decree establishing a will, Lord Hardwicke awarded a new trial on the discovery of a letter written by a witness who proved the will, to one of the trustees, requesting not to be summoned as a witness, because he knew the testator was insane. The new trial resulted in a verdict in favor of the heir at law, the former verdict and decree were set aside, and possession of the estate ordered to be delivered to the heir at law. This, too, without a suggestion even as to the necessity of a conviction of perjury against the witness.

In this case, though the general character of Peter Wood for veracity, was in contest in the original suit, yet the fact of the bribery was in no way brought in issue. We have, therefore, a right to use it as original matter newly discovered, to impeach his testimony as greatly within the principle decided in Tilly *v.* Wharton, 2 Vernon, or as a substantive ground of fraud against Russell in obtaining the decree.

(The remainder of Mr. Nicholas's argument on this head, is omitted for want of room.)

The argument of the counsel for the appellee, so far as it related to the points decided by the court, was as follows:

In arguing the case, we will first briefly consider the law which must govern the decision of it. As Southard's Bill of Review does not question the correctness of the opinion of this court on the original record, but relies altogether on an alleged discovery

of evidence since the date of the first decree in the Circuit Court — an inquiry into the correctness of the decision sought to be reviewed would be superfluous and impertinent.

Though a decree may be set aside for fraud in obtaining it, the proper proceeding in such a case is, not by a bill of review, but by an original bill in the nature of a bill of review.

A bill of review and a bill for a new trial of an action depend on the same principles, and are governed by analogous rules of practice; and neither of them, as we insist, can be maintained on the extraneous ground of a discovery of new testimony, unless the complaining party had been vigilant in the preparation of the original suit, and could not, by proper diligence, have made the discovery in time to make it available on the trial — nor unless the discovered testimony will prove a fact which, had it been proved before or on the hearing of the original case, would have produced an essentially different judgment or decree — nor unless the new evidence be either documentary, or, if oral, shall establish a fact not before in issue for want of knowledge of the existence of the fact or of the proof of it. This is the long and well-settled doctrine in Kentucky. See Respass, &c. *v.* McClanahan, Hard. 347; Eccles *v.* Shackleford, 1 Litt. 35; Yancey *v.* Downer, 5 Ib. 10; Findley *v.* Nancy, 3 Mon. 403; Hendrix's Heirs *v.* Clay, 2 A. K. Marsh. 465; Respass, &c. *v.* McClanahan, Ib. 379; Daniel *v.* Daniel, 2 J. J. Marsh. 52; Hunt *v.* Boyier, 1 Ib. 487; Brewer *v.* Bowman, 3 Ib. 493; Ewing *v.* Price, Ib. 522. This doctrine is as rational everywhere as it is authoritative in Kentucky; and we think that it is generally recognized and maintained wherever the equitable jurisprudence of England prevails. It is coexistent with the ordinances of Chancellor Bacon, of which that one applying to bills of review on extraneous ground has been, from the year of its promulgation, interpreted as requiring either new matter not before litigated, or record or written evidence decisive of a fact involved in the former issue, and of the existence of which memorial the complaining party was, without his own fault or negligence, ignorant, until it was too late to use it to prevent the decree sought to be reviewed. See Hinde's Practice, 58; Gilbert's For. Rom. 186; Story's Eq. Pl. 433–4, n. 3; Taylor *v.* Sharp, 3 P. Wms. 371; Norris *v.* Le Neve, 3 Atk. 33–4, 2 Mad. Ch. 537; Patridge *v.* Usborne, 5 Russ. 195; Wiser *v.* Blachly, 2 Johns. Ch. Rep. 491; Livingston *v.* Hubbs, 3 Ib. 126.

Discovery of additional witnesses, or of cumulative or explanatory evidence, "by the swearing of witnesses," has never been adjudged a sufficient ground for a bill of review, or for a new trial of an action. The rule applied by most of the foregoing authorities, and virtually recognized in all of them, is dictated

by obvious considerations of policy, security, and justice. A relaxation of it so as to allow a new trial or review, on the alleged discovery of corroborative or explanatory testimony by witnesses, would open the door to fraud, subornation, and perjury, and would not only encourage negligence, but would lead to vexatious uncertainty and delay in litigation.

As to the discovery of new "matter," or of written evidence, the law is also prudently stringent in requiring that such matter or evidence shall clearly make the case conclusive in favor of the party seeking to use it; and, moreover, that the court shall be well satisfied that the non-discovery of it opportunely was not the result of a neglect of proper inquiry or reasonable diligence. Young *v.* Keighly, 16 Ves. 352; 2 & 3 Johns. *supra*; Findly *v.* Nancy, *supra*, and some of the other cases cited.

Nor will a review or a new trial be granted for the purpose of impeaching a witness. Barret *v.* Belshe, 4 Bibb, 349; Bunn *v.* Hoyt, 3 Johns. 255; Duryee *v.* Dennison, 5 Ib. 250; Huish *v.* Sheldon, Sayre, 27; Ford *v.* Tilly, 2 Salk. 653; Turner *v.* Pearte, 1 Term Rep. 717; White *v.* Fussell, 1 Ves. & Beames, 151.

We respectfully submit the question, whether the principles recognized and the rules established by the foregoing citations, and many other concurrent authorities, do not clearly and conclusively sustain the decree dismissing Southard's bill of review, and which he now seeks to reverse? We suggest, *in limine*, that the bill should not be construed as intending to impeach the original decree as having been obtained by fraud. The only distinct allegation in it on that subject is, that Stewart (one of Russell's attorneys) fraudulently bribed Dr. Wood to give his deposition. There is no allegation that Wood's testimony was false, or that, without his testimony, Russell would not have succeeded in this court. Nor does the bill anywhere intimate what portion of Wood's evidence was false, or in what respect. And, could the bill be understood as sufficiently impeaching the decree for fraud in obtaining it, an original bill, and not a bill of review, was the proper remedy. If, therefore, it be Southard's purpose both to impeach the decree for fraud, and also, on the discovery of new testimony, to open it for review, we submit the question whether those incongruous objects can be united availably in a bill of review.

But we cannot admit that either the allegation of false swearing or of the perjury of a witness is ground for a bill impeaching a judgment or decree for fraud; nor have we seen a case in which it was ever adjudged that the subornation of false testimony by the successful party was such fraud in the judgment or decree as would lay the foundation for an original bill for setting it aside. Although it might be gravely questioned on

principle, yet it has been said that, while a bill of review or for a new trial will not be maintained on an allegation that the decree or judgment was obtained by the false swearing of a material witness, yet a subsequent conviction of the witness for the imputed perjury may be ground for a review or new trial. But whenever alleged perjury is the ground for relief, legal conviction and conclusive proof of it by the record are, at the same time, required as indispensable. And this is dictated by the same policy which forbids new trials or reviews for impeaching witnesses by other witnesses. Respass *v.* McClanahan, and Brewer *v.* Bowman, *supra*. Whilst, therefore, we doubt whether, on well-established principle or policy, even a conviction of perjury is, *per se*, sufficient cause for a new trial or review, we cannot doubt that imputed perjury, without conviction, is not sufficient in any case.

Simply obtaining a decree on a groundless claim and on false allegations, and even false proof, by a party knowing that his claim is unjust, and that his allegation and proof are untrue, has never been adjudged to be a fraud on the other party, for which he could be relieved from the decree by a bill of review, or an original bill impeaching it for fraud. Bell *v.* Rucker, 4 B. Mon. 452; Brunk *v.* Means, 11 Ib. 219.

If procuring a decree by false allegations, known by the party making them to be untrue, and also by availing himself of false testimony, knowing that it was not true, be not, in judgment of law, such a fraud on the other party as to subject the decree to nullification or even review, why should the fact that the same party, who knowingly alleged the falsehood, induced the false witness to prove it, make a case of remediable fraud?

But if, in all this, we are mistaken, we insist, as already suggested, that there is, in this case, neither proof nor allegation that Dr. Wood's testimony was either totally or partially false; although Southard, as proved by the depositions of Jos. C. Baird, and of R. F. Baird, and of E. Clark, and of Deering, and of W. J. Clark, made elaborate and sinister efforts to seduce Wood, and fraudulently extract from him something inconsistent with the truth of his deposition, his failure was so signal as to reflect corroborative credit on Wood's testimony. In the original case, Southard made a desperate effort to impeach Wood's testimony. In that he failed. This court, in its opinion, said that he should be deemed credible, and moreover said that his statements were intrinsically probable, and were also corroborated by other facts in the record. The assault now made upon him, and on the attorney of Russell, is but a renewed effort to impeach testimony that was accredited, and considered by this court in its original decision.

Could this forlorn hope succeed, the only effect of the success would be to deprive Russell of Wood's testimony. The setting aside of the decree would not follow as a necessary or even a probable consequence. If there be enough still remaining to sustain that decree, it will stand. And that there would be enough, we feel perfectly satisfied. The gross inadequacy of consideration — the defeasance and its accompanying circumstances — the peculiar and extraordinary means employed to disguise the true character of the contract — the condition and objects of Russell — the character, business and conduct of the Southards — the allegations, evasions, inconsistencies, and falsehoods of the answer of D. R. Southard — Johnson's testimony, proving, as this court said, a mortgage, — these and other considerations, independently of Wood's testimony, are amply sufficient to sustain the former opinion of this court, as shown by that opinion itself, and by abundant citations of recognized principles and adjudged cases in our former brief.

Then the allegations as to Wood and Stewart, had they even been sufficiently explicit to impute subornation and perjury, and had they been also proved, would not have amounted to vitiating and available fraud in obtaining the original decree, which could not be annulled or changed on that ground by an original bill impeaching it for fraud. This matter consequently is, in effect, only an impeachment of the credibility of a witness; and which, had it been possible, would have been ostensibly effected by the swearing, and perhaps perjury, of other witnesses, and by corruption and foul combination. But, though means extraordinary and discreditable have been employed to destroy Wood's credibility, the only circumstance which could, in any degree, tend to throw the slightest shade on the truth of his testimony is the fact that, about the time he gave his deposition, Mr. Stewart executed his note to him for $280. Is it proved, or can this court judicially presume that the consideration was corrupt? or can the court presume that Wood was bribed by that note to fabricate false testimony? Would not this be not only uncharitable, but unreasonable and unjust, in the absence even of any explanatory circumstance? But Russell, in answering the charge of bribery, peremptorily denies its truth, and affirms that his manager (Winn) had, among other liabilities incurred by him in managing the farm, presented him with an account due Dr. Wood for medical services, and also for a small sum loaned to him by Wood that, never having been able to pay that debt, he directed Stewart to adjust it by note before he should require Wood to testify to the facts which he had learned that he could prove by him; and also to adjust a demand which Dr. Smith held against him for a larger amount;

and that Stewart accordingly executed the note for $280 to Wood, but did not settle Smith's debt, because that was in litigation. Now Southard having made Russell a witness, and there being no inconsistency or improbability in his response, it should not be gratuitously assumed to be false. It is moreover not only uncontradicted, but intrinsically probable. The medical account for $126, with legal interest for about twenty-one years, would, together with less than $10 loaned, amount, at the date of the note, to $280. Dr. Smith proves that Stewart did speak to him about settling his debt. This is corroborative of the answer. And though Smith did not know that Wood had rendered professional services to Russell's numerous slaves while under Winn's charge, he himself having been generally their regular physician, yet it is quite probable, nevertheless, that he did, as Winn informed Russell, and as the latter seems to have believed and acknowledged. But, as before suggested, if Russell owed Wood nothing, Stewart's note to him, even if given to induce him to testify, would not prove that he testified falsely or in what respect. It has been not very unusual, as in the Gardiner case, to pay witnesses a bonus for subjecting themselves to the inconvenience and responsibility of proving the truth. In its worst aspect, the utmost effect of this matter would be to impair Wood's credibility, which cannot be done by a bill of review.

Our view of this matter, therefore, is: 1. That an original bill could not set aside the decree for the alleged subornation of a witness. 2. That the same cause would be insufficient to maintain a bill of review, unless the witness had been convicted of perjury, and that it may be doubted whether even conviction would make a sufficient cause. 3. That the bill in this case does not allege that Dr. Wood's testimony was false, nor intimate in what respect; and that, therefore, on this point it is radically defective and wholly insufficient. 4. That there is no proof that his testimony was untrue in any particular, but that, on the contrary, its perfect purity and truth, in every essential matter, are strongly fortified by the constancy and emphasis with which, drunk or sober, in defiance of corrupt combinations and strong temptations to seduce him into renunciation of some portion of it, or into some purchased or inadvertent declaration or admission inconsistent with it, he has adhered to and reiterated the truth of it at all times and under all circumstances. 5. That, without Wood's testimony, the decree was proper, and would have been just what it is. 6. That the object of the bill of review is to impeach Wood's credibility, which cannot now be allowed, and if allowable, has been entirely frustrated, and would be unavailing to Southard had he succeeded in his purpose.

"The credit of witnesses is not to be impeached after hearing and decree. Such applications for an examination to the credit of a witness are always regarded with great jealousy, and they are to be made before the hearing." White *v.* Fussell, 1 V. & B. 151. "There would be no end of suits if the indulgence asked for in this case were permitted." Livingston *v.* Hubbs, 3 Johnson's Ch. Rep. 126.

The alleged discovery of Hancock's testimony, and of Oldham's as to Talbot's Alabama property, and of a mistake, either by this court or by the witness himself, as to Dr. Johnson's testimony, are all plainly insufficient. These three distinct allegations are all in the same category. Each alike depends on the question whether a discovery, after decree, of new witnesses concerning a matter previously litigated and adjudged between the same parties, is good ground for a bill of review; for what was the value of the land conveyed by Russell to Southard, and whether this conveyance was a conditional sale or mortgage, were the principal questions involved in the original suit, and the testimony of Hancock and Oldham applies only to the first, and that of Johnson is merely explanatory of his former deposition as to the last of these litigated matters. The foregoing citations conclusively show that no such cumulative evidence by witnesses is sufficient for upholding a bill of review. "No witnesses which were or might have been examined to any thing in issue on the original cause, shall be examined to any matter on the bill of review, unless it be to some matter happening subsequent, which was not before in issue, or upon matter of record or writing, not known before. Where matter of fact was particularly in issue before the former hearing, though you have new proof of that matter, upon that you shall never have a bill of review." Hinde's Prac. 50; 2 Freeman, 31; 1 Harrison's Ch. 141. "This court, after the most careful research, cannot find one case reported in which a bill of review has been allowed on the discovery of new witnesses to prove a fact which had before been in issue; although there are many where bills of review have been sustained on the discovery of records and other writings relating to the title which was generally put in issue. The distinction is very material. Written evidence cannot be easily corrupted; and if it had been discovered before the former hearing, the presumption is strong that it would have been produced to prevent further litigation and expense. New witnesses, it is granted, may also be discovered without subornation, but they may easily be procured by it, and the danger of admitting them renders it highly impolitic." "If, then, whenever a new witness or witnesses can, honestly or by subornation, be found whose testimony may probably change a decree in chancery or

an award, a bill of review is received, when will there be an end of litigation? And particularly will it not render our contests for land almost literally endless? What stability or certainty can there be in the tenure of property? The dangers and mischief to society are too great to be endured." Respass *v.* McClanahan, &c., Hardin, *supra.* "The rule is well settled, that, to sustain a bill for a review or new trial at law, the evidence, if it applies to points formerly in issue, must be of such a permanent nature and unerring character as to preponderate greatly or have a decisive influence upon the evidence which is to be overturned by it." Findley *v.* Nancy, *supra.* "The nature of newly discovered evidence must be different from that of the mere accumulation of witnesses to a litigated fact." Livington *v.* Hubbs, *supra.* Such is the familiar doctrine to be found in the books *sparsim*, and without authoritative deviation or question since the days of Chancellor Bacon. It concludes the case as to the discoveries we are now considering. Besides they, when scrutinized, amount to nothing which, if admitted, could affect the decree.

Hancock's memory is indistinct and uncertain — see his affidavit and his two depositions — all vague and materially varying as to facts and dates. Moreover, he was not in Kentucky between the 1st of July, 1827, and the date of the conveyance from Russell to Southard. The same depositions prove that Russell was not in Kentucky during that year, until after the 8th of July. Consequently, if Russell made an offer to sell to Hancock, it was since, and probably more than a year since he conveyed to Southard; and, therefore, if he ever proposed such sale it was of the equity of redemption, which was in fact worth more than $5,000.

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 Kentucky.

The present defendant, Russell, filed a bill in the court below in 1847, against the present complainant, Southard, and others, for the purpose of having the deed of a large and valuable farm or plantation, and a defeasance on refunding the purchase-money executed at the same time, declared to be a mortgage; and, that the complainant be permitted to redeem on such terms and conditions as the court might direct. The cause went to a hearing on the pleadings and proofs, and a decree was entered May term, 1849, dismissing the bill. Whereupon the complainant appealed to this court, and, after argument, the decree of the court below was reversed, the court holding the deed and defeasance to be a mortgage; and, that

the complainant had a right to redeem, remanding the cause to the court below, with directions to enter a decree for the complainant, and for further proceedings in conformity to the opinion of the court. The case and opinion of this court will be found in 12 How. 139.

The main question litigated in the cause, both in the court below and in this, was whether or not the transaction, the decree and defeasance, was a conditional sale to become absolute on the failure to refund the purchase-money within the time, or a security for the loan of money. The case was severely contested in the court below, some seventy witnesses having been examined, as appears from the original record; and was very fully argued by counsel, and considered by this court, as may be seen by a reference to the report of the case.

On the coming down of the mandate from this court to the court below, and the entry of a decree in conformity thereto, the defendants filed a bill of review, which having been entertained by the court, the cause went to a hearing on the pleadings and proofs; and after argument the court dismissed the bill. The case is now before us on an appeal from that decree. Between forty and fifty witnesses have been examined upon the issues in this bill of review; but we do not deem it material to go into the evidence, except as it respects one or two particulars, which are mainly relied on as ground for interfering with the former decree. The learned counsel for the appellant, in a very able argument laid before us, frankly and properly admits that, so far as it regards the newly discovered evidence produced, the case rests mainly upon the alleged bribery of one of the material witnesses for the complainant in the original suit, Dr. Wood; and upon the evidence of Hancock, who had not before been a witness. It is claimed that this evidence is of such a nature and character, when taken in connection with the original case, as to be controlling and decisive of the original suit in favor of the defendants; and that it is competent and admissible as newly discovered facts bearing upon the main issue in that case, within the established doctrine concerning proceedings in bills of review.

It is important, therefore, to ascertain with some exactness the character and effect of this evidence when taken alone; and, also, when viewed in connection with the evidence in the former case.

The bill of review charges, upon information and belief, that Stewart (who was one of the solicitors for the complainant in the original bill) obtained by means of bribery the testimony of Dr. Wood, a material witness in the cause, and upon the faith of whose evidence this court was induced to render its decision

on the appeal; that said Stewart gave to the witness his note for the sum of two hundred and eighty dollars; and, that this fact first came to the knowledge of the complainants since the decree.

The answer sets forth, that this note was given by Stewart under the following circumstances: The defendant, on his return to the State of Kentucky, in the fall of 1827, ascertained that his overseer, Wing, who was his agent in charge of the farm or plantation in question, had greatly involved him in debt, and among the list of creditors furnished by said overseer were Doctors Smith and Wood. That afterwards, when he brought his suit for the redemption of the mortgage, he left with the said Stewart a list of the names by whom he believed he could prove the facts necessary to sustain his bill; and among others were the names of Doctors Wood and Smith. That he was subsequently informed by Stewart that each of these two witnesses claimed a debt against him; and that Wood had exhibited an account certified by said Wing, his overseer, for medical services and borrowed money; and knowing that any account signed by Wing was correct, the defendant authorized his solicitor to execute a note for the same as his agent; and to do the same thing in respect to Dr. Smith, after ascertaining what was really and truly due to him.

That he was afterwards informed by said Stewart, he had executed a note to Doctor Wood to the amount of two hundred and eighty dollars, which included his account together with the interest. That said Stewart also informed him he would have given a similar obligation to Doctor Smith; but on reference to a record of a suit of said Smith against the defendant in Louisville chancery court, it appeared doubtful if any further sum was due to him. Thus the facts stand upon the pleadings.

The proofs in the case, as far as they go, sustain the answer. They consist altogether of admissions drawn from Wood by persons in the service of Southard, the complainant, employed with the express view of extorting them by the temptation of reward, and by the use of the most unscrupulous and unjustifiable means. A deliberate and corrupt conspiracy was formed, at the instance of Southard, for the purpose of obtaining from Wood an admission that this note was given as an inducement to a consideration for his testimony in the original suit; but in the several conversations detailed, and admissions thus insidiously procured, Wood persisted in the assertion that the note was given as a consideration principally for medical services rendered to the slaves of Russell on the plantation in question. If any doubt could exist as to the truth of the circumstances under which this note was given, as declared by Wood, his

consistency in the numerous conversations into which he was decoyed, unconsciously, by the conspirators, should remove it. If not founded in fact, the consistency is strange and unaccountable, considering the character of the persons employed to entrap him, and the unscrupulous and unprincipled appliances used to accomplish a different result, namely, the obtaining an admission that the note was given as the wages of his former testimony. He was surrounded by professed friends for this purpose, and intoxicating liquors freely used, the more readily to entrap him. An attempt has been made to invalidate this explanation by the testimony of Doctor Smith, who states, that he was the general physician of the plantation, and that, in his opinion, services to the amount claimed by Wood could not have been rendered at the time without his knowledge; but this negative testimony, whatever weight may properly be given to it, is not sufficient to overcome the answer, and, corroborating circumstances to which we have referred. It is matter of opinion and conjecture; and that, too, after the lapse of some twenty-five years. Wing, the overseer, who might have cleared up any doubt upon the question, is dead.

One line of proof and of argument, on the part of the complainant in the original suit, to show that the transaction was a mortgage and not a conditional sale, was the great inadequacy of price. A good deal of evidence was furnished on both sides upon this point. The item of newly discovered evidence, besides that already noticed, is the testimony of Hancock, who states that Russell, in a conversation with him in the forepart of the year 1827, as near as he could recollect, offered to sell to him the plantation for the sum of $5,000. This is claimed to be material, from its bearing upon the question of adequacy of price, Southard having paid nearly this amount.

Without expressing any opinion as to the influence this fact, if produced on the original hearing, might have had, it is sufficient to say, that it does not come within any rule of chancery proceedings as laying a foundation for, much less as evidence in support of, a bill of review.

The rule, as laid down by Chancellor Kent, (3 J. Ch. R. 124,) is, that newly discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and of a very decided and controlling character. 3 J. J. Marsh. 492; 6 Madd. 127; Story's Eq. Pl. § 413.

The soundness of this rule is too apparent to require argument, for, if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to

tamper with witnesses for the purpose of supplying defects of proof in the original cause.

A distinction has been taken where the newly discovered evidence is in writing, or matter of record. In such case, it is said, a review may be granted, notwithstanding the fact to which the evidence relates may have been in issue before; but otherwise, if the evidence rests in parol proof. 1 Dev. & Batt. 108, 110.

Applying these rules to the case before us, it is quite apparent that the decree below dismissing the bill was right, and should be upheld. The utmost effect that can be claimed for the newly discovered evidence is: 1. The impeachment of the testimony of Doctor Wood in the original suit; and, 2. A cumulative witness upon a collateral question in that suit, which was the inadequacy of the price paid; a fact, it is true, bearing upon the main issue in the former controversy, but somewhat remotely.

As it respects the first — the impeachment of Wood — the means disclosed in the record resorted to by the complainant, Southard, strongly exemplify the soundness of the rule that excludes this sort of evidence as a foundation for a bill of review, and the danger of relaxing it by any nice or refined exceptions. And, as to the second — the evidence of Hancock — it is excluded on the ground, not only that it is merely cumulative evidence, but relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling. If newly discovered evidence of this character could lay a foundation for a bill of review, it is manifest that one might be obtained in most of the important and severely litigated cases in courts of chancery.

There is another question involved in this case, not noticed on the argument, but which we deem it proper not to overlook.

As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with.

The better opinion is, that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree.

Nor will a bill of review lie in the case of newly-discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the

decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits. 1 Vern. 416; 2 Paige, 45; 1 McCord's Ch. R. 22, 29, 30; 3 J. J. Marsh. 492; 1 Hen. & Munf. 13; Mitford's Pl. 88; Cooper's Pl. 92; Story's Eq. Pl. § 408. Neither of these prerequisites to the filing of the bill before us have been observed.

We think the decree of the court below, dismissing the bill of review, was right, and ought 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 Kentucky, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

WILLIAM J. SLICER, LAWRENCE SLICER, WILLIAM CROMWELL SLICER, AND MARCELLA SLICER, MINORS, BY THEIR FATHER AND NEXT FRIEND, WILLIAM J. SLICER, AND MARTHA VIRGINIA BERKLEY, JERMIEMIAH BERRY, AND THOMAS CROMWELL BERRY, APPELLANTS. *v.* THE BANK OF PITTSBURG.

Where there was a mortgage of land in the city of Pittsburg, Pennsylvania, the mortgagee caused a writ of *scire facias* to be issued from the Court of Common Pleas there being no chancery court in that State. There was no regular judgment entered upon the docket, but a writ of *levari facias* was issued, under which the mortgaged property was levied upon and sold. The mortgagee, the Bank of Pittsburg, became the purchaser.

This took place in 1820.

In 1836, the court ordered the record to be amended by entering up the judgment regularly, and by altering the date of the *scire facias*.

Although the judgment in 1820 was not regularly entered up, yet it was confessed before a prothonotary, who had power to take the confession. The docket upon which the judgment should have been regularly entered, being lost, the entry must be presumed to have been made.

Moreover, the court had power to amend its record in 1836.

Even if there had been no judgment, the mortgagor or his heirs could not have availed themselves of the defect in the proceedings, after the property had been adversely and quietly held for so long a time.

Slicer et al. v. The Bank of Pittsburg.

This was an appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

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

It was argued by *Mr. T. Fox Alden* and *Mr. Johnson*, for the appellants, and by *Mr. Hepburn* and *Mr. Loomis*, for the appellee.

The points made by the counsel for the appellants were the following:—

1. That a proceeding of *scire facias sur mortgage*, in Pennsylvania, is literally a bill in equity to foreclose the equity of redemption, and forfeit the estate of the mortgagor. Dunlop's Digest, 31, Act of 1705.

2. That the proceedings being in the nature of a bill in equity to foreclose the mortgage, the principles of equity, in that particular branch of chancery procedings, are alone applicable. Self-evident.

3. That amendments of judgments at common law, with all the authorities authorizing the entries of judgments *nunc pro tunc*, can in no case be applicable to amendments of decrees in equity, for foreclosure, because the reason of the law does not apply in such case, but *e converso*.

4. That while the bill to foreclose the equity of redemption is pending, the equitable bar, by analogy, does not run any more than the statute would run, while suit at law was pending. 1 Powell on Mortgages, 320.

5. When it has been shown that suit was instituted, it is incumbent on the party wishing to avoid the effect of the principle of *lis pendens*, to show that the cause was legally terminated. 13 How. 332.

6. The issuing of final process, void on the face of the record, does not terminate suit, at law; still less, is it to be construed in equity in such manner as to forfeit the estate of the mortgagor. Needs no authority.

7. No release of the equity of redemption, by express parol agreement, or by implication, arising from the acts of a distressed debtor, or mortgagor, in waiving inquisition, or notice, or appraisement, can compromit his rights as mortgagor, and work a forfeiture of his estate, when his solemn covenant, contained ill his condition of absolute sale, in his mortgage, will not be permitted to have such effect.

8. That estoppels, either at law or equity, are only allowable to advance justice, never in equity, to work a forfeiture of estate.

9. That presumptions are not allowed at law or equity, against fact, *a fortiori*, in equity, when such allowance would defeat an estate, the favorite of equity. 11 How. 360.

10. The confession of judgment, by warrant of attorney, in Pennsylvania, is not a judgment of record, until the confession of judgment is duly entered by the proper officer of record; still less is the parol declaration of any defendant, that he had confessed judgment, evidence of a judgment in Pennsylvania.

11. If such parol admission of the confession of a judgment is tantamount to the entry of a judgment in Pennsylvania, it must be a judgment for every purpose.

12. That the respondents cannot avail themselves of the amendment in this case, on the motion of Mr. Bradford, as they repudiate his acts as unauthorized by them, and further, without notice to Mr. Cromwell. Coke Litt. 303 a., 352 b.; Bull. N. P. 233; 1 Wash. C. C. R. 70; 11 Wheat. 286; 9 Cow. 274; 4 Metc. 384; 9 Wend. 147; 6 Ad. & Ellis, 469; 10 Ib. 90; 5 Watts & Sergt. 306.

13. That even if the amendment of judgment was regular, it did not, and could not, sanctify a void execution and sale. 4 Wend. 678, 474, 480; 1 Stark. Ev. 283; 12 Johns. Rep. 213; 1 Moore & Payne, 236.

14. That if such judgment was regular, and within the powers of the court, it was interlocutory in its nature, the proceedings being in the nature of a bill of foreclosure, &c., and the defendants having been in possession of the mortgaged premises for sixteen years, would either have to account in equity, for the reception of the profits, or have the same liquidated by action at law.

15. Laches, either at law or equity, when both parties are *in pari delictu*, are available by neither; and in this case it was the fault of respondents, if they did not press their mortgage to the foreclosure of the equity of redemption.

From which preceding propositions, if established, we contend that it flows as a legal consequence:

1st. That there was no judgment of the court, which would authorize a writ of *levari facias*.

2d. The sale, therefore, being void, the equity of redemption still exists, and the mortgagee is bound to account for rents and profits, and if he paid his debt, is bound to reconvey the mortgaged premises, or pay the value thereof on such equitable principles as the court may determine to be just and equitable to all parties.

The points on the part of the appellee were the following:

I. The *levari facias*, upon which the mortgaged premises were sold, was issued upon and fully warranted by a legal and valid judgment, confessed by Thomas Cromwell on the 13th day of September, A. D. 1820, to the plaintiff in the action

sci. fa. sur mortgage, No. 136, August term, 1820, (the Bank of Pittsburg *v.* Cromwell,) for the sum of $21,740.40. Of this the complainants have exhibited record evidence in the certificate of Edward Campbell, Jr., prothonotary of the Court of Common Pleas of Alleghany county, which may be found on page 17 of the record. That confession of judgment is a part of the record of which he certifies a full exemplification, and is correctly and rightfully certified as a part of the record. Reed *v.* Hamet, 4 Watts's Rep. 441; Lewis *v.* Smith, 2 S. & R. 142; Shaw *v.* Boyd, 12 Pa. State Rep. 216; Weatherhead's Lessee *v.* Baskerville, 11 Howard's 360; 7 S. & R. 206; Railroad Co. *v.* Howard, 13 Howard's R. 331; Cook *v.* Gilbert, 8 S. & R. 568; Wilkins *v.* Anderson, 1 Jones, 399; Sererenge *v.* Dayton, 4 Wash. C. C. R. 698.

II. If the entry of the judgment confessed by Cromwell in favor of the bank (upon a docket of the court) were requisite to its validity as a judgment, and material to the power and authority of the sheriff in acting upon the *levari facias*, by virtue of which the mortgaged premises were sold, it being the duty of the prothonotary to make an entry of the judgment upon a docket of the court, and the rough docket of 1820 having been lost, it will, after the lapse of thirty years, be presumed in favor of the validity of the proceedings, and for the protection of purchasers at a public judicial sale; that such entry was made by the prothonotary in pursuance of his duy upon the docket now lost. Shaw *v.* Boyd, 12 Pa. State Rep. 216; Owen *v.* Simpson, 3 Watts's Rep. 88; De Haas *v.* Bunn, 2 Barr, 338–9; Demarest *v.* Wynkoop, 3 Johns. Ch. Rep. 129, 146; 2 Peters, 162, 168.

III. The amendment made by the prothonotary, in the case of the Bank of Pittsburg *v.* Thomas Cromwell, No. 136, August term, 1820, by order of the court, on the 14th day of December, A. D. 1835, in the words and figures following, to wit, —

"September 13th, 1820, judgment confessed per writing filed, signed by defendant for the sum of twenty-one thousand seven hundred and forty dollars and forty cents, besides costs of suit a release of all errors, without stay of execution, and that the plaintiff shall have execution by *levari facias* by November term, 1820. H. H. Peterson, *Prothonotary.*"

— was the legitimate exercise of an undoubted discretionary power, vested in the court, and is not the subject of revision in the Supreme Court of Pennsylvania, nor can its validity be properly questioned collaterally in the courts of the United States. Mara *v.* Quin, 6 Term Rep. 1, 6, 7; Murray *v.* Cooper, 6 S. & R. 126–7; Ordroneaux *v.* Prady, 6 S. & R. 510; Marine

Insurance Co. *v.* Hodgson, 6 Cranch, 217; Griffeth *v.* Ogle, 1 Binney, 172–3; 1 Burrow's Rep. 148, 226; Owen *v.* Simpson, 3 Watts, 87, 88, 89; Maus *v.* Maus, 5 Watts, 319; De Haas *v.* Bunn, 2 Barr, 335–9; Rhoads *v.* Commonwealth, 3 Harris, 273, 276–7; Strickler *v.* Overton, 3 Barr, 323; Clymer *v.* Thomas, 7 S. & R. 178, 180; Chirac *v.* Reimcker, 11 Wheaton, 302; Hamilton *v.* Hamilton, 4 Barr, 193; Latshaw *v.* Steinman, 11 S. & R. 357–8.

IV. The exhibit marked "B," filed with complainants' bill, and prayed to be taken as a part of said bill, shows (page 9 of the record) a judgment in the case of the Bank of Pittsburg *v.* Cromwell, entered the 13th of September, 1820, for the sum of $21,740.40, which fully authorized the *levari facias* and subsequent proceedings, estops the complainants from controverting its verity or validity, and is, in this proceeding, conclusive upon the rights of the parties. Rhoads *v.* Commonwealth, 3 Harris, 273, 276–7; Strickler *v.* Overton, 3 Barr, 325; Marine Ins. Co. *v.* Hodgson, 6 Cranch, 217; Chirac *v.* Reimcker, 11 Wheaton, 302; United States *v.* Nourse, 9 Peters, 8–28; Voorhees *v.* Bank of the United States, 10 Peters, 450, 478; Elliott *v.* Piersol, 1 Peters, 329, 340; Thompson *v.* Tolmie, 2 Peters, 157; Clymer *v.* Thomas, 7 S. & R. 178; Levy *v.* Union Canal Co. 5 Watts's Rep. 105; Hauer's Appeal, 5 W. & S. 275; Drexel's Appeal, 6 Barr, 272; Davidson *v.* Thornton, 7 Barr, 131.

The amendment cannot be collaterally impeached, though no notice is given to defendant. Robinson *v.* Zollinger, 9 Watts, 170; Tarbox *v.* Hays, 6 Ib. 398.

V. The complainants are, in equity, estopped from having the relief prayed in their bill, by the appearance of Thomas Cromwell before the prothonotary of Alleghany county, on the 13th of September, 1820, and confessing judgment before that officer in favor of the Bank of Pittsburg for the sum of $21,740.40, besides costs, with a release of all errors, without stay of execution, and that plaintiff (the Bank of Pittsburg) have execution by *levari facias* to November term, 1820 — by the entry signed by him (page 16 of the record) on the *levari facias* which recites a valid judgment warranting the sale of the mortgaged premises commanded by said writ — by his subsequent acquiescence, for the period of thirty years, in the sale, without objection or complaint, especially after the expenditure of immense sums in improvement, and a great consequent enhancement in the value of the property. Dezell *v.* Odell, 3 Hill, 215–219; 6 Adolphus & Ellis, 475; 33 Eng. Com. Law, 117; 10 Adolphus & Ellis, 90; 37 Eng. Com. Law, 58; Hamilton *v.* Hamilton, 4 Barr, 193; Robinson *v.* Justice, 2 Penn. Rep. 22; Epley *v.* Withero, 7 Watts, 163; Carr *v.* Wallace, 7 Ib. 400; 10 Barr, 530; 1 Story's Eq. Jur. § 387.

VI. The bank, and those claiming under it, having held the possession of the mortgaged premises for a period exceeding thirty years, without account for rents, issues and profits — without claim for such account by the mortgagor — without admission by the bank during that entire period, that it possessed a mortgage title only, — the mortgagor and those claiming under him have lost the right of redemption and claim to account, and the title of the mortgagee and those claiming under the mortgagee has become absolute in equity, whether the bank entered as mortgagee or vendee. 2 Story's Equity Jurisprudence, §§ 1028 a, 1520, and authorities there cited. Moore *v.* Cable, 1 Johns. Ch. Rep. 320; Hughes *v.* Edwards, 9 Wheaton's Rep. 489, 497–8; Dexter *v.* Arnold, 1 Sumner's C. C. Rep. 109; Rafferty *v.* King, 1 Keen, 602, 609–10, 616–17; Demarest *v.* Wynkoop, 3 Johns. Ch. Rep. 135; Story's Equity Pleading, 757; Strimpler *v.* Roberts, 6 Harris, 302; Elmendorf *v.* Taylor, 10 Wheaton, 168; Underwood *v.* Lord Courtown, 2 Scho. & Lef. 71; Dikeman *v.* Parish, 6 Barr, 211; 1 Powell on Mortg. 362 a, n. 1.

Mr. Justice McLEAN delivered the opinion of the court.

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

The complainants represented in their bill that their ancestor, Thomas Cromwell, was seised of a tract of land, containing one hundred and seventy acres, situate in the county of Alleghany, at or nearly adjoining the city of Alleghany, and also a certain lot of land situate in the city of Pittsburg, which were mortgaged by the said Cromwell to secure a debt of twenty-one thousand dollars which he owed to the Bank of Pittsburg. That the bank, on the 9th of June, 1820, caused a writ of *scire facias* to issue on the mortgage in the Court of Common Pleas, which had jurisdiction of the case, a service of which was accepted by the said Cromwell in writing, but that said writ was never legally returned. That without any judgment on the mortgage a writ of *levari facias* was issued, and the lands mortgaged were levied on and sold, and the bank became the purchaser.

That on the 1st of December, 1835, the bank, by its attorney, Bradford, moved the court for a rule on Thomas Cromwell, the defendant, to show cause on the second Monday of December, why the record of the case should not be amended on the docket, so that the judgment, which appears among the papers, should be entered as of September 13th, 1820. The rule was granted, and on the 14th of December, 1835, the same was made absolute, and judgment, *nunc pro tunc* entered in favor of the bank by the prothonotary of the court.

And on the 16th of March, 1836, the said Bradford moved that the *scire facias*, which had been issued should be amended, by inserting the 13th of September, 1820, instead of the 13th of May of the same year, so as to conform to the judgment, and the motion was granted and the amendment made.

The judgment entered on the papers was as follows: The Bank of Pittsburg *scire facias*. "In my proper person I this day appeared before the prothonotary in his office, and confessed judgment to the plaintiff for $21,740.40, besides costs, with release of all errors without stay of execution, and that the plaintiff shall have execution by *levari facias* to November term, 1820:" signed, Thomas Cromwell — which paper the clerk states was filed September 13th, 1820. This paper is alleged to be in the handwriting of the attorney, but the signature is admitted to be Cromwell's.

This authority, it is alleged, did not authorize the entry of a judgment, and that it was no part of the record, and cannot show the judgment, it being no more than parol proof; which cannot be received to establish a judgment, unless it be shown that the book containing the original entry had been lost.

The bank is alleged to have been in possession, by itself and tenants, of the property sold; and that there being no judgment, the proceedings on the *scire facias* are void, and that in equity the bank should only be considered as a mortgagee and compelled to account for the rents and profits, and be decreed to release the mortgage on receiving the money and interest on the debt due to the bank as aforesaid.

The complainants are shown to be the heirs of Thomas Cromwell.

The bank, in its answer, admits the facts as set forth in the bill as to the debt, the mortgage, the issuing of the *scire facias*, the judgment, and the sale of the premises, &c., and alleges their validity, under the laws of Pennsylvania. That the mortgage having been produced and the property sold, which, before the year 1829, was sold, and conveyed by the bank to different individuals, and that it has ever since been in the hands of innocent purchasers; and it alleges there is no right of redemption under the circumstances, and it prays that the bill may be dismissed at the cost of the complainants.

From the proceedings in this case it appears, that the records of the court, where the proceedings on the mortgage were had, are kept loosely, and differently from the judicial records of the courts of common law in England or in this country. But the usage must constitute the law, under such circumstances, as a requirement of the forms observed elsewhere, would affect titles under judicial sales to a ruinous extent.

By the Judiciary Act of Pennsylvania, of the 13th of April, 1791, it is provided that prothonotaries shall have the power to sign all judgments, writs, or process, &c., as they had for those purposes when they were justices of the court. Before this statute it appears that one of the justices of the court, having possession of the seal, signed all writs and judgments, took bail, &c., and performed the duties of prothonotary. And under the above statute, the prothonotary still exercises many judicial functions.

The confession of judgment with release of errors, and the agreement that execution should issue returnable to November term ensuing, evinced a desire on the part of the mortgagor, to remove every obstruction to a speedy recovery of the demand by the bank. The *scire facias* was returned to August term, 1820. This mode of procedure on a mortgage was authorized by a statute, and was intended as a substitute for a bill in chancery, there being no such court in Pennsylvania.

The objection to this judgment is, that it was not entered upon the minutes kept by the prothonotary. It is in proof that these minutes or dockets were not carefully preserved by the prothonotary, and that the one in which this entry should have been made is lost, but there is no positive proof that any such entry was made.

The prothonotary took the confession of the judgment in writing, and there can be no doubt he had power to do so. By the practice of the common pleas, it seems the judgment is entered sometimes on the declaration, at others on a paper filed in the cause. From the entry of judgment the prothonotary is enabled to make out the record in form when called for, but unless required, the proceedings are never made out at length. For this purpose it would seem that the paper filed, containing the confession of a judgment by the defendant, would afford more certainty than the abbreviated manner, in which it was usually entered.

In Reed *v.* Hamet, 4 Watts's Rep. 441, the court say that judgments by confession, on the appearance of the party in the office, taken by the prothonotary, though not universal, have, from time immemorial, been frequent, and their validity has never been questioned.

Confession of judgment is a part of the record when made out, and it may be copied from the papers in the case. Cooper *v.* Gillett, 8 Serg. & R. 568; McCalmont *v.* Peters, 13 Serg. & R. 196; Lewis *v.* Smith, 2 Serg. & R. 142; Shaw *v.* Boyd, 12 Pa. State Rep. 216; 7 Serg. & R. 206.

The docket being lost, under the circumstances the court would, if necessary, presume the entry of the judgment was

made on it. This presumption would rest upon the fact, that judgment was confessed with the release of all errors, and an agreement that execution should issue by the mortgagor, which execution did issue and on which the land was sold, shortly after which the mortgagor surrendered the possession and an acquiescence by him and his heirs for thirty years, would afford ample ground to presume that the prothonotary had performed the clerical duty of entering the judgment on the docket.

But the court had the power to make the amendment, which they did make, and which removed the objection, by causing the judgment to be entered *nunc pro tunc*. This was a duty discharged by the court, in the exercise of a discretion, which no court can revise. Clymer *v.* Thomas, 7 Serg. & R. 178, 180; Chirac *v.* Reimcker, 11 Wheat. 302; Latshaw *v.* Stainman, 11 Serg. & R. 357–8; Walden *v.* Craig, 9 Wheat. 576.

If there had been no judgment, under the circumstances, the complainants could have no right to redeem the premises.

The complainants file their bill to redeem the land, as mortgagors, which, by the improvements and the general increase of the value of real estate where the property is situated, has become of great value. Thirty years have elapsed since it was sold, under the appearance, at least, of judicial authority. The property was purchased by the bank for less than the amount of the debt. By the confession of judgment, with a release of all errors, and an agreement that execution should be issued, the mortgagor did all he could to facilitate the proceedings and to secure a speedy sale of the premises. The bank, it seems, in the course of some six or nine years, sold the p o-perty in lots to different purchasers, for something more, perhaps, than its original debt and interest. For nearly twenty-five years the purchasers have been in possession of the property, improving it and enjoying it as their own.

No dissatisfaction was expressed by the mortgagor, who voluntarily relinquished the possession, and none appears to have been expressed by his heirs, until the commencement of this suit. For thirty years the mortgagee and its grantees have been in possession of the property, no claim of right being set up for the equity of redemption, or on any other account. Under such circumstances a court of equity could give no relief had there been no legal judgment.

"Twenty years undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage during that period, is a bar to a bill to redeem. But if within that period there be any account, or solemn acknowledgment of the mortgage as subsisting, it is otherwise. Dexter *v.* Arnold, 1 Sumn. C. C. Rep. 109.

A mortgagor cannot redeem after a lapse of twenty years, after forfeiture and possession, no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. Hughes v. Edwards, 9 Wheat. 489. Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged unless there be circumstances to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. Ib.

In every point of view in which the case may be considered, it is clear that there is no ground of equity, on which the complainants can have relief.

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 Western 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.

CHARLES B. CALVERT AND GEORGE H. CALVERT, PLAINTIFFS IN ERROR, *v.* JOSEPH H. BRADLEY AND BENJAMIN F. MIDDLETON.

Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two representing one interest) cannot maintain an action for the breach of it by the lessee.

The question examined, whether a mortgagee of a leasehold interest, remaining out of possession, is liable upon the covenants of the lease. The English and American cases reviewed and compared with the decisions of this court upon kindred points. But the court abstains from an express decision, which is rendered unnecessary by the application of the principle first above mentioned to the case in hand.

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 covenant brought by the Calverts against Bradley and Middleton, who were the assignees of the unexpired term and property in the house for the purpose of paying the

creditors of the lessee. The lease was of the property called the National Hotel, in Washington, owned as follows:

	Shares.
George H. Calvert and Charles B. Calvert, jointly	205
Roger C. Weightman	66
Philip Otterback	22
William A. Bradley	20
Robert Wallach, represented by his guardian, Alexander Hunter	2
Total shares	315

All of the above named persons signed the lease.

The history of the case and the manner in which it came up are set forth in the opinion of the court.

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

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

Two questions arise out of the record for the decision of this court:

First. Whether the plaintiffs have brought their action in proper form, without joining with the other covenantees.

Second. Whether the defendants, being assignees of the term, and having accepted the same for the purpose of fulfilling a trust, are liable on the covenants of the lease, as other assignees would be.

First point. In this case the covenant was with the covenantees jointly and severally; but as the two Calverts were the only parties whose interest in the property, and whose demise was joint, it was probably the intention of the parties that the term "jointly," in the covenants, was intended to apply to their case, and that as to all the rest the covenants were to be several. That construction, at least, will render all parts of the instrument consistent.

There is a distinction as to these terms "jointly and severally," when applied to covenantees, and when applied to covenantors. Covenantors may bind themselves jointly and severally, and they will be so bound, because that is their contract. But covenantees must bring their actions jointly or severally, according as their interests are joint or several. The rule is laid down by Lord Denman in Foley *v.* Addenbrooke, 4 Adol. & E. 205, 206, in the following terms: "But the result of the cases appears to be this, that where the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear, as in the case of cove-

nants to pay separate rents to tenants in common upon demises by them."

So in James *v.* Emery, 8 Taunt. Rep. 244, it was said by C. J. Gibbs: "The principle is well known, and fully established, that if the interest be joint, the action must be joint, although the words of the covenant be several; and if the interest be several, the covenant will be several, although the terms of it be joint."

The more recent decisions all refer to Slingsby's case, 5 Rep. 18, 19, as the leading authority on this question; then to Anderson *v.* Martindale, 1 East, 497; Eccleston *v.* Clipsham, 1 Saund. 153; Wilkinson *v.* Lloyd, 2 Mod. Rep. 82, besides the cases already referred to; S. P. in Slater *v.* Magraw, 12 Gill & J. 265.

The rule, as above established, is subject to modification where one of the covenantees possesses no beneficial interest, in which case the action must be joint; for though the covenant be separate, the legal interest is joint. Anderson *v.* Martindale, 1 East, 497; Southcote *v.* Hoare, 3 Taunt. 87; Scott *v.* Godwin, 1 Bos. & Pul. 67; which explains the decision in the case of Bradburn *v.* Botfield, 14 Mees. & Wel. 559.

Second point. The question is whether a party who accepts an assignment of lease in a deed of trust, as a security for money lent, or debt incurred, is liable upon the covenants in the lease, as he would be if the assignment were absolute, though he has never occupied the premises in fact?

On this question the decision in Eaton *v.* Jaques, Douglas's Rep. 460, is directly adverse to the plaintiffs in this cause.

That decision, however, was at the time not acquiesced in by other judges, or by the profession, and has since been repeatedly overruled, and stands alone and unsustained by any other authority. See the case of Williams *v.* Bosanquet, 1 Brod. & B. 238; Platt on Cov. 3 Law Lib. 488; Taylor's Land. & Tenant, 223; Turner *v.* Richardson, 7 East, 344; Walter *v.* Cronly, 14 Wend. 63.

The doctrine of Eaton *v.* Jacques has been followed in New York, (see 4 Kent's Comm. 153, 154,) but the doctrine of that case was repudiated as to the District of Columbia in the cases of Stelle *v.* Carroll, 12 Pet. 201; and Van Ness *v.* Hyatt, 13 Ib. 294.

Again, these trustees might themselves have sold and conveyed the leasehold interest in question. Suppose that had been done, would not the purchaser have taken the interest, subject to all the covenants in the lease? That cannot be questioned. If so, then the trustees must have held the lease in the same manner themselves; for they could not have assigned the lease

subject to a burden from which it was exempt whilst in their own hands.

Finally, how does the question stand in reference to considerations of justice and equity?

Suppose the lease had been one of great value. Blackwell chose to incur debts, and to make an assignment of all his property in the world, not only to secure particular favored creditors for debts already incurred, but for all liabilities which he might afterwards incur to them. The deed of trust is recorded, and protects this property from the just obligations imposed by the covenants in the lease. He holds the property by permission of the trustees from year to year, until the lease is about to expire, when he absconds, and abandons the premises in a dilapidated condition. The trustees then come forward, and under their deed of trust take possession of all the property on the premises, sell it, and pay the favored creditors in full from the proceeds; but because the lease is about to expire, they repudiate that, together with its covenants, because it was unprofitable to perform them. They had received and accepted the lease when it was made, and when it was valuable; but when it was about to expire they reject it, because to hold it, and perform its covenants, or to sell it, would be no longer to their advantage.

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

First. That the action is improperly brought, and the first vice in the pleading being in the plaintiffs' declaration, on general demurrer, the judgment of the court must be affirmed.

Second. Failing in this, they maintain that the matters set up in the second and third pleas, are properly pleadable to this action, and furnish a complete bar to plaintiffs' recovery.

First. As to the first general point, they say:

1. The action on the covenant to repair, in this demise, should have been a joint action by all the landlords.

If the covenant is expressly joint, the action must be joint; and if it be joint and several, or several only in the terms of it, yet, if the interest be joint, and the cause of action be joint, the action must be joint. Slingsby's Case, 5 Co. 18, (6); Eccleson *v.* Clipsham, 1 Saund. 153; 2 Keb. 338, 339, 347, 385; Spencer *v.* Durant, Comb. 115; 1 Show. 8; Johnson *v.* Wilson, Willes, 248; 7 Mod. 345; Saunders *v.* Johnson, Skin. 401; Hopkinson *v.* Lee, 14 Law J. (N. S.) 101; Anderson *v.* Martindale, 1 East, 497; Kingdom *v.* Jones, T. Jones, 150.

And the reason is clearly given in Anderson *v.* Martindale, 1 East, 500, where the court say: If both parties were allowed to bring separate actions for the same interest, where only one

duty was to be performed, which of them ought to recover for the non-performance of the covenant?

If the covenant is equivocal, the interest of the parties will determine the right of action, and make it joint or several, as the interest and cause of action is joint or several. Sheppard's Touchstone, by Preston, 166.

If tenants in common make a lease to another, rendering to them a certain rent during the term, "the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty. Littleton, § 316. And this because the demise is joint; but if the demise were several, whether in the same instrument or not, the action must be several for the rent, because the interest and cause of action is several. Wilkinson *v.* Hall, 1 Bing. N. C. 713; 1 Scott, 675.

The action must be joint in all matters that concern the tenements in common (and where the injury complained of is entire and indivisible) action on the case for nuisance, &c., detinue of charters — *warrantia chartæ*; case for ploughing lands whereby cattle were hurt; trespass for breaking into their house; breaking their inclosure or fences; feeding, wasting, or defouling their grass; cutting down their timber; fishing in their piscary, &c.; because in these cases, though their estates are several, yet the damages survive to all; and it would be unreasonable to bring several actions for one single trespass; so if there be two tenants in common, and they make a bailiff, and one of them dies, the survivor shall have an action of account, for the action given to them for the arrearages of rent was joint. See Archbold's Civil Plead. tit. Joinder of Plaintiffs, 54, and the cases cited; Bac. Ab., (Dub. Ed. 1786,) tit. Joint-Tenants and Tenants in Common, let. K. and cases cited.

Bacon says: A makes a lease in which the lessee covenants to repair; lessor grants his reversion by several moieties to several persons, and lessee assigns to J. S. In an action of covenant by the grantees of the reversion for not repairing, the question was. If two tenants in common of a reversion, could join in bringing an action of covenant against the assignee? And it was held, that they could and ought to join in this case, being a mere personal action according to Littleton's rule, which was held general, without relation to any privity of contract; and that the covenant being indivisible, the wrong and damages could not be distributed, because uncertain;" and he cites the same cases that Archbold does. Archbold says, after speaking of the several cases of personal actions in which they must join, and enumerating the cases in which they need not join, "But in all other cases where that which is sued for is not distributable, as in

covenant for not repairing where the damages are not distributable because uncertain, tenants in common must join in the action."

In Foley *v.* Addenbrooke, 4 Q. B. 207, 3 G. & D. 64, Lord Denman says, "The result of the cases appears to be this, that when the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be joint in its terms; but the several interest and several ground of action must distinctly appear."

And in Bradburne *v.* Botfield, 14 M. & W. 574, Parke, B. delivering the opinion of the court, says: "It becomes unnecessary to decide whether one of several tenants in common, lessors, could sue on a covenant with all to repair, as to which there is no decisive authority either way. That all could sue is perfectly clear;" and he cites the cases referred to by Bacon and Archbold. See also, Simpson *v.* Clayton, per Tindal, C. J. 4 Bing. N. C. 781, and Wakefield *v.* Brown, Q. B. Trin. T. 1846, 7 Law Times, 450.

These two cases of Foley *v.* Addenbrooke, and Bradburne *v.* Botfield, are cases in point, and show that—if there are covenants which are joint and several in the same instrument, and there is any one act or thing to be done for the redress of which they may all join, and there are covenants where they may sue severally, then the action for a breach of that covenant in which all may join, must be a joint action, and the action for the breach of any covenant when all cannot join, must be a separate action. See also Sorsbie *v.* Park, 12 M. & W. 146, and see the query put by Parke, B. at p. 566, 14 M. & W. "If there is a demise by one tenant in common as to his moiety, and a demise by the other tenant in common as to the other moiety, by the same instrument, and there is a covenant to repair, I want you to show that each may sue separately"

In this case the covenants are joint and several: they all may join in an action for repairs; they all may join for a failure to pay taxes; they are all jointly interested in the possession and mode of enjoyment; the covenant for repairs affects only the reversioners' possession and enjoyment, not the title; it is a joint and several demise, and the covenant is to them jointly and severally for a thing which is not distributable. They must join.

The non-joinder of plaintiffs on oyer may be taken advantage of on the plea of *non est factum*, and is for the court. Eccleston *v.* Clipsham, 1 Saun. 154, n. 1.

Second. The matters set up in the second and third pleas, are properly pleadable in bar.

First plea. It is a conveyance of a leasehold interest to third parties upon trust to secure a debt.

The possession is to remain in the assignor until default, and he is to pay the rent.

The assignment is not signed or sealed by the assignees, and they never took possession.

Second plea. The plaintiffs themselves took possession before the expiration of the term, and on the default of the assignor, and offered the premises for rent, and made alterations and repairs before the expiration of the term.

It is a trust, and not simply a mortgage. It is a confidence, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land. Co. Litt. 272, (b.) While a mortgage is a debt by specialty, (2 Atk. 435,) secured by a pledge of lands of which the legal ownership is vested in the creditor, but of which in equity the debtor and those claiming under him remain the actual owner until foreclosure. Coote on Mort. 1.

Here is a special trust, ministerial in its character, (Lewin on Trusts, 21, 22,) in which the trustee holds the legal estate with a power to sell and convey for the benefit of the debtor and creditor. He takes no interest personally in the land. He has no right to the possession, except for the mere purposes of sale; he has no right to the rents, issues, profits, or other income from the land. In all this he differs from a mortgagee.

He is a mere agent of both parties, as a means of holding and transmitting the title to others.

Can he be bound personally by the covenant of those from whom his authority emanates?

But it is said he is a mortgagee of a leasehold interest, and as such, is bound by a covenant to repair the mortgaged premises. And for this Williams *v.* Bosanquet, 1 Bro. & Bing. 238, is relied upon. It is undoubtedly true that that case has overruled Eaton *v.* Jaques, 2 Doug. 456, and is to be taken as the law of England at this day.

Eaton *v.* Jaques was decided 10th November, 1783. It proceeded on the ground that it was not an assignment of all the mortgagor's estate, title, right, &c.

Williams *v.* Bosanquet goes upon the ground that privity of estate existed by acceptance of the assignment, which it affirms to be equal to possession, and privity of contract by the assignment of a contract made with the lessee and his assigns, and thus all the estate, right, title, &c., of the mortgagee passed by the assignment.

"The American doctrine," says Mr. Greenleaf, note 1, p. 101, to the 2d vol. of his edition of Cruise, "as now generally settled, both at law and in equity, is, that as to all the world except the mortgagee the freehold remains in the mortgagor as it ex-

isted prior to the mortgage." Of course he retains all his civil rights and relations as a freeholder, and may maintain any action for an injury to his possession or inheritance as before. And he cites numerous cases in Maine, Massachusetts, Connecticut, New York, Pennsylvania, and Maryland.

At page 110, note to Tit. 15, Mortgage, ch. 11, § 14, referring to the cases of Eaton *v.* Jaques, and Bosanquet *v.* Williams: "It is well settled, as a general doctrine, that a mere legal ownership does not make the party liable, in cases like those supposed in the text, without some evidence of his possession, also, or of his actual entry." It is clearly settled in the law of shipping, and he cites numerous cases, to which reference is here made, that fully sustain his proposition. And he proceeds to show that Williams *v.* Bosanquet rests on purely technical grounds. Reference is made to the whole note.

The case cited in that note from 4 Leigh, 69, went upon the ground that the parties came into equity, seeking to avail themselves of the trust, and the court decided they must take it charged with the burdens upon it.

In addition to the cases referred to in these notes, see the Maryland cases, viz.

Payment of the mortgage debt re-invests the mortgagor with his title without release. Paxson's Lessee *v.* Paul, 3 H. & McH. 400.

The mortgagor's interest is subject to the attachment law of 1795. Campbell *v.* Morris, 3 H. & McH. 535, 561, 562, 576.

Being condemned and sold under execution, the purchaser has a right to redeem. Ford et al. *v.* Philpot, 5 H. & J. 312, and see the reasoning of the chancellor in this case. The mortgagor is the substantial owner, and, so long as the equity of redemption lasts, may dispose of the property as he pleases.

Unless there is an agreement to the contrary, the mortgagee has a right to the possession of the mortgaged property, and trespass will not lie against him for taking it. Jamieson *v.* Bruce, 6 G. & J. 72.

But the mortgagee has an interest in the subject-matter not absolute, but only commensurate with the object contemplated by the mortgage, the security of the debt. Evans *v.* Merriken, 8 G. & J. 39.

The devisees of the mortgagor have a right to call on the executor to redeem out of the surplus over specific legacies. Gibson *v.* McCormick, 10 G. & J. 66.

The interest of the mortgagee passes to his executor; that of the mortgagor to the heir. Chase *v.* Lockerman, 11 G. & J. 185.

These cases clearly establish the proposition of Lord Mans-

field, in Eaton *v.* Jaques, that the whole estate, right, and interest, do not pass by the assignment of the lease, by way of mortgage.

They are supposed to be in conflict with Stell *v.* Carroll, 12 Pet. 205, and Van Ness *v.* Hyatt, 13 Pet. 294–300.

As to the first, it only affirms the common-law doctrine that there can be no dower in an equitable estate.

As to the second, it affirms the common-law doctrine that legal estates only are subject to execution at law. But the case referred to at p. 300, as a manuscript case, and which is supposed to be the case of Harris *v.* Alcock, 10 G. & J. 226, shows that where there is judgment against a party having an equitable interest, and execution issued and returned *nulla bona*, the judgment creditor may, through a court of equity, reach the equitable interests.

Again. The assignee of a lease by way of mortgage, where there is a covenant such as exists in this case, cannot be in, by privity of estate. Astor *v.* Hoyt, 5 Wend. 603. His liability arises solely from privity of estate — not of contract. Walton *v.* Cronly, 14 Wend. 63; and see Platt on Cov. 493, 494, and cases in notes *v* and *t*. He is liable, therefore, only for acts during his possession. Platt, 494 and 503, and cases cited.

Here the claim is for the whole period of the lease to the bringing of the suit. It is a covenant to keep in repair. It must be to keep it so while in his possession.

The third plea sets up, that the acts of plaintiff prevented or dispensed with any obligation of the defendants to repair.

As between the original parties, the duty can only be discharged by a release under seal. The assignee is in a different position. Platt, 493, 494. He may avoid it by assignment.

Here the assignment is by deed poll. The obligation of the assignee may be released by parol. A surrender of the premises without a release would be sufficient. The interference of the landlord, or any acts of ownership, by which the possession and enjoyment were prevented or impaired — especially the taking possession, offering to rent, and proceeding to make the repairs and such alterations as the landlord saw fit — amount to a waiver.

Third Point. This is an action of covenant. The foundation of such an action is the seal of the covenants.

The action will not lie on a deed poll against the grantee. Platt on Cov. 10–18, inclusive.

Comyn on Land. and Ten. 273, citing Mills *v.* Harris, from Bayley, J., London, October sittings, 1820.

An action on the case by the lessee will lie against the assignee, but covenant will not lie.

Here there was neither a sealing by the assignees, nor any possession under the lease; covenant will not lie.

The judgment of the Circuit Court was therefore right.

Mr. Wylie, in reply.

1*st Point.* The cause of action was several, because the interests were several. The interests being several, the covenants in the lease, it must follow, were several also. If the covenants were several, and they were broken, the breach and the cause of action must therefore be several. It would be a solecism to say that the cause of action was joint, upon a covenant, when the interests were several and the covenants several. The breach of the covenant and the cause of action must follow the quality of the covenant. If that be joint the breach of it is joint; if it be several the breach of it is several.

The lessors were tenants in common of the premises in question. Tenants in common are joint but in one respect. They have neither the unity of time, nor of title, nor of interest; but only the unity of possession. They can join therefore in an action only when there has been an injury to their united possession; as in the case of trespass, waste, &c.

The breach of the covenant complained of in the present action, was an injury only to the interests of the several lessors, and not to their possession; and their interests being several the covenants and the breach of them must be several. The case of Bradburne *v.* Botfield, 14 M. & W. 574, which is so confidently relied upon by the defence, was decided upon an entirely different point. In that case the covenant was construed to be joint, because, as to one of the interests, there were trustees, and these trustees as well as their *cestuis que trust*, were parties to the demise and the covenant. Now if the covenant had been construed to be several in that case, then these trustees and their *cestuis que trust* might have sued for the same breach, and it would have been impossible to tell for which of them judgment could be rendered. The question was "What was to be done with the Foleys?" and if both the trustees and their beneficiaries could sue separately for the same injury, then would follow the absurdity that "the whole was not equal to all its parts." And in the conclusion of the opinion delivered, the court expressly disclaim to decide the question now under examination. The very point was decided in Wilkinson *v.* Loyd, 2 Mod. Rep. 82. See also notes A. & B. to Eccleston *v.* Clipsham, 1 Saund. 153; James *v.* Emory, 8 Taunt. Rep. 244; Scott *v.* Godwin, 1 Bos. & Pul. 67; 9 A. & E. 222.

2*d Point.* The authorities already referred to leave no ground to doubt as to what is the doctrine of the common law on this

point. There can no longer be any question about that. The only question (if it can be a question at all) is, whether the common law, or some other law that we know nothing of, is the law of the District of Columbia. In some of the States this doctrine of the common law has been changed by express enactment, and in others the common law has been abrogated by a gradual course of judicial construction. But in this district there has been no enactment on the subject; nor has there been any gradual course of judicial construction to undermine and wear away the settled doctrines of the common law. And this court in Stelle *v.* Carroll and Van Ness *v.* Hyatt, already cited, has shown its determination to uphold the common law, against the invasion of new principles and doctrines, which had succeeded in driving out the common law from some of the States of the Union. Maryland is one of the States in which the common law has in this respect been changed by statute, since its cession to the United States of this portion of the District of Columbia; and the authorities of that State are therefore not to be considered in this case.

As to the position that an assignee of a lease is not liable on the covenants to repair, contained in it, that is a new doctrine, against which it is hardly necessary to refer to authorities.

Mr. Justice DANIEL delivered the opinion of the court.

The plaintiffs brought their action of covenant, in the court above mentioned, against the defendants, to recover of them in damages the value of repairs made by the plaintiffs upon certain property in the city of Washington, known as the National Hotel, which had been on the 17th of April, 1844, leased by the plaintiffs, together with Roger C. Weightman, Philip Otterback, William A. Bradley, and Robert Wallach, to Samuel S. Coleman, for the term of five years. This property was owned by the lessors in shares varying in number as to the several owners, and by the covenant in the deed of demise, the rent was reserved and made payable to the owners severally in proportion to their respective interests, the interests of the plaintiffs only in the shares owned by them being joint. In addition to the covenant on the part of the lessee for payment to each of the lessors of his separate proportion of the rent, there is a covenant by the lessee for the payment of the taxes and assessments which might become due upon the premises during the term, and a further covenant that he would, during the same time, "keep the said hotel with the messuages and appurtenances in like good order and condition as when he received the same, and would, at the expiration of the said term, surrender them in like good repair." On the 1st of January, 1847, the lessee, Coleman, as-

signed all his interest in the lease to Cornelius W. Blackwell, who entered and took possession of the premises. On the 17th of February, 1848, Blackwell, by deed poll, conveyed to the defendants, Bradley and Middleton, all the goods, chattels, household stuffs, and furniture then upon the premises, together with the good will of the said hotel and business, and the rest and residue of the unexpired term and lease of said Blackwell in the premises — upon trust to permit the said Blackwell to remain in possession and enjoyment of the property until he should fail to pay and satisfy certain notes and responsibilities specified in the instrument; but upon the failure of Blackwell to pay and satisfy those notes and responsibilities, the trustees were to take possession of the property conveyed to them, and to make sale thereof at public auction for the purposes in the deed specified. Blackwell remained in possession after the execution of the deed to the defendants, until the 6th of March, 1849, when he absconded, leaving a portion of the rent of the premises in arrear. The property having been thus abandoned by the tenant, an agreement was entered into between the owners of the property and the defendants, that a distress should not be levied for the rent in arrear, but that the defendants should sell the effects of Blackwell left upon the premises, and from the proceeds thereof should pay the rent up to the 1st day of May, 1849 — the defendants refusing to claim or accept any title to, or interest in, the unexpired portion of the lease, or to take possession of the demised premises. In this state of things the plaintiffs, being the largest shareholders in those premises, proceeded to take possession of and to occupy them, and to put upon them such repairs as by them were deemed necessary, and have continued to hold and occupy them up to the institution of this suit. The action was brought by the plaintiffs alone, and in their own names, to recover their proportion of the damages alleged by them to have been incurred by the breach of the covenant for repairs contained in the lease to Coleman, which was assigned to Blackwell, and by the latter to the defendants by the deed-poll of February 17th, 1848.

To the declaration of the plaintiffs the defendants pleaded four separate pleas. To the 3d and 4th of these pleas the defendants demurred, and as it was upon the questions of law raised by the demurrer to these pleas, that the judgment of the court was given, we deem it unnecessary to take notice of those on which issues of fact were taken. The 3d and 4th pleas present substantially the averments that the deed from Blackwell to the defendants was simply and properly a deed of trust made for the security of certain debts and liabilities of Blackwell, therein enumerated; and giving power to the defendants in the

event of the failure on the part of Blackwell to pay and satisfy those responsibilities, to take possession of the subjects of the trust and dispose of them for the purposes of the deed. That this deed was not in law a full assignment of the term of Blackwell in the demised premises, and never was accepted as such, but on the contrary was always refused by the defendants as such; and that the plaintiffs, by their own acts, would have rendered an acceptance and occupation by the defendants, as assignees of the term, impracticable, if such had been their wish and intention, inasmuch as the plaintiffs themselves had, upon the absconding of Blackwell, the assignee of Coleman, entered upon and occupied the demised premises, and held and occupied the same up to the institution of this action, and had, during that occupancy, and of their own will, made such repairs upon the premises as to the plaintiffs has seemed proper or convenient.

Upon the pleadings in this cause two questions are presented for consideration; and comprising, as they do, the entire law of the case, its decision depends necessarily upon the answer to be given to those questions.

The first is, whether the plaintiffs in error, as parties to the deed of covenant on which they have declared, can maintain their action without joining with them as co-plaintiffs the other covenantees?

The second is, whether the defendants in error, in virtue of the legal effect and operation of the deed to them from Blackwell, the assignee of Coleman, and without having entered upon the premises in that deed mentioned, except in the mode and for the purposes in the 3d and 4th pleas of the defendants set forth, and admitted by the demurrer, were bound for the fulfilment of all the covenants in the lease to Coleman, as regular assignees would have been?

The affirmative of both these questions is insisted upon by the plaintiffs.

The converse as to both is asserted by the defendants, who contend as to the first, that the covenants for repairs declared on and of which profert is made, is essentially a joint contract, by and with all the covenantees, and could not be sued upon by them severally; and that the demurrer to the 3d and 4th pleas, reaching back to and affecting the first vice in the pleadings, shows upon the face of the declaration, and of the instrument set out *in hæc verba*, a restriction upon the plaintiffs to a joint interest, or a joint cause of action only with all their associates in the lease.

2. That the deed from Blackwell to the defendants, being a conveyance of a leasehold-interest in the nature of a trust for the security of a debt, by the terms of which conveyance the

grantor was to remain in possession till default of payment, and the grantees not having entered into possession of the demised premises, which were entered upon and held by the plaintiffs themselves, the defendants could not be bound, under the covenant for repairs, to the premises never in their possession, and over which they exercised no control.

The second of the questions above mentioned, as presented by the pleadings, will be first adverted to. This question involves the much controverted and variously decided doctrine as to the responsibility of the mortgagee of leasehold property, pledged as security for a debt, but of which the mortgagee has never had possession, for the performance of all the covenants to the fulfilment whereof a regular assignee of the lease would be bound.

With regard to the law of England, as now settled, there seems to be no room for doubt that the assignee of a term although by way of mortgage or as a security for the payment of money, would be liable under all the covenants of the original lessee. In the case of Eaton *v.* Jacques, reported in the 2d vol. of Douglas, p. 456, this subject was treated by Lord Mansfield with his characteristic clearness and force; and with the strong support of Justices Willes, Ashurst, and Buller, he decided that the assignee of a lease by way of mortgage or as a mere security for money, and who had not possession, is not bound for or by the covenants of the lessee. The language of his lordship in this case is exceedingly clear. "In leases," said he, "the lessee, being a party to the original contract, continues always liable notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing. He bears the burden while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not liable. To do justice, it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instrument between the parties? The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say, it is an absolute conveyance? It was a mere security, and it was not, nor ever is meant that possession shall be taken until the default of payment and the money has been demanded. The legal forfeiture has only accrued six months, and if the mortgagee had wanted possession he could not have entered *via facti*. He must have brought an ejectment. This was the understanding of the parties, and is not contrary to any rule of law." The same doctrine was sanctioned in the case of Walker *v.* Reeves, to be found in a note in Douglas, vol. 2, p. 461. But by the more recent case of Williams *v.* Bosanquet, it has been decided that when a

party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for the payment of the rent, though he never occupied or became possessed in fact. This decision of Williams *v.* Bosanquet is founded on the interpretation put upon the language of Littleton in the fifty-ninth and sixty-sixth sections of the treatise on Tenures — in the former of which that writer remarks, "that it is to be understood that in a lease for years by deed or without deed, there needs no livery of seizin to be made to the lessee, but he may enter when he will, by force of the same lease;" and in the latter, "also if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the force of the lease." And the reason, says Lord Coke, in his commentary upon these sections is, "because the interest of the term doth pass and rest in the lessee before entry, and therefore the death of the lessor cannot divest that which was vested before." True it is, he says, "that to many purposes he is not tenant for years until he enter, as a release to him is not good to increase his estate before entry." Co. Litt. 46, b. Again it is said, by this commentator, that "a release which enures by way of enlarging an estate cannot work without possession; but by this is not to be understood that the lessee hath but a naked right, for then he could not grant it over; but seeing he hath *enteresse termini* before entry, he may grant it over, albeit for want of actual possession he is not capable of a release to enlarge his estate." Whatever these positions and the qualifications accompanying them may by different minds be thought to import, it is manifest, from the reasoning and the references of the court in the case of Williams *v.* Bosanquet, that from them have been deduced the doctrine ruled in that case, and which must be regarded as the settled law of the English courts, with respect to the liabilities of assignees of leasehold estates. But clearly as this doctrine may have been established in England, it is very far from having received the uniform sanction of the several courts of this country, nor are we aware that it has been announced as the settled law by this court. Professor Greenleaf, in his edition of Cruise, Title 15, Mortgage, § 15, 16, p. 111, inclines very decidedly to the doctrine in Eaton *v.* Jacques. After citing the cases of Jackson *v.* Willard, 4 Johns. 41; of White *v.* Bond, 16 Mass. 400; Waters *v.* Stewart, 1 Caines's Cases, 47; Cushing *v.* Hurd, 4 Pick. 253, ruling the doctrine that a mortgagee out of possession has no interest which can be sold under execution, but that the equity of

redemption remaining in the mortgagor is real estate, which may be extended or sold for his debts; and farther, that the mortgagee derives no profit from the land until actual entry or other exertion of exclusive ownership, previous to which the mortgagor takes the rents and profits without liability to account, Mr. Greenleaf comes to the following conclusion, namely, "On these grounds it has been held here as the better opinion, that the mortgagee of a term of years, who has not taken possession, has not all the legal right, title, and interest of the mortgagor, and therefore is not to be treated as a complete assignee so as to be chargeable on the real covenants of the assignor."

In the case of Astor *v.* Hoyt, reported in the 5th of Wendell, 603, decided after the case of Williams *v.* Bosanquet, and in which the latter case was considered and commented upon, the Supreme Court of New York, upon the principle that the mortgagor is the owner of the property mortgaged against all the world, subject only to the lien of the mortgagee, declare the law to be, "that a mortgagee of a term not in possession, cannot be considered as an assignee, but if he takes possession of the mortgaged premises he has the estate, *cum onere*. In the case of Walton *v.* Cronly's Administrator, in the 14th of Wendell, p. 63, upon the same interpretation of the rights of the mortgagor which was given in the former case, it was ruled that a mortgagee who has not taken possession of the demised premises, is not liable for rent, and that the law in this respect is in New York different from what it is in England. It is contended, on behalf of the plaintiff in error, that the doctrine in Eaton *v.* Jacques, and in the several decisions from the State courts in conformity therewith, is inconsistent with that laid down by this court in the cases of Stelle *v.* Carroll, in the 12th of Peters, 201, and of Van Ness *v.* Hyatt et al. in the 13th of Peters, 294. With regard to this position it may be remarked, that the questions brought directly to the view of the court, and regularly and necessarily passed upon in these cases, did not relate to the rights and responsibilities of the assignee of a term, or to what it was requisite should be done for the completion of the one or the other. Giving every just latitude to these decisions, all that can be said to have been ruled by the former is, that by the common law a wife is not dowable of an equity of redemption, and by the latter, that an equitable interest cannot be levied upon by an execution at law. This court therefore cannot properly be understood as having, in the cases of Stelle *v.* Carroll and Van Ness *v.* Hyatt, established any principle which is conclusive upon the grounds of defence set up by the third and fourth pleas of the defendants. Nor do we feel called upon, in the present case, to settle that principle; for let it be supposed that such a principle has

been most explicitly ruled by this court, still that supposition leaves open the inquiry, how far the establishment of such a principle can avail the plaintiffs in the relation in which they stand to the other covenantees in the deed from Coleman. In other words, whether the covenant for repairs, contained in that deed, was not essentially a joint covenant; one in which the interest was joint as to all the grantees, and with respect to which, therefore, no one of them, or other portion less than the whole, could maintain an action?

The doctrines upon the subjects of joint and several interests under a deed, and of the necessity or propriety for conformity with remedies for enforcing those interests to the nature of the interests themselves, have been maintained by a course of decision as unbroken and perspicuous, perhaps, as those upon which any other rule or principle can be shown to rest. They will be found to be the doctrines of reason and common sense.

Beginning with Windham's case, 3d Reports, part 5th, 6 a, 6 b, it is said that joint words will be taken respectively and severally, 1st. With respect to the several interests of the grantors. 2d. In respect of the several interests of the grantees. 3d. In respect to, that the grant cannot take effect but at several times. 4th. In respect to the incapacity and impossibility of the grantees to take jointly. 5th. In respect of the cause of the grant or *ratione subjectæ materiæ*. The next case which we will notice, is Slingsby's case in the same volume, 18 a, 18 b, decided in the exchequer. In this case it was ruled that a covenant with several *et cum qualibet* and *qualibet eorum*, is a several covenant only where there are several interests. Where the interest is joint the words *cum quolibet et qualibet eorum* are void, and the covenant is joint. In the case of Eccleston and Wife *v.* Clipsham, the law is stated, that although a covenant be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees. And on the other hand, if the interest and cause of action be several, the action may be brought by one only. 1 Saunders, 153. The learned annotator upon Sir Edmund Saunders, in his note to the case of Eccleston *v.* Clipsham has collected a number of cases to this point and others which go to show that where there are several joint covenantees, and one of them shall sue alone without averring that the others are dead, the defendant may take advantage of the variance at the trial, and that the principle applicable to such a case is different from that which prevails where the action is brought against one of several joint covenantors or obligors who can avail themselves of the irregularity by plea in abatement only. The same rule with regard to the construction of covenants and to the legal rights and

position of the parties thereto in courts of law may be seen in the cases of Anderson *v.* Martindale, 1 East, 497; Withers *v.* Bircham, 3 Barn. & Cress. 255; James *v.* Emery, 5 Price, 533.

It remains now to be ascertained how far the parties to the case before us come within the influence of principles so clearly defined, and so uniformly maintained in the construction of covenants and in settling the legal consequences flowing from that interpretation. The instrument on which the plaintiffs instituted their suit was a lease from the plaintiffs and various other persons interested in different proportions in the property demised, and by the terms of which lease rent was reserved and made payable to the several owners of the premises in the proportion of their respective interests. So far as the reservation and payment of rent to the covenantees, according to their several interests, made a part of the lease, the contract was several, and each of the covenantees could sue separately for his portion of the rent expressly reserved to him. But in this same lease there is a covenant between the proprietors and the lessee, that the latter shall keep the premises in good and tenantable repair, and shall return the same to those proprietors in the like condition, and it is upon this covenant or for the breach thereof that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because its stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one or a greater portion of them exclusively and separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts?

It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in this case have sued.

The case of Foley *v.* Addenbrooke, 4 Adolph & Ell. 197. The declaration in covenant stated, that Foley and Whitby had demised to Addenbrooke lands and iron mines of one undivided moiety, of which Foley was seised in fee, Addenbrooke covenanting with Foley and Whitby and their heirs to erect and work furnaces and to repair the premises and work the mines; that Foley was dead, and plaintiff, Foley's heir, and breaches were assigned as committed since the death of Foley; that

Addenbrooke, and since his death his executors had not worked the mines effectually, nor repaired the premises, nor left them in repair. To this declaration it was pleaded, that Whitby, one of the tenants in common, and one of the covenantees, who was not joined in the action, still survived. This plea was sustained upon special demurrer, and Lord Denman, in delivering the opinion of the court, says: "In the present case the covenants for breach, of which the action is brought, are such as to give to the covenantees a joint interest in the performance of them; and the terms of the indenture are such that it seems clear that the covenantees might have maintained a joint action for the breach of any of them. Upon this point the case of Kitchen *v.* Buckley, 1 Lev. 109, is a clear authority; and the case of Petrie *v.* Bury, 3 Barn. & Cress. 353, shows that if the covenantees could sue jointly, they are bound to do so."

The case of Bradburne *v.* Botfield, in the Exchequer, reported in the 14th of Meeson & Welsby, was an action of covenant upon a lease by seven different lessors jointly, according to their several rights and interests in certain coal mines, to the defendant, yielding and paying certain rents to the lessors respectively, and to their respective heirs and assigns, according to their several and respective estates, rights, and interests in the premises; and the defendant covenanted with all the above parties and with each and every of them, their and each and every of their heirs, executors, administrators, and assigns, to repair the premises, and to surrender them in good repair to the lessors, their heirs and assigns respectively at the end of the term. The declaration then deduced to the plaintiff a title to the moiety of one of the lessors, and alleged as breaches the non-repair of the premises and the improper working of the mines. To this declaration it was pleaded, that one of the original lessors, who had survived all the other covenantees, was still living. It was held, upon demurrer, that the covenants for repairs and for working the mines were in their nature joint and not several, and that the surviving covenantee ought to have brought the action. Baron Parke, who delivered the opinion of the court, thus speaks: "We have looked, since the argument, into the lease now set out on oyer, and into all the authorities cited for the plaintiff, and are still of opinion that he cannot recover upon the covenants stated in the declaration. It is impossible to strike out the name of any covenantee, and all the covenantees must therefore necessarily sue upon some covenant; and there appear to us to be no covenants in the lease which are of a joint nature, if those declared upon are not, or which would be in gross, if the persons entitled to the legal estate had alone demised; for all relate to and affect the quality of the subject of the demise, or to the mode of enjoying of it."

We regard the cases just cited as directly in point, and as conclusive against the claim of the plaintiffs to maintain an action upon the covenant for repairs in the lease to Coleman, apart from and independently of the other covenantees in that lease jointly and inseparably interested in that covenant with the plaintiffs. We therefore approve the judgment of the Circuit Court, that the plaintiffs take nothing by their writ and declaration, but that the defendants recover against them their costs about their defence sustained, as by the said court was adjudged; and we order the said judgment of the Circuit Court 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 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.

SAMUEL H. EARLY, PLAINTIFF IN ERROR *v.* JOHN ROGERS, JUNIOR, AND JOSEPH ROGERS, SURVIVORS, &c. OF ROGERS & BROTHERS, DEFENDANTS.

Where a controverted case was, by agreement of the parties, entered settled, and the terms of settlement were that the debtor should pay by a limited day, and the creditor agreed to receive a less sum than that for which he had obtained a judgment; and the debtor failed to pay on the day limited, the original judgment became revived in full force.

The original judgment having omitted to name interest, and this court having affirmed the judgment as it stood, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest.

Where the debtor alleged that process of attachment had been laid in his hands as garnishee, attaching the debt which he owed to the creditor in question; and moved the court to stay execution until the rights of the parties could be settled in the State Court which had issued the attachment, and the court refused so to do, this refusal is not the subject of review by this court. The motion was addressed to the discretion of the court below, which will take care that no injustice shall be done to any party.

This court expresses no opinion, at present, upon the two points, namely:

1. Whether an attachment from a State Court can obstruct the collection of a debt by the process of the courts of the United States, or
2. Whether a writ of error was the proper mode of bringing the present question before this court.

THIS case was brought up by writ of error from the District Court of the United States for the Western District of Virginia.

On the 29th of June, 1849, John Rogers, junior, and Joseph Rogers, of Cincinnati, and citizens of the State of Ohio, survivors of the firm of Rogers & Brothers, the deceased partner of which was Alfred Rogers, late of St. Louis, in Missouri, sued Samuel H. Early in the District Court of the United States for the Western District of Virginia.

Early filed a plea in abatement, setting forth certain writs of foreign attachment against Rogers and Rogers, as non-resident defendants, and against himself and others, as home defendants. This plea was afterwards withdrawn, and the general issue pleaded.

At September term, 1850, the cause came on for trial, when a verdict was found for the plaintiffs in the sum of $12,115, on which verdict the following judgment was entered:

Judgment. Came again the parties by their attorneys, and thereupon came also the jury impanelled and sworn in this cause, in pursuance of their adjournment, and having retired to their chamber, after some hours returned into court, and upon their oaths do say, that they find the issues for the plaintiffs, and assess their damages to twelve thousand one hundred and fifteen dollars. Whereupon the defendant moved the court to set aside the said verdict, and award him a new trial in the premises; which motion, being argued and considered, is overruled. Therefore it is considered by the court, that the plaintiffs recover against the defendant the damages aforesaid, in the form aforesaid ascertained, and their costs about their suit by them in this behalf expended; and the said defendant in mercy, &c.

A bill of exceptions having been taken by Early, the case was brought up to this court.

At December term, 1851, the case was entered "settled" upon the docket of this court, the following agreement filed, and judgment entered, namely:

Agreement. In order to put an end to the litigation between the above parties, and as a compromise, the matters in difference between them, that said Samuel H. Early shall pay to the said John Rogers and Joseph Rogers, between this and the first day of September, next, the sum of ten thousand dollars, which sum of ten thousand dollars the said John Rogers and Joseph Rogers agree to receive of the said Samuel H. Early in full satisfaction and discharge of the original judgment entered against the said Early for the sum of about twelve thousand five hundred dollars, in said District Court of the United States, for the Western District of Virginia, and in full satisfaction and discharge of all claims and demands which said John Rogers and Joseph Rogers held against said Early in any account arising out of the dealings on which said litigation is founded.

And it is further agreed, that the original judgment rendered in said District Court of the United States for the Western District of Virginia, and which is taken up to the Supreme Court of the United States on a writ of error, which is now pending in that court, may be entered affirmed in said Supreme Court at its present session, subject to the above agreement: that is, the judgment, although affirmed, shall not be obligatory for more than the above sum of ten thousand dollars, to be paid as aforesaid; and as soon as that sum is paid, the said judgment shall be entered satisfied, provided the amount is paid on or before the said first day of September next. Costs to be paid by Early.

May 18th, 1852.

SAMUEL H. EARLY,
By CHARLES FOX, his attorney.
JOHN ROGERS,
JOSEPH ROGERS,
By JAMES F. MELINE, their attorney.

Order.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby affirmed, with costs, in conformity to the preceding stipulations; and that the said plaintiffs recover against the said defendant, Samuel H. Early, one hundred and twenty-nine dollars and fifty-two cents for their costs herein expended, and have execution therefor.

Upon the going down of the mandate an execution was issued by the District Court, in January, 1853, as follows:

Amount of judgment,	$12,115.00
Costs in District Court,	246.56
Interest from the 7th of December, 1850, the date of the writ of error issued by the Supreme Court, to the 7th of December, 1851, date of the mandate,	741.69
Costs in Supreme Court,	129.52
Cost of writ of execution,	3.37

In April, 1853, a motion was made by Rogers to amend the judgment for $12,115, by adding "with interest till paid," but this motion was overruled.

At the same term, and on the motion of Samuel H. Early, a rule was awarded him returnable here forthwith against John Rogers, jr., and Joseph H. Rogers, requiring them to show cause why the execution heretofore sued out on the mandate of the Supreme Court of the United States, awarded on a judgment of the said Supreme Court in favor of said John and Joseph

Rogers against said Samuel H. Early, which execution bears date of the 11th day of January, 1853, and was returnable at March rules, 1853, shall not be quashed. And also to show cause why execution on the said judgment of the said Supreme Court should not be limited to the sum of ten thousand dollars, with interest thereon from the 1st day of September, 1852, and the costs; and also why the same shall not be stayed until the further order of the court, on account of certain attachments and suggestions.

Whereupon the said John Rogers, jr., and Joseph H. Rogers appeared in answer to the said rule, and the evidence and arguments of counsel being heard, it is considered by the court that the said execution be quashed, but that the said John Rogers, jr., and Joseph H. Rogers be allowed to sue out their execution against the said Early for the sum of $12,115, and $246.56 costs of the judgment in this court, and $129.52, the costs in the Supreme Court aforesaid, but without interest, and without damages on said sums.

Mem. — That on the trial of the said rule, the said Samuel H. Early tendered a bill of exceptions to opinions of the court delivered on the said trial, in the following words and figures, to wit:

Bill of exceptions. — The bill of exceptions contained eight records of cases of attachments, and concluded as follows:

Whereupon, on consideration of said rules to show cause why the execution should not be limited to the sum of $10,000, principal of said judgment, &c.; and why execution should not be stayed, &c.; the court was of opinion to discharge and disallow each of said rules, which was done accordingly; to each of which opinions and judgments of the court the defendant, Early, by his counsel, excepts, and prays that then his exceptions may be signed, sealed, and reserved to him.

JOHN W. BROCKENBROUGH, [SEAL.]

Upon this bill of exceptions the case came up to this court, and was argued by *Mr. Mason*, for the plaintiff in error, and by *Mr. Chase*, for the defendants in error.

Mr. Mason, for the plaintiff in error, made the following points:

The errors complained of, and for which it is now asked to reverse the last judgment of the court below, are:

First. Because the execution should have been limited to the sum of $10,000, or to be discharged by payment of that sum, under the agreement of the parties.

Second. Execution should have been stayed until the attachments set out in the bill of exceptions were finally disposed of.

On the first point —

In allowing execution in the court below, that court was necessarily constrained to construe the contract between the parties of the 18th of May, 1852, on which the affirmance of the judgment was rendered by the Supreme Court.

It is recited in this contract, (p. 12, 13, of the printed record,) that as "a compromise of the matters in difference," between the parties, it was agreed that Early should pay to Rogers the sum of $10,000, on or before a given day, and which sum the latter agreed to receive, "in full satisfaction and discharge of the original judgment," &c., and "in full satisfaction and discharge of all claims and demands," which Rogers held against Early, "arising out of the dealings on which said litigation is founded;" and further, that the original judgment on which an appeal was then depending in the Supreme Court should "be entered, affirmed, subject to the above agreement." This is the whole contract. What follows is, on its face, only explanatory, and should not have been construed to convert the time of payment into a penalty or forfeiture.

The contract must be construed as a whole, and the intention of the parties thus gathered, is to be carried into effect.

It is submitted, that it was not the agreement of the parties that so heavy a forfeiture as the sum of $2,115, should be incurred on a compromise merely by failure to pay at the day, nor is it in any manner susceptible of such construction, unless it be taken from the last clause in the nature of a proviso. But this clause does not necessarily require such construction; referring it to the contract, it relates to the entering of satisfaction on the judgment and to that only, so that the explanatory addendum would read thus: the judgment although affirmed, shall not be obligatory for more than the above sum of $10,000, to be paid as aforesaid, and the judgment shall be entered, satisfied if that sum is paid on the day appointed for its payment herein above.

In support of this view, I refer to Story's Equity, vol. 2, § 13, 14, where the principle is stated, "that wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory," &c.

On the first point, then, it is respectfully submitted that the judgment should be reversed, because execution was allowed for a sum exceeding that stipulated in the contract of the parties, and subject to which contract the judgment had been affirmed.

On the second point —

It is submitted, that no execution should have issued until the attachment set out in the bill of exceptions had been disposed of.

By the statutes of Virginia the attaching creditors obtained a lien on the property of their debtor from the time the process was served, and the garnishee (Early) could not pay to the defendant in error, without violating the law, and subjecting himself to the risk of paying twice. Code of Virginia, (1849) p. 603, § 11, 12; p. 605, § 17.

So entirely is the garnishee protected, in cases of attachment, from the action of the absent debtor, that he is not even responsible for interest, whilst, pending the attachment, he is restrained from parting with the effects in his hands. 1 Sergent on Attachments, 169; Fitzgerald *v.* Caldwell, 2 Dallas, 215; same case, 4 Ib. 251; Willings *v.* Consequa, 1 Peters's Cir. Court Rep. 172; Erskine *v.* Staley, 12 Leigh, 406.

The reason why the garnishee is protected from interest is, that he is not allowed to part with the principal, until the rights of parties are settled under the attachment.

In allowing these attachments from a State court to be regarded by the federal court, when asked to direct execution to be issued against the garnishee, there is no collision between the respective judiciaries. Far less is the action of the federal court made subordinate to that of the State. The citizen is fully subject to the process of each, on matters within their respective jurisdictions; and although it were conceded that the State court must yield, when a federal court has taken jurisdiction properly, yet this must be in a case when the right litigated, or the nature of the controversy is the same in both courts, and where, unless one jurisdiction was paramount, there would arise collision. Such is in no manner the case here. The federal court, in disallowing executions, because of the pendency of these attachments, decides only that the judgment creditor is not entitled to execution, because, since the judgment was rendered, other rights had intervened — rights not asserted to question or challenge the authority which rendered the judgment, but, in fact, affirming such authority, and relying upon it.

The judgment against Early, established a property in Rogers, which property the creditors of the latter, through the State court, seek to subject to payment of their debts, and they may do this without the slightest interference with the authority of the court that rendered the judgment.

I am informed by counsel, on the other side, that he shall ask the court to correct the judgment of affirmance, so as to allow

interest on the amount of the verdict, from its date. On this I have to say, that if it be error, it was error in the judgment of the court below, and from which there is no appeal, and of course cannot be corrected here.

But if I am right in my construction of the contract, under which the judgment was affirmed, the parties have waived the interest, which the law of Virginia would attach to a verdict, by agreeing to a sum without interest.

Mr. Chase, for the defendants in error, said that the questions presented were these:

I. The sum of $10,000 not having been paid by the 1st of September, 1852, according to the terms of the affirmance agreement, are the judgment plaintiffs entitled to the full amount of the judgment affirmed?

II. Can the proceedings in the State court be set up to arrest the action of the federal court in enforcing its own judgment by its own process?

III. There is a third point which arises, both on the writ of error and on motion, namely, are the judgment plaintiffs entitled to interest on the amount of the judgment affirmed, and from what time?

I. The answer to the first question depends on the terms of the agreement. That hardly seems to admit of two interpretations. It consists of two parts. The first stipulates that Early shall pay to Rogers and Rogers $10,000 by the 1st of September, which sum, so paid, the latter agree to receive in full satisfaction of the original judgment; the second expresses the same understanding in somewhat a different phraseology: the judgment is to be affirmed, but is not to be obligatory for more than $10,000, on payment of which sum satisfaction is to be entered, provided the amount is paid on or before the 1st day of September next.

Under the agreement the judgment was affirmed. This judgment was for $12,115. Early had a right to have it satisfied by payment of $10,000 by the 1st September. He did not exercise that right, and therefore lost it. No later payment than on the 1st of September would avail him, and he has offered none.

It is claimed that the stipulation for the affirmance of the judgment, upon agreement to accept a less sum in satisfaction, if paid by a certain day, operates as a stipulation for a penalty, and ought not to be enforced. This is by no means so. The original judgment was for a balance of account. Rogers and Rogers were pressed for money, and anxious for early payment. They were willing to accept a part soon, rather than risk the

collection of the whole by process in the uncertain future. Hence their agreement. The whole was no more than their due. The agreement to accept part was conditional. Early not having fulfilled the condition, they are justly entitled to the whole.

II. The answer to the second question depends on the effect to be given to the various proceedings in the State court.

All these suits, except two, were commenced after the institution of the suit in the District Court, and it is quite certain that the pendency of these constitutes no objection to the enforcement of the judgment of the court. Wallace *v.* McConnell, 13 Peters, 136, is in point.

Of the two suits commenced prior to that of Rogers and Rogers, the first (Wilson's) has been prosecuted to final decree, 20th November, 1851, (Record, p. 28,) against Rogers for the debt, and against William Shrewsbury for payment, which decree seems to have been satisfied, as the record shows a judgment on a forthcoming bond against Shrewsbury and Lewis. There is nothing to show, and no ground to suppose that Early can be made liable for any thing in this suit in any event.

The other suit (Sargent's) was commenced by issuing the subpœnas on the 15th of June, but there is nothing to show when process was served on Early. The bill was not filed until July. Nothing has been done in this cause beyond the mere filing of the bill; and the court will not presume, without proof, that process was served on Early so as to fix any liability on him. 2 Rob. Prac. 201.

But if both suits had been commenced, and process in both had been served on Early prior to the commencement of the suit against him in the District Court, it would have made no difference, and for several reasons:

1. An attachment does not create a lien, but a mere contingent liability, which can only become fixed after judgment or decree, in the principal suit, and, in case, also, that the debt due from the garnishee has not been previously extinguished otherwise than by his voluntary act. Ex parte Foster, 2 Story, 151, 152; Embree *v.* Hanna, 5 Johns. 101.

2. If a defendant would avail himself of a pending attachment against a subsequent suit for the debt attached, he must plead the pendency of the attachment in abatement. Wallace *v.* McConnell, 13 Pet. 151. After issue joined it is too late to plead in abatement. Payne *v.* Grimm, 2 Munf. 297; May *v.* State Bank, 2 Rob. 56.

3. In the present case Early waived all objections to the proceeding in the District Court growing out of the pending of the attachment suits. The record shows that he did plead the pending of some of these suits in abatement, and voluntarily

withdrew the plea and joined issue. Record, 57. He was fully aware, also, of the attachments when he consented to the affirmance of the judgment, and it would be unreasonable to allow him to avail himself of grounds to evade payment, which, when he positively engaged to pay, he must have been understood to waive; for otherwise his engagements would amount to nothing.

III. We claim that the court below erred in not correcting the judgment, by allowing interest on the verdict, and ask that this error may be corrected. The original omission of interest in the judgment was, doubtless, a clerical error. The verdict was for the balance of an account. The Code of Virginia is express, that "if a verdict be rendered hereafter, which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose heretofore, or shall arise hereafter, and judgment shall be entered accordingly." Code of Virginia, 1849, c. 177, § 14, p. 673.

As the whole case is before the court upon the writ of error, the court may, and we think should, correct this manifest error. At all events the court will allow interest upon the amount of the judgment, either from the date of the verdict or from affirmance, by way of damages. Rule 18.

If defendant attached wishes to exempt himself from interest, he must bring the money into court. 2 Rob. Prac. 205–6, and cases there cited.

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendants, (Rogers & Co.) on the 27th of May, 1852, recovered in this court against the plaintiff a judgment, in the following words:

"In order to put an end to the litigation between the above parties and as a compromise the matters in difference between them, that said Samuel H. Early shall pay to the said John Rogers and Joseph Rogers, between this and the first day of September next, the sum of ten thousand dollars, which sum of ten thousand dollars the said John Rogers and Joseph Rogers agree to receive of the said Samuel H. Early, in full satisfaction and discharge of the original judgment entered against the said Early for the sum of about $12,500, in said District Court of the United States, for the Western District of Virginia, and in full satisfaction and discharge of all claims and demands which said John Rogers and Joseph Rogers held against said Early in any account arising out of the dealings on which said litigation is founded.

"And it is further agreed, that the original judgment rendered in said District Court of the United States for the Western Dis-

trict of Virginia, and which is taken up to the Supreme Court of the United States on a writ of error, which is now pending in that court, may be entered affirmed in said Supreme Court at its present session, subject to the above agreement; that is, the judgment, although affirmed, shall not be obligatory for more than the above sum of ten thousand dollars, to be paid as aforesaid; and as soon as that sum is paid, the said judgment shall be entered satisfied, provided the amount is paid on or before the said first day of September next. Costs to be paid by Early.

"May 18th, 1852.

SAMUEL H. EARLY,
By CHARLES FOX, his attorney.
JOHN ROGERS,
JOSEPH ROGERS,
By JAMES F. MELINE, their attorney.

"On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs, in conformity to the preceding stipulations; and that the said plaintiffs recover against the said defendant, Samuel H. Early, one hundred and twenty-nine dollars and fifty-two cents for their costs herein expended, and have execution therefor.

"May 27, ——."

The mandate of this court was issued in October, 1852, and spread upon the records of the District Court for the Western District of Virginia. In January, 1853, an execution issued returnable to the March rules of that year. At the April term of that court, the plaintiff, Early, obtained a rule against Rogers & Co., requiring them to show cause why the execution so sued out should not be quashed, and also why execution on the said judgment of the said Supreme Court should not be limited to the sum of ten thousand dollars, with interest thereon, from the 1st day of September, 1852, and the costs; and also why the same shall not be stayed until the further order of the court, on account of certain attachments and suggestions. Whereupon the court ordered the execution to be quashed, but that the said Rogers & Co. be allowed to sue out their execution against said Early for the principal sum of $12,115, with costs, but without interest or damages.

The writ of error has been taken to bring this order awarding the execution to this court. We think the district judge interpreted the agreement of the parties and the judgment of this court upon it, correctly. The parties made the reduction of the judgment to ten thousand dollars, dependent upon a condition,

which has not been fulfilled. The plaintiff in error had obliged himself to comply with this condition, or to lose his claim for a deduction. We think the award of execution, for the amount contained in the order, was proper.

The motion to stay the execution, founded upon the fact that creditors of Rogers & Co. had attached this debt, by service of garnishment on the plaintiff in the State courts, was addressed to the legal discretion of the District Court, and its judgment is not revisable by this court.

The mere levy of an attachment upon an existing debt, by a creditor, does not authorize the garnishee to claim an exemption from the pursuit of his creditor. The attachment acts make no such provision for his benefit. It is the duty of the court wherein the suit against the garnishee by his creditor may be pending, upon a proper representation of the facts, to take measures that no injustice shall grow out of the double vexation. The court should ascertain if the attachment is prosecuted for a *bonâ fide* debt, without collusion with the debtor, for an amount corresponding to the debt, that no mischief to the security of the debt will follow from a delay, and such other facts as may be necessary for the protection and security of the creditor. An order of the court to suspend, or to delay the creditor's suit, or his execution in whole or for a part, could be then made upon such conditions as would do no wrong to any one.

It is apparent that such inquiries are proper only for the court of original jurisdiction, in the exercise of the equity powers over proceedings and suitors before it, with the view to fulfil its great duty of administering justice in every case. We do not perceive in this record evidence that the district judge has exercised his discretion unwisely.

We do not express any opinion upon the questions whether a writ of error was the proper remedy to bring this order before us, nor whether attachments could be levied from the State court upon a judgment or claim in the course of collection in the courts of the United States. Accepting the case as it has been made by the parties, and has been argued at the bar, our conclusion is, there is no error in the record, and the judgment is affirmed.

Order.

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

WILLIAM EARLY, PLAINTIFF IN ERROR, *v.* JOHN DOE, ON THE DEMISE OF RHODA E. HOMANS.

Where the language of the statute was "That public notice of the time and place of the sale of real property for taxes due to the corporation of the city of Washington shall be given by advertisement inserted in some newspaper published in said city, once in each week for at least twelve successive weeks," it must be advertised for twelve full weeks, or eighty four days.

Therefore, where property was sold after being advertised for only eighty-two days, the sale was illegal, and conveyed no title.

THIS case came 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 ejectment brought by Rhoda E. Homans, to recover that part of lot number four, in square number seven hundred and thirty, in the city of Washington; beginning for the same at a point on the line of A street south, at the distance of thirty-two feet from the north-east corner of said square; and running thence due west with the line of said street, fifty feet and five inches; thence due south, fifty feet; thence due east, fifty feet and five inches; thence fifty feet to the place of beginning; and also into three messuages or tenements with the appurtenances situated thereon, in the county above named.

Upon the trial, the plaintiff showed title in herself, and the defendant made title under a tax sale, when the jury, under the instructions of the court, found a verdict for the plaintiff. The following bill of exceptions explains the case.

Defendant's bill of exceptions.

At the trial of the above cause, after the plaintiff's lessor had shown a legal title in herself, a devisee of D. Homans, who died in August, 1850, to the fifty feet five inches of ground fronting on A street by fifty feet deep, a part of lot 4, in square No. 730, in Washington city, with the houses thereon, being the premises described in the declaration; entitling her, as admitted *primâ facie*, to recover the same as such devisee, and that the defendant held possession thereof at the commencement of this action. The defendant thereupon, to maintain the issue on his part, offered evidence of a tax title from the corporation of the city of Washington, to sustain which, and to show that the requirements of the act of 26th May, 1824, had been complied with, proved the notice of the time and place of the tax sale to

have been given by the city collector, by advertisement in the National Intelligencer, in the following words:—

COLLECTOR'S OFFICE, CITY HALL,
August 25th, 1848.

"On Wednesday, the 15th day of November next, the annexed list of property will be sold by public auction, at the City Hall in the City *Hall in the city* of Washington, to satisfy the corporation of said city for taxes due thereon as stated, unless the said taxes be previously paid to the collector, with such expenses and fees as may have accrued at the time of payment." And amongst other property so advertised was the following:

No. of Sqr.	No. of Lot.	Assessed to.	Taxes.	Total.
730.	Pt. 4, fronting 50 ft. 5 in., and improvement on A street, and 50 ft. deep, lying next to the eastern 32 ft. of said lot.	Daniel Homans.	1845. 1846. 1847. 9.94, 9.94, 9.94.	$29.82

And the insertion of said advertisement was on the following days:

Saturday,	26th	Aug.,	1848.	Saturday,	14th	Oct.,	1848.
"	2d	Sept.,	"	"	21st	"	"
"	9th	"	"	"	28th	"	"
Thursday,	14th	"	"	"	4th	Nov.	"
"	21st	"	"	"	11th	"	"
Saturday,	30th	"	"	Wednesday	15th	"	"
"	7th	Oct.,	"				

And that on such last day above mentioned, the said sale took place and the defendant became the purchaser of said premises for $55. Whereupon the plaintiff prayed the opinion and instruction of the court to the jury, "that the said sale was invalid and of no effect, and passed no title to the defendant in the premises in question; because a period of twelve full and complete weeks had not intervened betweeen the 26th August, the time of the first advertised notice of said sale, and the 15th November, 1848, the day or time of said sale, but a period of eleven weeks and four days only;" which opinion and direction the court gave as prayed for by the plaintiff; to which opinion and direction of the court to the jury, the defendant by his counsel, prayed leave to except, and that the court would sign and seal these his bill of exceptions, according to the form

of the statute in such cases made and provided, which is accordingly done this 17th day of May, 1853.

JAS. S. MORSELL, [SEAL.]
JAS. DUNLOP, [SEAL.]

Test: JNO. A. SMITH, *Clerk.*

Upon this exception the case came up to this court and was argued by *Mr. Lawrence*, for the plaintiff in error, and by *Mr. Redin* and *Mr. Woodward*, for the defendant in error.

Mr. Lawrence.

The only question in this case is, whether the words of the act of 26th May, (4 Stat. at Large, 75,) "inserted in some newspaper published in said city, once in each week for at least twelve successive weeks," are to be understood as requiring the full period of eighty-four days between the first and last advertisement, or as requiring an insertion once in each of twelve successive weeks.

A week is a definite period of time, beginning on Sunday and ending on Saturday, (4 Pet. 361); and insertions of notice on Monday and the Saturday week following, were held to fulfil the requirement of "one in each week," although thirteen days intervened between the two.

It is maintained, for the plaintiff in error, that if there are twelve insertions of the notice in any part of each of twelve successive weeks, that is sufficient.

The counsel for the defendant in error contended that the notice was insufficient.

The last charter of the city of the 17th May, 1848, makes no change in the period of notice and the manner of giving it; they are still regulated by the act of 26th May, 1824.

The words of the second section of that act are, "that public notice of the time and place of the sale of all real property for taxes due the corporation of the city of Washington, shall be given in all cases hereafter by advertisement, inserted in some newspaper, published in said city, once in each week, for at least twelve successive weeks; in which advertisement shall be stated the number of the lot," &c.

The facts. The first insertion was on Saturday, the 26th August, 1848; the last, on Wednesday, the 15th November, the day of the sale, being a period of eighty-two days only, including both days, namely, the day on which the notice first appeared, and the day of sale.

The eleventh week ended, either on Friday, the 10th of November, or on Saturday, the 11th, according as the week is made to commence on the day on which the notice first appears, or on the first succeeding Sunday thereafter. The twelfth week

could not expire until Friday the 17th, or Saturday the 18th November, and the earliest day on which the sale could have been made was one of those days. It was made on the previous Wednesday, the 15th November, before the twelve weeks had expired.

By the charter of 1812, it was directed that the notice should "be given, by advertising, at least six months, where the property belongs to persons residing out of the United States; three months, where it belongs to persons residing in the United States, but out of the District of Columbia; and six weeks, where it belongs to persons residing within the district."

The charter of 1820, superadded to the period of notice, the further requisition of weekly insertions of the advertisement, "once a week, for at least six months, three months, or six weeks," according to the residence of the owner. Section 12.

The act of 1824 changed the period of notice from months to weeks, but retained the further requirement of weekly insertions, "once in each week, for at least twelve successive weeks."

There are, then, two requirements, as to notice, by the act of 1824: 1st, twelve weeks notice; and, 2d, the insertion of the advertisement once in each of those twelve weeks.

The full period of twelve weeks' notice must be given. In Ronkendorff *v.* Taylor, 4 Peters, 361, the court say: "A week is a definite period of time, commencing on Sunday, and ending on Saturday;" and, being thus composed of seven days, twelve weeks cannot consist of less than eighty-four days. And that case sanctions the idea, that the whole period of twelve weeks should elapse before the sale. Whether the week be made to commence on the day on which the notice is first published, and to end on the seventh day thereafter; or to begin on the Sunday following the first day of the notice, and end on the succeeding Saturday, is immaterial in this case; the result — not twelve weeks' notice — is the same on either mode of computation. The first insertion was on Saturday, the 26th August. If the week commenced on that day and ended on the following Friday, there are but eighty-two days, including both day of notice and day of sale. If it began on Sunday, the 27th, and ended on the succeeding Saturday, there would be but eighty-one days, including both. And, if the true rule be to include the day on which the notice first appears, and to exclude the day of sale, there would still be but the same eighty-one days; — eleven weeks and four days.

The expression in the act of 1824 is: "once in each week, for at least twelve successive weeks," not merely once in each week, but once in each week "for" twelve weeks during or through that certain space of time; and not merely for twelve

weeks, but for "at least" twelve successive weeks, not less than that whole period.

The notice, according to Ronkendorff *v.* Taylor, may be inserted on any day in each of those twelve weeks, on the last day of the eleventh week and the first day of the twelfth week. But that rule was not meant, as the corporation officers seem to have supposed, to authorize the collector to abridge the period of notice; to insert one advertisement in each of the first eleven weeks and a twelfth on the fourth day after the end of the eleventh week, and to sell on that day and before the twelfth week had fully expired. The corporation by-law followed the words of the act of Congress. The collector has no dispensing power.

All the analogies require the full term. As the familiar instance of six months' notice to quit or four months' notice of publication against non-residents under our acts of assembly: four or six whole months, less will not do. In all judicial sales, either by sheriff or trustee, the period of notice is usually prescribed, and the full term must be given. And as to these tax sales. The fourth point in Pratt and the Corporation, 8 Wheat. 681, as seen in the record, was whether sufficient notice had been given. After the first insertion of the advertisement, the amount of the taxes was changed without any change in the day of sale, so that the full period of notice was not given after such change. The sale was adjudged bad.

So in Pope & Hamner *v.* Headen, 5 Ala. R. 433. The law required "ninety days' notice" of the sale, to be published in some newspaper. The advertisement was dated the 1st of November, 1839, and was then handed to the publisher of the newspaper, was inserted therein weekly from the 6th of November, which was the first day of publication, until the 29th of January, 1840, and the sale took place on the 3d of February, 1840. Between the date of the advertisement and the day of sale there were more than ninety days; but between the first day of the publication and the day of sale there were but eighty-nine days, excluding, as the court did there, the first, and including the last day. The date of the advertisement and the handing of it to the publisher within time were considered by the court; but the sale was held to be clearly void.

In our case, counting from the date of the advertisement, the 25th of August instead of the 26th, the day of its publication, and even including the day of its date, and also the day of sale, there are not eighty-four days, but eighty-three only.

See also Lyon et al. *v.* Hunt et al. 11 Ala. R. 295, for a full collection of the cases.

It is not enough to give twelve or more insertions of the ad-

vertisement. It may be continued twice or thrice a week, or even daily. In the early charters the corporation began simply with the period of notice: six weeks, three months, six months. Weekly insertions were first superadded by the charter of 1820, and have been continued by the act of 1824. But the law is not satisfied by a compliance with that requisite merely. Each requirement of the law must be observed. Here both, namely, "twelve weeks at least," and weekly insertions, are essential to the validity of the sale. The non-observance of either destroys it, as much so as the omission of both.

Neither of these requirements can, as to the other, be deemed the primary requisite. If either could be so considered, it would be the period of notice rather than the number of insertions.

It is purely a matter of positive law. The rules are arbitrary; eleven weeks and four days might have answered just as well as twelve weeks; but the statute says twelve weeks, meaning twelve full or whole weeks. The language is clear and express; there is no room for construction or discretion. In 8 Wheat. 687, Judge Johnson asks: "what have we to do with such inquiries in cases of positive enactment?"

The act means that notice of the sale shall be given by publication for at least twelve weeks prior to the day of sale, which notice shall also be published once in each of those twelve weeks. The object in naming the period of notice was to give the owner time for paying the taxes; and, in requiring weekly insertions, to afford him a better opportunity of seeing the advertisement of sale.

These sales are nowhere regarded with favor, but are everywhere tested by the strictest rules. They are penal, lead to forfeiture of estate, and whatever is prescribed to give them validity must, and ought to be, observed, and has always been required. 4 Wheat. 77; 6 Wheat. 119; 6 Peters, 328; 9 How. 248.

It is idle for the officer or collector of the corporation to be speculating and refining in this way. Why not give the legal notice? Where is the inconvenience in giving three or four days' more notice, or waiting a few days longer for the taxes?

They will not be lost by the avoidance of the sale. The corporation has the power to re-assess the taxes on the same property. Act of 1824, §. 3.

Mr. Justice WAYNE delivered the opinion of the court.

This is an ejectment suit for part of lot No. 4, in square, No. 730, in the city of Washington.

The only question raised by counsel in the argument of the case here, is, whether, where property has been assessed for taxes, it can be considered as having been regularly advertised

and regularly sold, if it shall be sold before twelve full weeks (or eighty-four days) have passed from the date of the first advertisement. Eighty-four days advertisement were not given when the property in dispute in this case was sold. Upon the trial in the Circuit Court, the plaintiff in that court prayed its instruction to the jury in these words: "That the said sale was invalid and of no effect, and passed no title to the defendant in the premises in question; because a period of twelve full weeks had not intervened between the 26th of August, the time of the first advertised notice of sale, and the 15th of November, 1848, the day or time of sale, but a period of eleven weeks and four days only." The court gave the instruction accordingly. The defendant's counsel excepted to the same. The court, upon his prayer, allowed it, and the case is regularly here by writ of error.

It appears that the notice for sale of the property in dispute was inserted in the National Intelligencer twelve times in successive weeks, the first insertion being on Saturday, the 26th of August, and the last on the 15th of November, the day of sale. Including the 26th of August as one of the days of the notice, and the 15th of November necessarily as another, we find that the notice was given only for eighty-two days. The language of the statute regulating the notice to be given is in these words: "That public notice of the time and place of the sale of all real property for taxes due the corporation of the city of Washington, shall be given hereafter, by advertisement, inserted in some newspaper published in said city, once in each week, for at least twelve successive weeks." Now, the first week following the date of the advertisement expired with the next Friday, the tenth of November, and, if the computation is carried out, it will be found that the twelfth week expired on the 17th of November. But the sale was made two days before, on the 15th of November, the last insertion of the notice being on the day of sale.

So there were eleven insertions of the notice in the newspaper in different weeks (making, with the first, twelve) after the expiration of the week from the first insertion, and the point to be settled is, whether the statute means that twelve insertions in successive weeks is sufficient notice, without respect to the number of days in twelve weeks. We do not doubt if the statute had been "once in each week for twelve successive weeks," a previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded, that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient. But when the legislator has used the words, for at least twelve successive weeks, we cannot doubt that the

words, at least as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks or eighty-four days. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. Our construction of the statute under review gives to every word its meaning. The other leaves out of consideration the words "for at least," which mean a space of time comprehended within twelve successive weeks or eighty-four days. The preposition, for, means of itself duration when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that any thing may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it shall not be done before. The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words "once a week," which precede in this statute those which follow them, "for at least twelve successive weeks." We think that the court did not err in refusing to give to the jury the instruction which was asked by the defendant upon the trial of this case.

The construction of the statute will be recognized to be in harmony with that policy of the law which experience has established to protect the ownerships of property from divestiture by statutory sales, where there has not been a substantial compliance with the law, by which a public officer is empowered to sell it.

Property is liable to be sold on account of an undischarged obligation of the owner of it to the public or to his creditors. But it can only be done in either case where there has been a substantial compliance with the prerequisites of the sale, as those are fixed by law. Any assumption by the officer appointed to make the sale, or disregard of them, the law discountenances. He may not do any thing of himself, and must do all as he is directed by the law under which he acts. He may not, by any misconstruction of it, anticipate the time for sale within which the owner of the property may prevent a sale of it, by paying the demand against him, and the expenses which may have been incurred from his not having done so before. This the law always presumes that the owner may do, until a sale has been made. He may arrest the uplifted hammer of

the auctioneer when the cry for sale is made, if it be done before a *bonâ fide* bid has been made. The authority of the officer to sell is, as it was in this case, "unless the taxes be previously paid to the collector, with such expenses as may have accrued at the time of payment." There is a difference, it is true, in the strictness required in a tax sale, and that of a sale made under judgment and execution, but in both, the same rule applies as to the full notice of time which the law requires to be given for the sale. "In deciding upon tax land titles great strictness has always been observed. The collector's proceedings are closely scanned. The purchaser is bound to inquire whether he has done so or not. He buys at his peril, and cannot sustain his title without showing the authority of the collector and the regularity of his proceedings."

This court said, in Williams *v.* Peyton, 4 Wheat. 77, that the authority given to a collector to sell land for the non-payment of the direct tax, "is a naked power not coupled with an interest." In all such cases the law requires that every prerequisite to the exercise of that power must precede its exercise, that the agent must pursue the power or his act will not be sustained by it. Again, in Ronkendorff's Case, 4 Peters, 349, this court repeated that in an *ex parte* proceeding, as a sale of lands for taxes, under a special authority, great strictness is required. An individual cannot be divested of his property against his consent, until every substantial requisite of the law has been complied with. The proof of the regularity of the collector's proceedings devolves upon the person who claims under the collector's sale. At an earlier day, the court decided, in Stead's Executors *v.* Course, 4 Cranch, 403: A collector selling lands for taxes, must act in conformity with the law from which his power is derived; and the purchaser is bound to inquire whether he has so acted. It is incumbent upon the vendee to prove the authority to sell. See also McClung *v.* Ross, 5 Wheaton, 116; Thatcher *v.* Powell, 6 Wheaton, 119. The decisions made by this court are full as to the circumstances under which tax titles may be set aside. We recommend also the perusal of the case of Lyon et al. *v.* Burt et al., in 11 Alabama Reports, cited by the counsel for the defendant in error; and to all of the cases cited in the opinion of Chief Justice Collier. It is not necessary for us to extend this opinion farther in citing cases upon tax sales. So far as we know, the law upon the subject is the same throughout the United States, and where differences exist they have occurred from a different phraseology in statutes, and not from any discordance in the views of judges in respect to the common law to be applied in tax sales.

See 4 Cranch, 403; 9 Cranch, 64; 1 Scam. 335; 1 Bibb, 295;

5 Mass. Rep. 403; 4 Dec. & Bal. 363; 3 Ohio Reports, 232; 2 Ohio, 378; 3 Yeates, 284; 2 Yeates, 100; 13 Sergeant & Rawle, 208; 4 Dec. & Bal. 386; 5 Wheat. 116; 6 Wheat. 119; 1 Yeates, 300; 3 Monroe, 271; 1 Tyler's Rep. 295; 14 Mass. 177; 8 Wheaton, 681; 15 Mass. 144; Greenleaf's Rep. 339; Taylor's North Carolina Rep. 480; 3 Hawks's Rep. 283; 1 Gilm. 26; 10 Wend. 346; 18 Johns. Rep. 441; 5 Alabama, 433. I have not the reports of the Supreme Court of Georgia at hand to cite from them any cases of tax sales, if any have been decided by it, but I know that the decisions of the courts in that State are the same as those stated in this opinion and in the cases cited.

We affirm the judgment of the Circuit Court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of 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.

CRUZ CERVANTES, APPELLANT, *v.* THE UNITED STATES.

Upon an appeal from the District Court of the United States for the Northern District of California, where it did not appear, from the proceedings, whether the land claimed was within the Northern or Southern District, this court will reverse the judgment of the District Court and remand the case for the purpose of making its jurisdiction apparent, (if it should have any,) and of correcting any other matter of form or substance which may be necessary.

THIS was an appeal from the District Court of the United States for Northern California.

In February, 1852, Cervantes filed before the board of commissioners to ascertain and settle the private land claims in California, the following claim:

Cruz Cervantes, a citizen of said State, gives notice that he claims, by virtue of a grant from the Mexican nation, a tract of land situated in the county of Santa Clara, in said State, and known by the name of San Joaquin or Rosa Morada, with the boundaries described in the grant thereof, to wit: on one side the arroyo of San Felipe; on the second side, the hills or moun-

tains of San Joaquin; on the third, the arroyo of Santa Anna; and on the fourth, a line drawn through the plain of San Juan.

Said land was conceded to claimant by a grant issued on the 1st day of April, 1836, by Don Nicolas Gutienez, superior political chief *ad interim* of California, and thereby authorized to grant lands in the name and on behalf of the Mexican nation. On the 18th February, 1841, judicial possession was given to claimant by Juan Miguel Anzar, Judge of First Instance of that jurisdiction.

Said land has been occupied by claimant, according to law and the directions contained in said grant, and is now held by him in quiet possession.

There is no conflicting grant to said land, or any part thereof, in the knowledge of claimant.

Said land has never been surveyed, but its boundaries are natural and well known, and may be easily traced. It is supposed to contain the quantity of two sitios de ganado mayor, more or less.

A copy and translation of said grant, and a copy of said act of judicial possession, are herewith presented, and the originals are ready to be produced and proved, as may be required.

On the 3d of August, 1852, Commissioner *Harvy J. Thornton* delivered the opinion of the board, declaring the claim valid.

In July, 1853, the following notice was issued:

CRUZ CERVANTES, claimant, *vs.* UNITED STATES.

ATTORNEY-GENERAL'S OFFICE,

Washington, D. C. July 11th, 1853.

You will please take notice, that the appeal in the above case from the decision of the commissioners, to ascertain and settle the private land claims in the State of California to the District Court of the United States, for the Northern District of California, will be prosecuted by the United States.

C. CUSHING,

Attorney-General United States.

To the Clerk of the District Court of the United States for the Northern District of California, San Francisco.

At a special term of the District Court of the United States of America, for the Northern District of California, held at the court-house in the city of San Francisco, on Monday, the 31st day of October, in the year of our Lord one thousand eight hundred and fifty-three.

Present, the honorable Ogden Hoffman, Jr., District Judge.

THE UNITED STATES, appellants, *v.* CRUZ CERVANTES, appellee.

This cause coming on to be heard at the above stated term, on appeal from the final decision of the commissioners to ascer-

tain and settle private land claims in the State of California, under the act of Congress, approved 3d of March, 1851, upon the transcript of the proceedings and decision, and the papers and evidence on which said decision was founded; and it appearing to the court that said transcript has been duly and regularly filed in pursuance of the 12th section of the act of Congress, approved August 31st, 1852.

And the argument of counsel for the United States and for the claimant being heard, it is ordered, adjudged, and decreed that the decision of the said commissioners be in all things reversed and annulled; and that the said claim be held invalid and rejected.

(Signed.) OGDEN HOFFMAN, JR.,
U. S. District Judge.

Cervantes appealed from this decree to this court, which appeal was allowed.

It was argued by *Mr. William Carey Jones*, for the appellant, when

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

It does not appear, from the proceedings before the District Court, that the land claimed is within the Northern Judicial District of California. This is necessary to give that court jurisdiction. It can exercise no power over any claim, where the land lies in the Southern Judicial District of the same State.

This court has often held, unless the jurisdiction of the Circuit or District Court appear in the record, the judgment of such court may be reversed on a writ of error. It is therefore important, that in dealing with land titles, the jurisdiction of the inferior court should appear in the proceeding.

From a map of the State of California, recently published, it appears the land claimed in this case lies in the Southern District, and if so, no jurisdiction attached to the court where the proceeding was instituted.

For the purpose of correcting the proceeding in this respect, the decision of the District Court is reversed, and the cause is remanded to that court with leave to amend the proceeding in regard to the jurisdiction of the District Court, and to any other matter of form or substance which may be necessary.

Order.

This cause came to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, and it not appearing therefrom that the

land claimed is within the Northern Judicial District of California, it is, on consideration thereof now here ordered and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court, with leave to amend the proceedings in regard to the jurisdiction of the said District Court, and also in regard to any other matter of form or substance which may be necessary.

John C. Deshler *v.* George C. Dodge.

The eleventh section of the Judiciary Act of 1789, says, "nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

This clause has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention.

Therefore where an assignee of a package of bank-notes brought an action of replevin for the package, the action can be maintained in the Circuit Court, although the assignor could not himself have sued in that court.

This case was brought up by writ of error from the Circuit Court of the United States for the District of Ohio.

It was an action of replevin brought by Deshler, a resident and citizen of the State of New York, against Dodge, a citizen and resident of the State of Ohio.

The proceedings in the case were these:

In March, 1853, Deshler filed in the Circuit Court of the United States for the District of Ohio the following *præcipe* and affidavit.

Præcipe. Issue a writ of replevin for the following goods and chattels, to wit, a quantity of bank-bills, of various denominations, consisting of fives, tens, twenties, and fifties, given for the payment, in the aggregate, of the sum of ten thousand five hundred and eighty dollars, being the same bank-bills taken by the said George C. Dodge, from the City Bank of Cleveland, on the 26th day of March, 1853. Also another quantity of bank-bills, of various denominations, consisting of ones, twos, threes, fours, fives, tens, twenties, fifties, and hundreds, and given for the payment, in the aggregate, for the sum of seven thousand nine hundred sixty-five dollars, being the same bank-bills taken by the said George C. Dodge, from the Merchants Bank of Cleveland, on the 26th day of March, A. D. 1853. Also another quantity of bank-bills, of various denominations, consisting of ones twos,

threes, fives, tens, twenties, fifties, and hundreds, and given for the payment, in the aggregate, of the sum of nine thousand two hundred and sixteen dollars, being the same bank-bills taken by the said George C. Dodge, from the Canal Bank of Cleveland, on the 26th day of March, A. D. 1853. Also another quantity of bank-bills, of various denominations, consisting of ones, twos, threes, fives, tens, twenties, fifties, and hundreds, and given for the payment, in the aggregate, of the sum of eleven thousand two hundred and twenty dollars, being the same bank-bills taken by the said George C. Dodge, from the Commercial Bank of Cleveland, on the 26th day of March, A. D. 1853.

Affidavit. John G. Deshler, plaintiff in the case in the annexed *præcipe* named, being first duly sworn, does depose and say: That he has good right to the possession of the goods and chattels described in the annexed *præcipe*, and that the same are wrongfully detained by the said George C. Dodge, named as defendant in the said *præcipe;* and that the said goods and chattels were not taken in execution on any judgment against the said John G. Deshler, nor for the payment of any tax, fine, or amercement assessed against the said Deshler, nor by virtue of any writ of replevin, or any other mesne or final process whatsoever issued against the said Deshler. Said Deshler further makes oath and says, that he is a citizen and resident of the State of New York, and that the said George C. Dodge is a citizen and a resident of the State of Ohio.

U. S. America, District of Ohio, ss. JOHN G. DESHLER

The writ was issued accordingly, and served by the marshal. The property was appraised at $38,592. Deshler gave the usual replevin bond.

At April term, 1853, Dodge made the following motion:

And now comes the said George C. Dodge, by R. P. Spalding, his attorney, and moves the court for a rule on the plaintiff to show cause, during the present term, why the said suit should not stand dismissed, for all and singular the reasons following, to wit:

1st. Because there is no sufficient affidavit filed by plaintiff as a predicate for the writ of replevin.

2d. Because it does not comport with sound public policy, that any portion of the revenue of the State should be arrested, at the instance of the tax-payers, or other person for his benefit, and taken from the hands of the collector, through the instrumentality of the writ of replevin.

3d. Because the several bank-bills in the writ specified were assigned to the plaintiff by said several banks in the city of Cleveland, for the sole purpose of instituting suit in this court.

4th. Because said assignment from said banks to said John G. Deshler was colorable merely, and operates as a fraud upon the act of Congress of September 24, 1789, establishing the judicial courts of the United States.

5th. Because this court is debarred taking jurisdiction of this case by a provision contained in the eleventh section of said act of Congress of September 24, 1789, in the words following: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of any assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." It being admitted, for the purposes of this motion, that the said John G. Deshler derived all his right to said bank-notes from an assignment in writing made to him by the Commercial Bank, the Merchants Bank, the City Bank, and the Canal Bank of Cleveland, all corporate bodies in the State of Ohio, after the seizure of the said bank-bills, by the said George C. Dodge, as treasurer of Cuyahoga county, to satisfy sundry taxes assessed against said banks.

R. P. SPALDING,
Attorney for defendant.

In August, 1853, the court overruled the motion, but permitted the defendant to set up the same matter, by plea.

At the same term, the plaintiff, Deshler, filed his declaration, and Dodge filed the following plea:

And the said George C. Dodge, in his own proper person, comes and says, that this court ought not to have or take further cognizance of the action aforesaid, because he says that on the day and year in the said declaration mentioned, to wit, on the twenty-sixth day of March, in the year one thousand eight hundred and fifty-three, he, the said George C. Dodge, was acting as treasurer of the county of Cuyahoga, in the State of Ohio, and as such treasurer on the day and year last mentioned, at Cleveland, in the county of Cuyahoga aforesaid, held in his hands for collection the tax duplicate of said county of Cuyahoga, for the year one thousand eight hundred and fifty-two, upon which tax duplicate sundry large amounts of taxes stood assessed against the several banks in the plaintiff's declaration mentioned, to wit, against the City Bank of Cleveland, the Merchants Bank of Cleveland, the Canal Bank of Cleveland, and the Commercial Bank of Cleveland; which said taxes, with a large amount of penalty thereon, were then due and unpaid; and it then and there became, and was the official duty of the said George C. Dodge, as such treasurer, to distrain a sufficient amount of bank-bills belonging to said banks and in their pos-

session, (respectively,) to satisfy the said taxes and penalties, amounting in the aggregate to a large sum of money, to wit, to the sum of thirty-eight thousand nine hundred and eighty-one dollars. And the said George C. Dodge did in fact, then and there, to wit, on the 26th day of March, in the year one thousand eight hundred and fifty-three, at the city of Cleveland, in the county of Cuyahoga aforesaid, enter into said banks and take and distrain from them, respectively, the amount of taxes and penalty as aforesaid, to wit: From the City Bank of Cleveland he took and distrained the sum of ten thousand five hundred and eighty dollars in bank-bills of various denominations, consisting of fives, tens, twenties, and fifties, the same being at the time said distress was made the exclusive property of said City Bank of Cleveland. From the Merchants Bank of Cleveland he took and distrained the sum of seven thousand nine hundred and sixty-five dollars in bank-bills of various denominations, consisting of ones, twos, threes, fours, fives, tens, twenties, fifties, and hundreds, the same being at the time said distress was made the exclusive property of said Merchants Bank of Cleveland. From the Canal Bank of Cleveland he took and distrained the sum of nine thousand two hundred and sixteen dollars in bank-bills of various denominations, consisting of ones, twos, threes, fives, tens, twenties, fifties, and hundreds, the same being at the time said distress was made the exclusive property of said Canal Bank of Cleveland. And from the Commercial Bank of Cleveland he took and distrained the sum of eleven thousand two hundred and twenty dollars in bank-bills of various denominations, consisting of ones, twos, threes, fives, tens, twenties, fifties, and hundreds, the same being at the time said distress was made the exclusive property of said Commercial Bank of Cleveland. And the said George C. Dodge, having thus, then and there taken and distrained said bank-bills, being all and singular the bank-bills in the plaintiff's declaration set forth and described, immediately, to wit, on the twenty-sixth day of March, in the year one thousand eight hundred and fifty-three aforesaid, removed said several bank-bills from said several banks, respectively, to a place of security, to wit, to the vault of the Cleveland Insurance Company, where the same were specially deposited by the said George C. Dodge, and where the same in fact remained to the credit of the said George C. Dodge as a special deposit, until they were afterwards seized and taken by force of the writ of replevin issued at the instance of the said John G. Deshler, plaintiff in this suit.

And the said George C. Dodge further saith, that on the same twenty-sixth day of March, A. D. 1853, but after the said George C. Dodge had so as aforesaid distrained, and taken away from

the possession and keeping of the said several banks herein before mentioned, the said bank-bills above mentioned, and after he had deposited the same for safe keeping in the vault of the Cleveland Insurance Company in manner aforesaid, the said several banks above mentioned, all of which were incorporated by the laws of the State of Ohio to transact a general banking business in said city of Cleveland, in the county of Cuyahoga aforesaid, and not elsewhere, and all of which in fact were at the time said taxes were assessed, and at the time the said bank-bills were so as aforesaid distrained for the payment of said taxes, transacting a general banking business in the city of Cleveland aforesaid, entered into an arrangement with the said John G. Deshler, the plaintiff in this suit, who claims to be a citizen and resident in the State of New York; whereby the said several banks, by written instruments of assignment, bearing date on the said twenty-sixth day of March, A. D. 1853, and executed in behalf of said banks by their cashiers or other agents duly authorized by the directors of the same, sold, assigned, and transferred to the said John G. Deshler, plaintiff in this suit, all and singular the bank-bills so as aforesaid taken and distrained by the said George C. Dodge, and which said bank-bills were, by the express terms of said several assignments in writing, declared to be then, and at the time of the execution of said several instruments of assignment, in the possession of George C. Dodge, treasurer of the county of Cuyahoga, in the State of Ohio.

And the said George C. Dodge further saith, that before and at the time of the taking and distraining said several bank-bills for the payment of said taxes and penalties assessed as aforesaid against said several banks, he, the said John G. Deshler, had no right of property in, or claim to, the possession of said several bank-bills whatsoever, but that all the pretended right, interest, and claim of the said John G. Deshler thereto arose under and by virtue of said several instruments of assignments, executed and delivered long after said bank-bills had been taken and distrained by the said George C. Dodge, as treasurer as aforesaid, in satisfaction of the taxes and penalty so due as aforesaid from said banks, and while the said bank-bills were on special deposit in the vault of the said Cleveland Insurance Company to the credit of the said George C. Dodge, treasurer as aforesaid. And the said George C. Dodge further saith, that he is a citizen of and resident in the State of Ohio, and was such at the time when this suit was instituted; and that all and singular said banks are corporate bodies of said State of Ohio, and have not now and never had any legal existence except within the limits of said State. And so the said George C. Dodge pleads, and

says, that said supposed causes of action are not within the jurisdiction of this court, and this he is ready to verify; whereof he prays judgment whether this court can or will take further cognizance of the action aforesaid. GEORGE C. DODGE.

This plea was verified by affidavit.

The plaintiff demurred to this plea, when the court overruled the demurrer and sustained the plea upon the ground, "that the matters therein contained are sufficient in law to preclude the said Deshler from having and maintaining said action against the said Dodge in this court, and that the court has no jurisdiction of the same."

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

It was argued by *Mr. Stanberry*, for the plaintiff in error, and by *Mr. Spalding* and *Mr. Pugh*, for the defendant.

Mr. Stanberry.

Only one question is made in this case, and that is whether replevin will lie to recover the possession of certain bank-notes, payable to bearer, wrongfully detained by the defendant, the plaintiff claiming as owner of the notes by purchase and assignment from former owners of them, not capable of suing in the courts of the United States.

The decision in the court below was adverse to the plaintiff on the ground that the case was within the eleventh section of the Judiciary Act.

That section denies to the circuit courts of the United States cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange.

This section restricts the right of suit given by the Constitution, in reference to citizenship, — must therefore be construed strictly, and be confined to the very cases within the restriction.

To make the restriction apply, these things must concur.

1. A plaintiff claiming as assignee of a chose in action.
2. A suit for the contents of such chose in action.
3. An assignor who could not have maintained the suit for the contents.

1. The plaintiff here is not the assignee of a chose in action within the meaning of this section.

The subject-matter was bank-notes, payable on demand to bearer. Such a chose passes by delivery.

There is no promisee named in the contract, no named person with whom and to whom the contract or promise was made.

The promise is original to every holder in succession.

Although there happened to be a written assignment in this case, yet that is only evidence of a sale. Just as in a bill of sale of goods, or any chattel, the purchaser is not made an assignee by taking written evidence of his purchase. He takes as purchaser, as owner, a *jus in rem*, not *ad re*.

2. No suit for contents.

The suit is for a thing in *specie*, *in rem*, not on the contract, not against the banks who made the notes, not against any one liable on the contract.

A suit for the contents of a note must be a suit to recover the thing promised to be paid by the note, not for the note, but something contained within it.

Such a suit destroys the chose in action; it reduces it to a chose in possession, *transit in rem adjudicatam*.

But this suit is not for the contents, it is not on the contract, or against any one liable in virtue of the contract. It does not, when judgment is recovered, merge the chose, for it remains a chose in action after judgment and recovery.

Finally, this suit is not within the intent of the act, not within the mischief to be prevented. That intent is clearly to restrain the construction of domestic contracts to the domestic forum, so as to ensure the application of the *lex loci contractus*, in cases where in its inception the contract was made in a State and between citizens of the same State. The exception in favor of foreign bills of exchange proves the rule to be as stated.

This suit not being on the contract, nor against the promisor, but only to recover a thing in the hands of a wrongdoer, does not come at all within the reason of the rule.

The plaintiff will rely on the following cases. Bank of Kentucky *v.* Wister et al. 2 Peters, 324. It was held, in this case, that in an action for or upon a bank-note, payable to bearer, against the bank, it is sufficient if the holder or plaintiff is entitled to sue in the federal courts, without regard to the character of any former holder; and that such a note is payable to anybody, and is not affected by the disabilities of the nominal payee.

Bullard *v.* Bell, 1 Mason, 251, held that the eleventh section only applies to actions founded on choses in action by an assignee, and that a bank-note, payable to A. B. or bearer, whether A. B. were a fictitious person or not, was not within the act, and that the promise was in law made to each holder as an original promisee. In this case the action was upon the note against a stockholder individually liable.

Smith et al. *v.* Kernochen, 7 How. 198, was an ejectment by an assignee of a mortgage, from a mortgagor not competent to sue in United States courts. The objection was that the

assignment was merely colorable. Neither counsel nor court suggested any objection under the eleventh section.

The Brig Sarah Ann, 2 Sumner, 211. This case is to the point, that the sale and assignment of a chattel by a person out of possession is not the sale of a chose in action, but is the sale of the thing itself, and passes the title, whether the subject-matter is in the hands of a lawful depositary or of a wrong-doer. 24 Pick. 95.

In all the cases relied upon by the counsel for the defendant in error, the action was for the contents of the chose against the maker or debtor, in virtue of his contract or debt, and not, as in the case at bar, for the specific thing, and against a mere tortious holder.

The following notice of the view taken by the counsel for the defendant in error, is from the brief of *Mr. Spalding*.

But one point is made by defendant to sustain the judgment of the court below, to wit:

The assignment, made by the several banks named in the pleadings, of the bank-bills in question to the plaintiff, after the same had been distrained for taxes by the defendant, and had been removed from their possession, was simply an assignment of a chose in action, within the meaning of the eleventh section of the "Act to establish the judicial courts of the United States," approved September 24th, 1789. United States Statutes at Large, volume 1, p. 79. And as the banks could not themselves have maintained a suit in the federal court to recover said bank-bills, if no assignment had been made, so a like disability attaches to their assignee; or, more properly speaking, as the court below could not take jurisdiction as between the banks and the defendant, so by the terms of said statute it is prohibited from taking cognizance as between the assignee of the banks and the defendant.

The words of the prohibition are as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

For the construction heretofore put upon this act of Congress by the courts, see Serè & Laralde *v.* Pilot et al. 6 Cranch, 332; Bradford *v.* Jenks et al. 2 McLean, 130; Gibson et al. *v.* Chen, 16 Peters, 315; Dromgoole et al. *v.* F. & M. Bank, 2 Howard, 241; Brown *v.* Noyes, 2 Woodb. & Miriot, 80; Sheldon et al. *v.* Sill, 8 Howard, 441; 8 Porter, Alabama Rep. 240.

In this last-mentioned case, Mr. Justice Grier, in pronouncing

the opinion of the court, says, " The term chose in action is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another by action."

I shall insist that the only right, (if any right there was,) transferred by the banks of Cleveland to John G. Deshler, under the circumstances set forth in the plea, was a thing in action; a mere right to sue George C. Dodge to recover, in replevin, the bank-bills, or in trover the value of the bank-bills, if Dodge had improperly converted them. And hence the Circuit Court of the United States had no jurisdiction.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Ohio.

The suit below was an action of replevein to recover the possession of a quantity of bank-bills, in the hands of the defendant, upon banks in the city of Cleveland, amounting in the whole to the sum of thirty-eight thousand five hundred and ninety-two dollars, and the title to which was derived by an assignment from the banks to the plaintiff. The declaration is in the usual form for wrongfully and unjustly detaining the possession of the property, the plaintiff averring that he is a citizen and resident of the State of New York; and the defendant a citizen and resident of the State of Ohio.

To this declaration, the defendant plead to the jurisdiction of the court, setting up that the defendant was acting-treasurer of the county of Cuyahoga, Ohio, and had distrained the bills in question belonging to the banks to satisfy the taxes and penalties duly imposed upon them; and that after the said bills had been thus distrained and in his possession, the said banks being incorporated companies by the laws of the State of Ohio, and doing business in the city of Cleveland, sold, assigned, and transferred the same to the plaintiff; and that all the right and title to the said bills belonging to him is derived from the aforesaid assignment: wherefore the defendant says, the supposed causes of action are not within the jurisdiction of the court, and prays judgment if it will take further cognizance of the suit.

To this plea the plaintiff demurred, and the defendant joined in demurrer, upon which judgment in the court below was given for the defendant.

The only question presented in the case by either of the parties is, whether or not the court below had jurisdiction of the case within the true meaning of the 11th section of the Judiciary Act of 1789, the material part of which is as follows: " Nor shall any

district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned.

In the case of a tortious taking, or wrongful detention of a chose in action against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the time of the injury.

The distinction, as it respects the application of the 11th section of the Judiciary Act to a suit concerning a chose in action is this—where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the court, if no assignment had been made; but, if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel.

The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not, within this section; but, if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee. 7 Howard 198. This distinction is stated by Mr. Justice Grier, in the case of Sheldon et al. *v.* Sill, 8 Howard, 441. The learned Justice, in delivering the opinion of the court in that case, observed, "that the term chose in action is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confers on one party a right to recover a personal chattel, or sum of money from another, by action." This paragraph has been relied on

to sustain the plea in question; but other portions of this opinion will show, that the phrase "right to recover a personal chattel," was not meant a recovery in specie, or damages for a tortious injury to the same, but a remedy on the contract for the breach of it, whether the contract was for the payment of money, or the delivery of a personal chattel. Indeed, upon a close examination, this is the fair import of the language used, as he was speaking of the contract in the instrument assigned, not of the sale or transfer of it.

We have looked simply at the question of jurisdiction in the case, as that is the only question raised by the plea, and as we are satisfied that the demurrer to it is well taken, the judgment of the court below should be reversed, with costs, and proceedings remitted, with directions that judgment be given for the plaintiff that the defendant answer over.

Mr. Chief Justice TANEY, Mr. Justice CATRON, Mr. Justice DANIEL, and Mr. Justice CAMPBELL, dissented.

Mr. Justice CATRON, dissenting.

The defendant, Dodge, was treasurer and tax-collector of Cuyahoga county, in Ohio, for the year 1852. There was assessed on the tax list of that year, against the Bank of Cleveland, $10,580; against the Merchants Bank of Cleveland, $7,965; on the Canal Bank of Cleveland, $9,216; and on the Commercial Bank of Cleveland, $11,981 — making $38,981.

These respective amounts were distrained in bank-notes from each bank, and deposited by the tax-collector with the Cleveland Insurance Company, to his credit. As the four banks whose property was distrained were incapable of suing the tax-collector (who was citizen of Ohio) in the Circuit Court of the United States, they joined in a written transfer of the bank-notes to John G. Deshler, the plaintiff, a citizen of New York, and he obtained a writ of replevin, and process founded on it, out of the Circuit Court of the United States, and declared as a citizen of New York. The defendant Dodge pleaded in abatement, alleging that the causes of action are not within the jurisdiction of the court; to which plea, there was a demurrer.

The first question is, whether this plea in abatement is the proper defence, or should the plea have been in bar.

The plea sets forth the distress for taxes due and unpaid from the banks to the State; that the defendant Dodge was the tax-collector, and had the proper authority to make the distress, and did distrain, by virtue of his authority. By the laws of England, replevin does not lie for goods taken in execution; nor in

cases where goods are taken by distress according to an act of parliament, this being in the nature of an execution. 7 Bac. Ab. Replevin and Avowry, C. 71; 6 Comyns's Digest, Replevin, D. 218; Ilsley *v.* Stubbs, 5 Mass. Rep. 282, per Parsons, Ch. J.

So the statute of Ohio, under which the proceeding in this case was had, gives the writ of replevin, and prescribes the mode of proceeding, requiring an affidavit from the owner (or his agent) that the goods were his, that they are wrongfully detained by the defendants; "and that said goods and chattels were not taken in the execution, on any judgment against said plaintiff, nor for the payment of any tax, fine, or amercement assessed against the plaintiff;" and it is further provided that any writ of replevin, issued without such affidavit, shall be quashed at the costs of the clerk issuing it; and that he and the plaintiff shall be liable in damages to the party injured. This affidavit, Deshler made, and got the property into his possession on giving bond as the law requires.

The plea distinctly shows that the property was in a condition not to be taken by the writ of replevin, and that the Circuit Court had no jurisdiction to issue the writ, or in anywise interfere with the property by that suit in replevin; and there being no jurisdiction to try title, or proceed further, the plea in abatement was the proper one. And so are the American decisions. Shaw *v.* Levy, 17 Serg. & Rawle, 99.

The next question is, whether these corporations could lawfully assign to a third person their rights of action, to property out of their possession, and held adversely? On common-law principles such an assignment is champerty. Blackstone says, (vol. 4 135,) champart, in French law, signified a similar division of profits: "In our sense of the word it signifies the purchasing of a suit, or right of suing; a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right, but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right."

I am not aware that this, as a general rule, has been disputed. It therefore follows, as I think, that the assignment was void, and that the causes of action belonged to the four banks as if it had never been made; and they alone, having the right to sue in any form, and being citizens of Ohio, no power to interfere with the tax-collector, Dodge, or the property distrained, existed in the United States court.

A principal objection that I have heard urged is, that as the plea sets forth matter in bar, and commences and concludes in abatement, it is bad for this reason: If we were allowed to rely on such a barren technicality, the assumption is not well found

ed. In a replevin for goods the defendant may plead property in another (or that the goods were taken in execution) either in abatement or bar. 1 Chit. Pl. 446; Ilsley v. Stubbs, 5 Mass. Rep. 284–5; 1 Johns. Rep. 380; 1 Salk. 5.

As the plaintiff had no title that he could assert, it is of no consequence to him who has, say some of the authorities; but if this second ground was doubtful, it is cured by the act of jeofails.

The thirty-second section of the Judiciary Act declares that no proceeding in civil causes shall be quashed or reversed, for any defect of want of form, but that the courts shall proceed and give judgment according to the right of the cause without regarding such defects, or want of form in any pleading, except in cases of demurrer, where the party demurring shall have specially set down and expressed in his demurrer, the causes thereof. The demurrer here is general, and no mere technicality was allowable.

"The right of the matter in law," in this case, involves a very grave consideration, such as would in all probability deeply disturb the harmony of the Union, if tax-payers in larger classes, could combine together, let their property be distrained, and then assign it to a third person, a citizen of another State, and on the same day, as in this case, take it from the State authority by a federal court writ, and let it be taken beyond the State's jurisdiction.

It was said by the Supreme Court of Pennsylvania, in a case where property had been seized for taxes due, and taken from the officer's possession by a writ of replevin, "that the court will not support this form of action in such a case, nor suffer such an abuse of their process. If one man may bring replevin where his goods have been taken for taxes, so may every other person; and thus the collection of all taxes might be evaded. Independently of the act of assembly we are bound to quash this writ." 3 Yeates's Rep. 82.

I deem the case before us to have been a very disreputable proceeding. The officers of these banks could not make the necessary oath required to obtain a writ of replevin; and to evade the laws of Ohio, the device of an assignment of their separate causes of action to a non-resident was resorted to, who could swear that this property was not distrained for his taxes, and thus apparently comply with the law, so far as an oath was required; whereas he violated its spirit, to bring into a tribunal of the Union a controversy that a State court would not sanction, by practising a fraud on the laws of Ohio, and a fraud on the Constitution of the United States. And what adds to the grossness of this transaction is, the attempt to assign and vest in this plaintiff divers causes of action, by separate assignors, thus seek-

ing to practise champerty, in a form and to an extent not heretofore devised. If four could assign, and their claims be combined in one suit, by the assignee, so could as many hundreds. To sanction the validity of an assignment to a non-resident of property adversely held, and let him sustain a suit for it, would throw open the United States courts to every matter of litigation where property was in dispute exceeding the value of five hundred dollars.

I feel quite confident that the Constitution did not contemplate this mode of acquiring jurisdiction to the courts of the Union, and am of opinion, that the judgment of the Circuit Court sustaining the plea ought to be affirmed.

Mr. Justice DANIEL.

I also dissent from the opinion of the court in this case, and concur in the views so conclusively taken of it by my brother Catron.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the District of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged, by this court, that the judgment of the said Circuit Court, in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein, in conformity to the opinion of this court.

JOHN DOE, ON THE DEMISE OF LOT CLARK, DAVID CLARKSON, JOSEPH D. BEERS, ANDREW TALCOTT, BRANTZ MAYER, AND HARRIET HACKLEY, PLAINTIFF IN ERROR, *v.* JOSEPH ADDISON BRADEN.

In the ratification, by the King of Spain, of the treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida, amongst which was one to the Duke of Alagon, were annulled and declared void.

A written declaration, annexed to a treaty at the time of its ratification, is as obligatory as if the provision had been inserted in the body of the treaty itself.

Whether or not the King of Spain had power, according to the Constitution of Spain, to annul this grant, is a political and not a judicial question, and was decided when the treaty was made and ratified.

A deed made by the duke to a citizen of the United States, during the interval between the signature and ratification of the treaty, cannot be recognized as conveying any title whatever. The land remained under the jurisdiction of Spain until the annulment of the grant.

This case came up, by writ of error, from the District Court of the United States for the Northern District of Florida.

It was an ejectment brought by the lessee of Clark and the other plaintiffs in error against Braden, to recover all that tract or parcel of land in Florida, which is described as follows, namely: Beginning at the mouth of the river heretofore called or known as the Amanina, where it enters the sea, to wit, at the point of the twenty-eighth degree and twenty-fifth minute of north latitude, and running along the right bank of that river to its head spring or main fountain source; thence by a right line to the nearest point of the river St. John; then ascending said river St. John, along its left bank, to the lake Macaco; then from the most southern extremity of that lake, by a right line, to the head of the river heretofore known or called the Hijuelas; and then descending along that river's right bank to its mouth in the sea; thence continuing along the coast of the sea, including all the adjacent islands, to the mouth of the river Amanina, the beginning point aforesaid, containing twelve millions of acres of land.

The cause went on regularly by the appearance of the defendant, the confession of lease, entry, and ouster, and the admission of counsel on behalf of the United States to defend the suit.

In May, 1852, the case came up for trial at the city of St. Augustine.

The counsel for the plaintiff offered in evidence the following duly verified papers:

1. A memorial of the Duke of Alagon to the King of Spain, dated 12th July, 1817, praying the king to be pleased to grant him the uncultivated lands not already granted, in East Florida, situated between the banks of the river Santa Lucia and San Juan, as far as their mouths into the sea, and the coast of the gulf of Florida and its adjacent islands, with the mouth of the river Hijuelos by the twenty-sixth degree of latitude, following along the left bank of said river up to its source, drawing thence a line to lake Macaco, descending thence by the way of the river San Juan to lake Valdez, and drawing another line from the extreme north part of said latter lake to the source of the river Amanina, thence pursuing the right bank of said river to its mouth by the 28th or 25th degrees of latitude, and continuing along the coast of the sea with all its adjacent islands, to the mouth of the river Hijuelos, in full property for himself and his

heirs, and permitting him the importation of negroes free of duty to work and cultivate said lands, a favor which he hopes to obtain from the innate benevolence of your Majesty, whose precious life may God preserve many years, as he prays.

MADRID, 12th July, 1817.

2. The order of the King upon the above, addressed to the royal and supreme council of the Indies, as follows:

His Majesty having taken cognizance of the contents therein, and in consideration of the distinguished merit of this individual, and of his well known zeal for the royal service, and likewise in consideration of the advantages which will result to the State by the increase of the population and civilization of the aforesaid territories, which he solicits, he has deigned to resolve, that the same be communicated to the supreme council, declaring to them that the favor which he solicits is granted to him, provided the same be not contrary to the laws; all of which I communicate to your Excellency by his royal order for your information and that of the council, and for the other necessary ends. God preserve your Excellency many years.

PALACE, December 17th, 1817.

3. A cedula, issued by the extinct council of the Indies, addressed to the governor, captain-general of the island of Cuba and its district, to the intendant of the army and royal exchequer of the Havana and its districts, and to the governor of the Florida. This document bore date on the 6th of February, 1818, and after reciting the petition and grant, concluded as follows:

Wherefore I command and require you, by this my royal cedula, that in conformity with the laws touching this matter, effectually to aid the execution of said gift, taking all the measures proper to carry it into effect without prejudice to the rights of a third party; and in order that the said Duke of Alagon may be enabled to put into execution his design, agreeably in every respect to my benevolent wishes, in furtherance of the agriculture and commerce of said possessions, which demand a population proportioned to the fertility of the soil and the defence and security of the coast, reporting hereafter successively the progress that may be made; it being understood that the importation of negroes, comprehended in said gift, is to be made, as far as the traffic in them is concerned, in conformity with the regulations prescribed in my royal order of the nineteenth of December ultimo, for such is my will; and that account be taken of this royal order in the contaduria-general of the Indies. Given at the palace, this sixth day of February, one thousand eight hundred and eighteen.

4. A power of attorney from the Duke of Alagon to Don Nicholas Garrido, dated 27th of February, 1818.

5. A decree of Coppinger, governor of Florida, dated 27th of June, 1818, putting Garrido into possession of the land claimed.

6. A deed of conveyance, dated 29th of May, 1819, from the Duke of Alagon to Richard S. Hackley, of Richmond, Virginia. This deed conveyed a part of the lands in question to Richard S. Hackley and company, for the purpose of immediately opening, clearing, and settling them.

7. The deposition of Ann Rachel Hart, of Baltimore, Maryland, that Richard S. Hackley was a native-born citizen of the United States.

8. A deed from Richard S. Hackley, dated 14th of September, 1836, to Joseph D. Beers, Lot Clark, and David Clarkson, the lessors of the plaintiff.

9. An admission by the counsel for the United States that Braden, the defendant, was in possession of $587\frac{43}{100}$ acres of land, lying on the Manatee river, in the present county of Hillsborough, which was covered by the foregoing titles, and was of the value of two thousand dollars and upwards.

The defendant, to prove the issue on his part, read in evidence certified copies of patents for his land from the United States.

A great number of other documents and testimony were offered by the defendant and plaintiff, but a particular notice of them is not deemed necessary in the present report.

On the conclusion of the argument, the court instructed the jury as follows:

1st. The foundation of the plaintiff's title is the concession or order of the King of Spain of the 17th of December, 1817, and the cedula or royal order of the 6th of February, 1818, which, together, constitute the grant or concession to the Duke of Alagon to the lands in question. Whether the order of the 17th of December, 1817, was complete in itself, and amounted to a grant, I deem it unimportant to inquire, because it was reaffirmed and made operative by the cedula or royal order of the 6th of February, 1818, which related back to the order of the 17th of December, 1817; and hence that may be considered the date of the concession, explained and rendered more full and perfect by the order of the 6th of February, 1818, and it is so considered for the purposes of this suit.

Taking these two orders together, it is manifest, from their tenor and spirit, and it is more particularly apparent from the orders and proceedings of the king and the council of the Indies, in the early part of 1818, that one object and intent, and one condition of the grant or concession to Alagon, and one of the principal inducements on the part of the king to make the

grant, was the colonization and settlement of the country, and the agricultural and commercial advantages which it was supposed would arise to the province therefrom. And it is equally clear that the grant was made subject to the laws of Spain, and particularly subject to such laws of the Indies as were applicable to the case; and that the Duke of Alagon, in his proceedings to carry into effect the objects of the grant, and to avail himself of its benefits, was bound to conform to those laws.

The testimony goes to show not only what those laws were, but that early in 1818, and before the Duke of Alagon had sold or conveyed any of these lands, his attention was distinctly called to them by the king and the council of the Indies, or by the proper officials of the Spanish government, and that every effort was made on the part of the King of Spain to insure the due observance of them by the Duke of Alagon; and that he was especially cautioned and advised that he could not by law, and would not be permitted to alienate the lands, or any part of them, particularly to strangers or foreigners. After this, and before any treaty had been ratified and confirmed between the United States and Spain, and while the province of East Florida was still under the dominion of Spain, and subject to the laws of Spain, the deed of May, 1819, was executed by Alagon to Richard S. Hackley.

Second. Therefore, if the jury are satisfied that the laws of Spain and the Indies were such as have been read to them, and that it was not lawful for a Spanish subject to sell or transfer lands to a stranger or foreigner, then this deed of May, 1819, from Alagon to Hackley, was in violation of law and void, and conferred no title upon Hackley.

The Duke of Alagon could not (if those laws have been correctly and satisfactorily proved) legally make any such conveyance; and had he attempted so to do here in the province of East Florida, where it ought to have been done if at all, he would have been prevented by the governor from doing it; and no notary here could have executed the papers without violation of law and of the royal order.

The same objection applies to the deed of conveyance to Hackley of the 30th of June, 1820. That conveyance was likewise in violation of law, and against the express injunctions of the king. It was made in Madrid instead of the province of East Florida, and while the Spanish law was in full force and effect here.

Third. The court is further of opinion, that the grant to the Duke of Alagon was in fact formally annulled by the king on the final ratification of the treaty, by and with the consent of the cortes, as appears from the evidence in the case; and

whether this revocation or annulment of the grant by the king and cortes was founded upon the fact that Alagon had justly forfeited all right to the lands by disregarding the objects and conditions of the grant, and by attempting to transfer the lands to a foreigner, or upon the right of eminent domain, and upon the ground that it was necessary, in order to complete the treaty, and therefore for the public good and general welfare of the nation, to resume or revoke the grant, it was in either case a rightful and legitimate use of sovereign power, and one which cannot be questioned in a court of justice.

Fourth. The court is further of the opinion, that even if the grant was not rightfully annulled by the treaty, yet it is not a grant which, by the terms of the treaty, would stand ratified and confirmed, or which the United States are bound to confirm, although made before the 24th of January, 1818: that the United States are bound to ratify and confirm it only to the same extent that it would have been valid if the territory had remained under the dominion of Spain; and it is manifest, from the evidence in the case, that if the treaty had not been made, the grant would not have been held valid by the Spanish government; it was in fact revoked and annulled by the king and cortes. The United States, therefore, are not bound either by the rules of public law, by the universal principles of right and justice, or by the terms of the eighth article of the treaty, to recognize or confirm it.

Fifth. The court is further of the opinion, that inasmuch as this claim under the grant to the Duke of Alagon has never been recognized and confirmed by the United States, or by any board of commissioners or court authorized by Congress to adjudicate or decide upon the validity of the grant, it is therefore a claim "not recognized or confirmed," and within the meaning of the first section of the act of Congress of 3d March, 1807, (relating to settlements, &c., on the public lands: 2d vol. Statutes at Large of the U. S. page 445,) and that the claimants, therefore, have only an equitable or inchoate title at best, and have not the right to take possession; but, on the contrary, are expressly forbidden so to do until their title has been confirmed. Consequently, that not having the right of possession, or the complete legal title, they cannot sustain an action of ejectment; that their only redress is by application to the political power or legislative department of the government; that the courts of justice cannot furnish it without a violation of law.

These points being fully conclusive as to the rights of the parties, the court deems it unnecessary to notice other points raised in the course of the trial and arguments.

From these views of the court, however, the jury are bound to find a verdict for the defendant, and are so instructed accordingly.

To all of which charge, and each and every paragraph or section of the same, the plaintiffs' counsel excepted, and prayed their exception to be noted in the words following:

To all and every part of which instructions and directions, so far as adverse to the plaintiffs, the plaintiffs except, and especially to each and all of the directions and propositions and points contained in each of the articles or paragraphs of said instructions numbered, respectively, in the said instructions, 1, (one,) 2, (two,) 3, (three,) 4, (four,) and 5, (five.)

And the plaintiff prays the court to sign and seal this his bill of exceptions, which is accordingly done this twenty-fourth day of May, eighteen hundred and fifty-two.

(Signed) I. H. BRONSON, *Judge.* [SEAL.]

Upon this exception, the case came up to this court, and was argued by *Mr. Mayer*, and *Mr. Johnson* for the plaintiff in error, and by *Mr. Cushing* (Attorney-General) for the defendant.

Mr. Mayer prefaced his argument with a narrative, and inasmuch as a part of that historical narrative contained the foundation of one of his points, it is necessary to insert it, namely:

The royal order (constituting the grant to Alagon) of 17th December, 1817, declares that "His Majesty having taken cognizance of the contents, [of the petition of the duke,] and in consideration of the distinguished merit of this individual, and of his well-known zeal for the royal service, and likewise in consideration of the advantages which will result to the State by the increase of the population and civilization of the aforesaid territories which he solicits, he has deigned to resolve that the same be communicated to the supreme council, declaring to them that the favor which he solicits is granted to him, provided the same be not contrary to the laws." This order is addressed to the president of the council of the Indies.

It may be here remarked that when this order was passed, and for more than two years afterwards, the King of Spain was absolute monarch, the cortes for that period not existing; but at the ratification by him of the treaty the cortes had already been in renewed power for full seven months. Upon that ratification the sanction of the cortes was obtained for, and only for the 2d and 3d articles of the treaty, which yielded the Spanish territory; and it was asked because by the constitution the king could not alone alienate any part of the Spanish territory, nor any national property, but for the alienation needed the consent of the cortes. Constitution, title 4, c. 1, art. 172,

§§ 4, 7. Describing the king as a constitutional monarch, we further may advert to the 10th section of the same article of the constitution; that declaring that "he shall not take the property of any person or corporation, nor hinder or impede the free possession, use, and benefit thereof," — and the same section proceeds to prescribe that "if at any time it shall be necessary for an object of acknowledged public utility to take the property of an individual; nevertheless, it shall not be done, unless he be at the same time indemnified and a fair equivalent be given him upon a sufficient inquiry made by fit and proper men."

The ancient laws of Spain on the general rights of property have always been authoritative as if constitutional rules; and, upholding the sanctity of private property against the royal encroachment, the Laws of Spain and the Indies, Book 3, tit. 5, Law 1, ordain that "those things which the king gives to any one cannot be taken from him either by the king or any one else without some fault of his; and he to whom they are given shall dispose of them at his will, as of any other thing belonging to him.

The points made by *Mr. Mayer*, were the following:

1. The royal acts (the order of 17th December, 1817, upon the duke's petition of the preceding July, and the cedula or missive to the captain-general of Cuba of 6th February, 1818,) constitute a grant, and an assurance of the legal estate in the lands, and taking date from the 17th December, 1817. That being the effective date of the grant, it is not affected by the 3th article of the treaty with Spain, which condemns only grants of date after the 24th January, 1818. The grant was consummated by all the formal possessions that it can be pretended the Spanish law demanded; and the possessory ceremony was by that law authorized through an attorney, on this occasion Garrido, whose conferred powers are fully testified. Moreover, this attorney was empowered to sell and settle and improve the granted lands in execution of the purpose declared by the duke's petition as his view in asking the grant. And the action of Garrido in this latter branch of his agency (shown in the testimony of the defendant himself) proves all diligence and *bona fides* in fulfilling what the petition indicated as the grantee's design. All in that respect was done that could within the brief period have been exacted, assuming the expression of purpose by the petitioner to have the effect, when shown to have induced the grant, to make the grant conditional, and that even precedently so. But the grant was not under a condition, either precedent or subsequent. The declaration of purpose in the petition for a grant from Spain, when the grant itself does not, upon that declaration, introduce it as a condition in terms,

is not, as this court has determined, to be treated as a condition of any kind. The crown shows its content with the general assurance offered by the grantee, and rests upon his good faith; and so implies by not converting the general pledge or promise into terms of condition. If, however, a condition (for settling and improving the land) is to be implied, it can be but a condition subsequent, and, agreeably to this court's adjudication, the fulfilment of the duty was prevented, and therefore excused, by the succeeding and so early transfer of the sovereignty of the region from Spain to the United States. And when a grant is conditional, and the condition has been performed, or has ceased to bind, the grant is deemed absolute *ab initio*.

(*Mr. Mayer* then proceeded to show, by reference to authorities, that the grant was founded on sufficient consideration.)

II. The deed of Alagon to Hackley bears date the 29th of May, 1819, and, so, after the ratification by the United States of the treaty with Spain. The treaty was ratified anew by our government after Spain's ratification, and was reratified merely because it was necessary to waive the limitation of six months specified in the treaty for the exchange of ratifications. It was the original treaty, bearing date the 22d of February, 1819, that was ratified. The proprietary rights of the United States took date from the date of the treaty, and, on the consummate ratification, related to that period. No control of Spain is to be deemed to have rested in her after the treaty's date over the territories of Florida as a domain, or for any purpose of legislation, or of administration, referable to her interest, or within her polity, municipal or foreign. The validity of that deed, as to Hackley's capacity, being a foreigner, to take it was, consequently, beyond any regulation of Spain, no matter how ancient, save only contingently, in the event of the treaty not being definitely ratified.

III. This treaty with Spain in the consideration of the 8th article, and of the clauses of territorial cession, has been by the Supreme Court always determined to design no departure from the great principle of civilized justice, and of modern international law, that in no transfer of a territory can any domain be passed or be accepted from the ceding nation than what belongs to the government — the public property. That property alone, and the sovereignty of the transferred region, are the only legitimate objects of such international transactions, and the sovereignty is to be esteemed the primary object. The court has said that the express terms of this treaty deferring to private rights, were not needed for thus limiting the treaty's scope; and the 8th article is not to be regarded as enlarging the cession of property. In other words that article, even as to grants sub-

sequent to 24th of January, 1818, must be construed in subserviency to the sanctity that our own public law accords to the rights of contract and private property. 8 Peters, 445, 449, 450; Aredondo's Case, 6 Ib. 735, 736; Percheman's Case, 7 Ib. 86; 9 Ib. 133, 169, 170; 14 Ib. 349; 8 Howard, 306, 307; Terrett v. Taylor, 9 Cranch, 43.

These cases affirm, too, the reformed doctrine of international law, that even by conquest the lands of individuals shall not be wrested from them, and in no respect are to be yielded even to the rights of war. Much less are they, then, to be conceded to the exactions of diplomatic bargaining. We may add to these authorities (not now adverting to all the treatises on international law where they enjoin the same doctrine) 1 Pet. 517; 12 Ib. 410, 511; 8 Wheat 464; 4 Ib. 518; 4 Cranch, 323; Fletcher v. Peck, 6 Ib. 87; Wheat. Nat. Law 269, b. 2, ch. § 16. All real property taken in war is entitled to postliminy.

IV. These views, under our third head, lead to the conclusion that no grants of Spain, in her Florida region, of portions already conceded to individuals, could be asked to be annulled; or could be accepted by our government from Spain, if even her king had had despotic power to thus despoil without redress — (which immunity and irremediableness of wrong defines despotic government) — except only where the individual interest could be shown to have expired from default justly imputable, and going to the forfeiture of the rights. Such a default would be the failure to fulfil conditions of the grants. It will be seen, that in the correspondence of our government prior to the treaty, and in the expostulations that followed our ratification of it throughout the negotiation, which the executive, unprompted by the Senate's counsel or instructions, and so without full warrant, we might say, embarked in, the vacating of grants of Spain actually made, (no matter of what extent,) was not claimed save upon the ground of their conditions having been violated, or having failed to be fulfilled. The gratuitous character of grants was not made the plea; and as little was, or could the area of the grants be the pretext; in both particulars the sovereignty of Spain giving her absolute discretion, and her policy, already adverted to, placing her liberality beyond suspicion in these territorial appropriations. Consistently then with what was assumed as the only basis of the pretension, as well as looking to the only grounds that could find shelter in the pure public law of the era, no grants could under the treaty have been designed for denunciation, except those that were extinct for violation of their conditions. Let the expository terms used by the king in his ratification be deemed then more than what it merely is, (and it is merely the expression of an opinion, and a

comment on the treaty text,) and let it be dignified, or aggravated, as a decree of forfeiture or of confiscation, and yet it must be interpreted relatively to the grounds upon which we, or rather the executive, claimed the annulment to be just, and not as if we demanded it as a royal despotic assumption. It is well to remark here, (as bearing on the idea that may be urged that Spain yielded the sacrifice of the Alagon grant, under a pressure as dire as if under belligerent durance,) that the instructions to our minister at Madrid, which our quotations on this head embrace, show that the exaction of the annulment was meant to be experimental, and that the terms were not to be insisted on if the Spanish government were found impracticable when remonstrated with. It will be perceived by the court that Don Onis, the Spanish Minister here, in his communication to our Secretary did, — true to the principle that the annulment of no grants was to be arbitrary, and that no absolute power was assumed thus to reside in the Spanish crown, — declared that if he had even known that the grant to Alagon (and the other obnoxious grants) bore date before the 24th of January, 1818, he would not have assented to their being declared void — that is, merely on an assumption of a particular date, for sweeping nullification, careless of the infirmity or the vigor of the grantee's rights or pretensions.

That the ratification of our government, which took place immediately on the signature of the treaty, was regarded as definitive, and not as contingent upon any expansion (by Rider or by royal rescript or opinion) of the terms of the treaty, is evident from the fact which the succeeding correspondence and instructions show, that the immediate occupation of the ceded territory was claimed under the auspices of the treaty. In the testimony of our opponents, we have in the case the Executive Journal of the Senate, relative to the treaty already referred to by us, showing the original and very prompt ratification by us of the treaty, and so giving its due weight and peculiar character to the diplomatic movement following the ratification. Beside the passages mentioned of the Senate Executive Journal, we refer, with regard to the positions just submitted, to the following portions of the "State Papers," in the 4th volume, pp. 465, 509, 532, 627, 652, 653, 658, 659, 669, 683, 684, 687, 689.

With this grant, then, no condition having been violated and no default to inflict forfeiture having occurred, it follows that the claim of Mr. Hackley could not have become void within the actual meaning of the parties to the treaty, even giving to the king's declaratory ratification the extreme office of a decree of annulment, and supposing that his prerogative gave him power for such action.

V. It cannot be said that the annulment may be justified upon imputable fraud of Spain, assuming even that the grant was made after, instead, as is the fact, of being made before, (and of pending before the king more than six months) the period of proposing the cession; more than a year elapsing further before the treaty was concluded. Under the theory of that imputation, the king's special ratification would be a concession of the fraud, and a decree not only against the grant, but against the honor of the crown. Fraud is not ascribable to a sovereign State, in her compacts with other powers; and particularly not as to a subject of concession, over which her dominion was legally absolute until that subject actually, by her own act, the result of her own pleasure, were severed from her possessions.

This court has deemed the supreme right of disposal in the Spanish crown, or in any government having power to alienate the domain of the State, too positive and absolute to allow complaint of any act within that power, no matter even how reasonable it be to infer that it was in anticipation of a surrender of sovereignty of the region, and designed to lessen the public domain of the succeeding sovereign. United States *v.* Clarke, 8 Peters, 463. That decision in effect affirms that fraud is not to be inferred, nor is chargeable against any act of a sovereign power, if merely it be coördinate with the sovereign legal rights and control. 15 Peters, 595; 11 Wheat. 359; 7 Cranch, 130.

VI. The grant could not have been amended by the right of eminent domain residing in the king. The constitution of Spain declares, art. 172, tit. 4, c. 1, § 10, that the king "shall not take the property of any person or corporation, nor hinder or impede the free possession, use, and benefit thereof, and if at any time it shall be necessary for an object of acknowledged public utility to take the property of an individual, nevertheless it shall not be done unless he be at the same time indemnified, and a fair equivalent be given him upon a sufficient inquiry made by fit and proper men." No indemnification is pretended to have been here at any time provided for this deprivation of property, and no establishment of the necessity, nor of the object of "public utility" is testified from the only appropriate arbiter, the legislative authority of Spain, composed of cortes as well as king, in which legislature resided the representative sovereignty of Spain. This determination of the urgency of the object for which the private property is to be granted by this eminent domain, is by all political law assigned to the sovereignty. It is emphatically so appropriated by the Spanish constitution. Art. 3, tit. 1, c. 1, declares that "the sovereignty

resides essentially in the nation," and by art. 15, tit. 2, c. 3, the legislative power belongs to the cortes together with the king."

VII. Thus showing the limitation of the royal power and how special and narrowed was, as shown even by the king's act of ratification, the action of the cortes as to the cession, and how that action, allowing only public estate to be ceded and excluding from cession private property, did, in effect, contradict the king's surrender (if his act be so construed) of the lands of Alagon and make his provisions in his ratification repugnant to the act and will of his constitutional partners in the sovereignty of Spain. What effect can be assigned to that ratification in its denunciation of the grant to the duke? Recurring to the constitutional inhibitions upon the king's interference with private property, quoted under the preceding heads, and to the ancient laws we have cited, of equal obligation, we are at a loss to apprehend where, in himself, and in clear contradiction of the view, and even the determination of the cortes, there can be found a warrant for his repudiation of the grant, regarding now his act as a decree of annulment or of confiscation? Divorced from the public domain, for all power of alienation, by the positive interdict of the constitution, and forbidden, beside, by the superadded terms of the constitution from alienating "any portion of the Spanish territory," "however small," and whether public or private, and these limitations of prerogative and respect for private property solemnly consecrated by the king's oath; and, again, art. 4 of the constitution declaring that "the nation is bound to maintain and protect by wise and equitable laws the civil liberty, property, and other legal rights of the individuals who compose it," it seems only necessary to show that the constitution of Spain was in force when this ratification occurred, to have the king's condemnation of our grant dismissed as a mere nullity. But it pretends not to be a decree or ordinance annulling the grant. It takes the treaty as a text, and appends, by making the denunciation, only a version of the treaty itself, or records testimony as to an "understanding," that by the very treaty has failed to be carried out, and whose basis the eighth article of the treaty shows to be erroneous. Viewed as an opinion, (however it be a royal emanation,) it can have no effect. As testimony to explain, or rather to prevail in contradicting the treaty, it must likewise be unavailing. The declaration could legitimately serve but one purpose and as a memorial of fact; and that is to found a claim by the United States against Spain for indemnification, for parting with property which she taught the United States to believe would pass to her in the general cession of territory.

We deny that even the king and cortes, in combined legislative action, or under any title of power, could have annulled the grant. And we are in that aspect of the case independent of the testimony, given by our adversary, that the grant was not annulled by concurrence of the cortes, and that the king's act had in no respect their sanction. The Spanish constitution vests no such power in the cortes and king even united to confiscate private property, unless indeed it were admissible under the prerogative of "eminent domain," an interpretation which we have shown to be here inapplicable. Can it be pretended that the king alone, divorced as he was from the power to alienate any portion of the public domain, and, more than that, any "portion of the Spanish territory," or interfere with private property, whether in the title to it or the use of it, could effect that by his decree, which, if legitimately practicable at all by the state, could be effected by only the sovereignty of the country, and that formed of the cortes and himself?

7 Cranch, 134, 136. There this court defines legislative power; and denounces as alien to it, and as despotic, all pretension by a legislative authority to annul private rights, especially without compensation.

But we refer, as conclusive against the power to annul, in king, or in king and cortes, to the effect of the treaty's relation to its date, as stated at page 31 hereof.

VIII. Conceding to the ratification the character of a decree and the king's constitutional power to pass it, can the United States accept the land thus taken arbitrarily from an individual and enjoy the sacrifice of private rights? If under other circumstances it could be accepted, can it be after all that has transpired in relation to this grant, and especially after our ratifying this treaty — before this American citizen, Mr. Hackley, received his conveyance — without then intimating a complaint, much less interposing a protest, against the grant to Alagon — but lulling the world into the impression that private property was to be held sacred, and that (whatever might have been the suggestions, hostile to it, in course of the negotiation) the grant of Alagon was, by the limitation of date proclaimed in the treaty, left inviolate and committed to its intrinsic merits?

Our principles of public law reject the proffer of such an addition to the treaty domain; and by that law, as we recognize it under our peculiar political institutions, this case and the force of the king's act of confiscation are to be judged. If we cannot, because contrary to those principles, sanction the right to have decreed this regal spoil, how can the right to it be enforced by the United States, and, if so, how then can any pretension be effective as a defence founded on such a supposed right?

Story's Confl. L. §§ 244, 326, and the cases there cited; 15 Pet. 595; 1 Gallis. Rep. 375; Fletcher *v.* Peck, 7 Cranch, 132, 133, 135.

If this view be true generally, as to all contracts and pretensions of foreign source, repugnant to our maxims of political and social justice, it applies here most conclusively to this case of a native American citizen, as Mr. Hackley is proved to have been. 7 Cranch, 138, 139. He was protected by the Constitution of the United States, and (as the Supreme Court, in the case cited, says) "by the general principles common to our free institutions."

IX. It has been assumed by us that this is not a case for political action of our government, but for the judicial power directly. This, in the case of our complete grant, since the cases of Perchman, in 7 Peters, and of Aredondo, in 6 Peters, and of United States *v.* Wiggins, 14 Pet. 349, is unquestionable. Nor have we made any remarks as to the sufficiency of authentication of our documentary testimony; that being in our opinion unnecessary after the decision by this court on that head. Among those decisions we may refer to 14 Pet. 345, 346.

Mr. Cushing (Attorney-General) rested his case upon the following point:

That the annulment of the grant to the Duke of Alagon, declared by the treaty of cession of the Floridas, is binding and absolutely conclusive upon all the departments of the government and upon the people of the United States.

By the Constitution of the United States, the political power of making treaties is vested in the President of the United States by and with the advice and consent of the Senate, (art. 2, § 2.)

"And all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." Art. 6, para. 2.

Hence it follows that the treaty of cession of the Floridas, having been duly ratified, proclaimed, and published in the statute book, operates of itself, in respect of these three annulled grants, as a supreme law.

The Congress of the United States passed the act of the 3d of March, 1821, to carry into execution the treaty between the United States and Spain, concluded at Washington on the 22d day of February, 1819, (3 Stat. at Large, by Little & Brown, 637, c. 39.) The first section authorized the President to take possession of and occupy the "territories of East and West Florida and the appendages and appurtenances thereof; and to transport the officers and soldiers of the King of Spain, being

there, to the Havana, agreeably to the stipulations of the treaty between the United States and Spain, concluded at Washington on the 22d day of February, in the year 1819, providing for the cession of said territories to the United States." The same act organized a territorial government, and extended the laws of the United States for collection of the revenue, and prohibiting the importation of persons of color over the said ceded territories.

The legislative and the executive departments of the United States government, in the exercise of their political powers, and his Catholic Majesty, in the exercise of his political power, have explicitly annulled the grant to the Duke of Alagon.

The explanation of the 8th article, so made before the ratifications of the treaty, upon which explanation the treaty was accepted and ratified by the President and Senate of the United States, and upon which explanation the ratifications were exchanged between the two contracting powers, is as much a part of the eighth article, and as much a part of the treaty, as any other of the articles.

That explanation and express annulment of the grant to the Duke of Alagon, so affected by the political powers of the government of the United States, is binding upon, and to be followed by, the judicial department. Foster & Elam *v.* Neilson, 2 Peters, 307, 309, 312, 313; Garcia *v.* Lee, 12 Peters, 516, 517, 518, 519, 521; United States *v.* Reynes, 9 Howard, 153, 154.

These three cases were decided upon the cession by Spain to the United States of the Floridas; the private claims asserted in those cases were granted by Spain after the treaty of San Ildefonso, of 1800, after the cession of Louisiana to the United States by the treaty of Paris of 1803, and before the 24th of January, 1818. They were located between the rivers Iberville and Perdido, in the parish of Feliciana, within the disputed limits between Louisiana and West Florida, which had been repeatedly discussed, with talent and research, by the governments of the United States and Spain.

The private claimants insisted—

1st. Upon the right of Spain to the disputed territory, and invoked the decision of this court upon the true construction of the treaty of San Ildefonso, of the 1st of October, 1800, by which Spain retroceded Louisiana to France, and of the treaty of Paris of 30th of April, 1803, by which France ceded Louisiana to the United States.

2d. That their claims, granted by Spain before the 24th of January, 1818, were expressly confirmed by the first member of the eighth article of the treaty of 1819, for the cession of the Floridas to the United States.

3d. That the explanatory clause, contained in the ratification of the treaty, forms a part of the eighth article, and that the article so explained should be understood as if it had been written thus: "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or his lawful authorities in the said territories, ceded by his Majesty to the United States, except those made to the Duke of Alagon, the Count of Puñonrostro, and Don Pedro de Vargas, shall be ratified and confirmed, &c."

To the first position, this court answered, (2 Peters, 307,) "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

"We think then, however individual judges might construe the treaty of San Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed."

The court then cited the acts of Congress showing that the United States had, before the ratification of the treaty for the cession of the Floridas, distinctly declared that the boundary of Louisiana, as acquired under the treaties of San Ildefonso, of 1800, and of Paris of 1803, extended east as far as to the river Perdido — had taken actual possession of territory according to such declaration of the boundary of Louisiana as acquired by the treaties of San Ildefonso, of 1800, and of Paris, of 1803 — and had annexed a part of the disputed territory to the State of Louisiana. Whereupon this court said, (2 Peters, 209,) "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in our own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect the pronounced will of the legislature."

To the second position, this court answered, (2 Peters, 310, 311,) That his Catholic Majesty, by the second article of the treaty, ceded to the United States "all the territories which belong to him," situated to the eastward of the river Mississippi,

known by the name of East and West Florida; that the words "which belong to him," limit the extent of the cession; that the United States cannot be considered as admitting by this article that the territory which, at the signature of the treaty, composed a part of the State of Louisiana, rightfully belonged to his Catholic Majesty; that these terms were probably selected so as not to compromit the dignity of either government, and which each might understand consistently with its former pretensions; that the sixth article, stipulating for incorporating the inhabitants of the ceded territories into the Union of the United States, is coextensive with the cession, and did not include the territory which was then a part of the State of Louisiana, which was already a member of the American confederacy; that the eighth article of the treaty must be understood as limited to grants made by his Catholic Majesty within the ceded territory, that is, within "the territories which belong to him."

To the third proposition this court answered, (2 Peters, 312,) "But an explanation of the eighth article has been given by the parties which (it is supposed) may vary this construction. It was discovered that three large grants, which had been supposed at the signature of the treaty to have been made subsequent to the 24th of January, 1818, bore a date anterior to that period. Considering these grants as fraudulent, the United States insisted on an express declaration annulling them. This demand was resisted by Spain; and the ratification of the treaty was for some time suspended. At length his Catholic Majesty yielded, and the following clause was introduced into his ratification: 'Desirous at the same time of avoiding any doubt or ambiguity concerning the meaning of the eighth article of the treaty,' &c., (quoting the residue of the king's ratification.)

One of these grants, that to Vargas, lies west of the Perdido.

"It has been argued, and with great force, that this explanation forms a part of the article. It may be considered as if introduced into it as a proviso or exception to the stipulation in favor of grants anterior to the 24th January, 1818."

". . . . . These three large grants being made about the same time, under circumstances strongly indicative of unfairness, and two of them lying east of the Perdido," (and the third also being as to a part east of the Perdido,) might be objected to on the ground of fraud common to them all; without implying any opinion that one of them, which was for lands lying within the United States, and most probably sold by the government, could have been otherwise confirmed. The government might well insist on closing all controversy relating to these grants, which might so materially interfere with its own rights and policy in its future disposition of the ceded lands, and not allow them to

become the subject of judicial investigation; while other grants, though deemed by it to be invalid, might be left to the ordinary course of the law. . . . . .

"An extreme solicitude to provide against injury or inconvenience, from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can, in their opinion, furnish no satisfactory proof that the government meant to recognize the small grants as valid, which in every previous act and struggle it had proclaimed to be void, as being for lands within the American territory."

The principles so adjudged in 1829, in Foster & Elam *v.* Neilson, were affirmed in Garcia *v.* Lee, in 1838, and again in 1850, in United States *v.* Reynes, before cited.

The treaty ceding the Floridas to the United States, as explained in the ratification, expressly annuls the grants to the Duke of Alagon, the Count of Puñonrostro, and Don Pedro de Vargas; — in this express declaration and understanding, it was accepted and ratified by the President and Senate of the United States; in this sense the ratifications were exchanged between the two contracting nations; in this understanding the Congress passed various statutes, whereof only two need be particularly noticed here. The first is "An act for ascertaining claims and titles to land within the territory of Florida," approved 8th May, 1822, (3 Stat. at Large by Little & Brown, p. 709, c. 129,) the fourth section of which alludes to the claims rejected by the treaty, and excepts them from the powers of the commissioners, as herein before quoted. The other is "An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida," approved 23d May, 1828, (4 Stat. at Large by Little & Brown, 284,) the sixth section whereof authorized claimants to lands in Florida, not decided and finally settled under the provisions of this act, &c., to present their cases by petition to the judiciary, to try the validity of their claims: "Provided, that nothing in this section contained shall be construed to authorize said judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners, or register and receiver, in conformity to the several acts of Congress, providing for the settlement of private land claims in Florida."

The explanation of the 8th article of the treaty, so made and contained in the ratifications as exchanged between the two governments, forms a part of the 8th article.

In that the legislative, the executive, and the judicial departments of the United States have hitherto concurred.

The grants by his Catholic Majesty to the Duke of Alagon,

the Count of Puñonrostro, and Don Pedro de Vargas, are annulled by the treaty.

The plaintiff, in ejectment, produces, in evidence, this annulled Spanish grant to the Duke of Alagon as the foundation of his title to the land demanded, as the fulcrum of his action against the adverse possessor.

Upon the plaintiff's own evidence, upon his showing of the facts, the supreme law of the land pronounces that he has no title, no just cause of action.

All subsequent and subsidiary questions are vain.

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

This controversy has arisen out of the treaty with Spain by which Florida was ceded to the United States.

The suit is brought by the plaintiff in error against the defendant to recover certain lands in the State of Florida. It is an action of ejectment. And the plaintiff claims title under a grant from the King of Spain to the Duke of Alagon. This is the foundation of his title. And if this grant is null and void by the laws of the United States, the action cannot be maintained.

The treaty in question was negotiated at Washington, by Mr. Adams, then Secretary of State, and Don Louis De Onis, the Spanish Minister. It was signed on the 22d of February, 1819; and by its terms the ratifications were to be exchanged within six months from its date.

It appears, from the treaty, that the negotiations commenced on the 24th of January, 1818, by a proposition from the Spanish government to cede the Floridas to the United States. The grant to the Duke of Alagon bears date February 6th, in the same year, and consequently was made after the King of Spain had authorized his minister to negotiate a treaty for the cession of the territory, and after the negotiation had actually commenced. It embraces ten or twelve millions of acres.

The fact that this grant had been made came to the knowledge of the secretary, pending the negotiation; and he also learned that two other grants — one to the Count of Puñonrostro, and the other to Don Pedro de Vargas, each containing some millions of acres, had also been made under like circumstances. These three grants covered all or nearly all of the public domain in the territory proposed to be ceded. And the secretary naturally and justly considered that grants of this description made while the negotiation was pending, and without the knowledge or consent of the United States, were acts of bad faith on the part of Spain, and would be highly injurious to the interests of the United States, if Florida became a part of

their territory. For the possession and ownership of such vast tracts of country by three individuals would be altogether inconsistent with the principles and policy on which this government is founded. It would have greatly retarded its settlement, and diminished its value to the citizens of the United States. For no one could have become a landholder in this new territory without the permission of these individuals, and upon such conditions and at such prices as they might choose to exact.

Acting upon these considerations, the secretary insisted that if the negotiations resulted in a treaty of cession, an article should be inserted by which these three grants, and any others made under similar circumstances, should be annulled by the Spanish government.

The demand was so obviously just, and the conduct of Spain in this respect so evidently indefensible, that after much hesitation it was acceded to, and the 8th article introduced into the treaty to accomplish the object. By this article "all grants made since the 24th of January, 1818, when the first proposal on the part of his Catholic Majesty for the cession of the Floridas was made, are thereby declared and agreed to be null and void;" and all grants made before that day, are confirmed.

With this provision in it, the treaty was submitted to the Senate, who advised and consented to its ratification on the 24th of February, 1819, and it was accordingly ratified by the President.

Before, however, the ratifications were exchanged, the Secretary of State was informed that the Duke of Alagon intended to rely on a roy[illegible] order, of December 17, 1817, (which is recited in the grant hereinbefore mentioned,) as sufficient to convey to him the land from that date; and upon that ground claimed that his title was confirmed and not annulled by the treaty.

The secretary, it appears, was satisfied that this royal order conveyed no interest to the Duke of Alagon; and that the grant in the sense in which that word is used in the treaty, was not made until the instrument, dated the 6th of February, 1818, was executed.

But as a claim of this character, however unfounded, would cast a cloud upon the proprietary title of the United States, and as claims might also be set up under similar pretexts under the grants to the Count of Puñonrostro and Vargas, the secretary deemed it his duty to place the matter beyond all controversy before the ratifications were exchanged. He therefore requested and received from Don Louis de Onis a written admission that these three grants were understood by both of them to have been annulled by the 8th article of the treaty; and that it was nego-

tiated and signed under that mutual understanding between the negotiators. And having obtained this admission, he notified the Spanish minister that he would present a declaration to that effect, upon the exchange of ratifications, and expect a similar one from the Spanish government to be annexed to the treaty.

But the King of Spain for a long time refused to make the declaration required, or to ratify the treaty with the declaration of the American government attached to it. And a great deal of irritating correspondence upon the subject took place between the two governments. Finally, however, the King of Spain ratified it on the 21st of October, 1820, and admitted, in his written ratification annexed to the treaty, in explicit terms, that it was the positive understanding of the negotiators on both sides when the treaty was signed, that these three grants were thereby annulled; and declared also that they had remained and did remain entirely annulled and invalid; and that neither of the three individuals mentioned, nor those who might have title or interest through them, could avail themselves of the grants at any time or in any manner.

With this ratification attached to the treaty, it was again submitted by the President to the Senate, who on the 19th February, 1821, advised and consented to its ratification. It was ratified, accordingly, by the President, and the ratifications exchanged on the 22d of February, 1821. And Florida, on that day, became a part of the territory of the United States, under and according to the stipulations of treaty — the rights of the United States relating back to the day on which it was signed

We have made this statement in relation to the negotiations and correspondence between the two governments for the purpose of showing the circumstances which occasioned the introduction of the 8th article, confirming Spanish grants made before the 24th of January, 1818, and annulling those made afterwards; and also for the purpose of showing how it happened that the three large grants by name were declared to be annulled in the ratification, and not by a stipulation in the body of the treaty. But the statement is in no other respect material. For it is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged — the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.

It is not material, therefore, to inquire whether the title of the Duke of Alagon takes date from the royal order of December 17th, 1817, or from the grant subsequently made on the 6th of February, 1818. In either case the treaty by name declares it to be annulled.

It is said, however, that the King of Spain, by the constitution under which he was then acting and administering the government, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.

But these are political questions and not judicial. They belong exclusively to the political department of the government.

By the Constitution of the United States, the President has the power, by and with the advice and consent of the Senate, to make treaties provided two thirds of the Senators present concur. And he is authorized to appoint ambassadors, other public ministers and consuls, and to receive them from foreign nations; and is thereby enabled to obtain accurate information of the political condition of the nation with which he treats; who exercises over it the powers of sovereignty, and under what limitations; and how far the party who ratifies the treaty is authorized, by its form of government, to bind the nation and persons and things within its territory and dominion, by treaty stipulations. And the Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land.

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

In this case the King of Spain has by the treaty stipulated that the grant to the Duke of Alagon, previously made by him, had been and remained annulled, and that neither the Duke of Alagon nor any person claiming under him could avail himself of this grant. It was for the President and Senate to determine whether the king, by the constitution and laws of Spain, was

authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States, and subject to and governed by their laws. And as the treaty is by the constitution the supreme law, and that law declared it public domain when it came to the possession of the United States, the courts of justice are bound so to regard it and treat it, and cannot sanction any title not derived from the United States.

Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly no judicial tribunal in the United States ever claimed it, or supposed it possessed it.

The plaintiff seems to suppose that he has a stronger title than that of the Duke of Alagon. It is alleged that the Duke of Alagon, on the 29th of May, 1819, conveyed the greater part of the land granted to him by the King of Spain to Richard S. Hackley, a citizen of the United States. This deed to Hackley was after the signature of the treaty and before the exchange of ratifications, and the plaintiff claims through Hackley, and contends that this American citizenship protected his title.

But if the deed from the Duke of Alagon to a citizen of the United States was valid by the laws of Spain, and vested the Spanish title in Hackley; yet the land in his hands remained subject to the Spanish law and the authority and power of the Spanish government as fully as if it had continued the property of the original grantee. Hackley derived no title from the United States, nor were his rights in the land, if he had any, regulated by the laws of the United States, nor under their protection. It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the government might lawfully exercise over it, depended altogether upon the laws of Spain. And whatever rights he may have had under the deed of the Duke of Alagon, they were extinguished by the

government from which he held them while the land remained a part of its territory and subject to its laws. It was public domain when it came to the possession of the United States, and he had then no rights in it.

In this view of the case it is not necessary to examine the other questions which appear in the exception or have been raised in the argument. The treaty is the supreme law, and the stipulations in it dispose of the case. The judgment of the District Court must therefore be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the 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 District Court in this cause be, and the same is hereby affirmed, with costs.

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OF THE

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